EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr S Gehlen	**AND**	**Allay (UK) Limited**

JUDGMENT OF THE TRIBUNAL

Heard at: North Shields **On: 28-30 November 2018 (inclusive)**
Deliberations: 18 January 2019

Before: Employment Judge A M Buchanan
Non-Legal members: Ms L Jackson and Ms P Wright

Appearances

For the Claimant: Mr Richard Owen – Gateshead CAB
For the Respondent: Ms A Niaz - Dickinson of Counsel

JUDGMENT

It is the unanimous Judgment of the Tribunal that:
1. The claim of direct race discrimination is not well-founded and is dismissed.
2. The claim of harassment related to race is well-founded and the claimant is entitled to a remedy.
3. The claim of ordinary unfair dismissal is dismissed on withdrawal by the claimant.
4. The respondent is ordered to pay forthwith to the claimant the sum of £5030.63p as compensation for harassment related to race.

REASONS

Preliminary Matters

1. By an ET1 filed on 30 January 2018 the claimant brought complaints to the Tribunal of race discrimination pursuant to the provisions of the Equality Act 2010 ("the 2010 Act") and a claim of unfair dismissal. The claimant relied on an early conciliation certificate on which Day A was 7 December 2017 and Day B was 7 January 2018. The respondent filed its response on 28 February 2018 and denied all liability to the claimant.

1.2 A private Preliminary Hearing ("PH") by telephone took place before Employment Judge Johnson on 9 April 2018 when orders were made. The claim of unfair dismissal was dismissed on withdrawal but no Judgment to that effect was issued. That matter is confirmed in this Judgment. At the private PH, the claimant was ordered to provide further information in respect of his allegations of discrimination. Identification of the issues in the claims was postponed pending further information being produced.

1.3 On 27 April 2018 the claimant filed further information in respect of the claims of discrimination. The claims advanced were of direct race discrimination and harassment related to race. On 18 May 2018 the respondent filed an amended response which responded to the further information provided by the claimant.

1.4 In the face of the stated intention of the respondent to seek to strike out the claims of direct discrimination and harassment, the claimant filed amended further particulars of his claims on 10 July 2018.

1.5 A final hearing was set for 15-17 August 2018 but was vacated by reason of the unavailability of a witness for the respondent and the matter was relisted to take place on 28-30 November 2018 and came before this Tribunal on those days.

1.6 At the conclusion of the hearing the Tribunal reserved its decision. This Judgment is issued with full reasons in order to comply with the provisions of Rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It is regretted that the pressure of other judicial duties have meant that this Judgment is only able to be promulgated at this time.

The claims

2 The claimant advances the following claims to the Tribunal:-

2.1 A claim of direct race discrimination relying on the provisions of sections 9, 13 and 39 of the Equality Act 2010 ("the 2010 Act").

2.2 A claim of harassment related to race relying on the provisions of sections 9, 26 and 40 of the 2010 Act.

The Issues

Note: the identities of those referred to by initials in this paragraph 3 are set out in paragraph 4 unless otherwise stated.

3 The issues in the various claims are:

Factual allegations in respect of the claim of direct race discrimination

3.1. Was the claimant regularly excluded from high level meetings and only invited to 4 or 5 such meetings during his period of employment? Was the claimant treated differently in this regard to his comparator Cheyne Ravenscroft ("CR")? Was CR junior to the claimant?

3.2 Did the respondent fail to give the claimant direction as to what he should be working on? When the claimant started to look at a policy or process was he told by AS or AB that it was not his concern?

3.3 Was the claimant invited to present a weekly and monthly business review pack to the weekly board meetings in late October/early November 2016. Was he told to scrap the pack by AS after the second presentation? In contrast did AS spend considerable time with CR giving him guidance on how to create a data pack several times per month and every month?

3.4 Was the claimant told in March 2017 by AS and AB not to mention the matter again when he suggested that computer monitors being purchased by the respondent were not adjustable and that that could lead to claims from those using them?

3.5 Was the claimant told at the few board strategy meetings he attended by both AS and AB that he did not "know the business" when he attempted to present his ideas for automation of the Digital Subject Access Request ("DSAR") process in December 2016 and May 2017 with no explanation as to why his ideas would not work. In June 2017 did Mark Hawkins present a virtually identical idea to that advanced by the claimant which was given the go ahead.

3.6 Did the claimant suggest an IT Procurement Policy to AS in November 2016 and was he told by AS not to look at that matter but to concentrate on improving the business generally. Was Ian Pearson allowed to purchase an Asus gaming laptop in January/February 2017 which he was then allowed to purchase from the respondent over a 12 month period?

3.7 Did the claimant in December 2016 suggest automating part of the process in respect of Subject Access Requests and was he told by AS that his idea would not work and that it was not his concern? Was the same idea suggested by Mark Hawkins in August 2017 given the go ahead?

3.8 Did the claimant in May 2017 suggest the respondent reprocess claims classified as "dead status" and was this idea rejected by the respondent? Was the same suggestion made by Mark Hawkins in August 2017 actioned as a priority?

3.9 Did the claimant find out only in May 2017 that the respondent was to acquire a new business line of airline delay claims known as "airFair"? Was CR involved in that acquisition at a much earlier stage?

3.10 Was the claimant denied his requests by AS to be allowed to visit other office locations of the respondent and the teams based there? Did the claimant only visit the Manchester area office once? Did CR visit those offices regularly?

3.11 Was the claimant's internet access restricted by Ian Pearson at least twice per month under the guise of profile testing? Was CR treated more favourably in this regard?

3.12 Was the claimant given a verbal warning by AS in June 2017 for working on the sales floor (level 1) when he was building a new computer tool for the sales floor

manager? Was the claimant told to work only on the third floor? Did CR often sit in with software development employees on level 1?

3.13 Did the claimant ask to work away from his desk in December 2016 and February and March 2017? Was he refused permission by AS with the words "what would other people think"?

3.14 Was the claimant given feedback or direction about his work by senior directors including AS who was his line manager? Was the claimant given supervision or review meetings?

3.15 Was the claimant asked by AS and AB and Ian Pearson ("IP") where he went during his lunch break and why he left the office? Was he the only member of staff scrutinized in that way?

3.16 Was the claimant expected to have detailed knowledge of the respondent's IT systems without there being any or only vague process maps or documentation and in particular no change documentation and was no training being given to him? Was the claimant set up to fail in this regard?

3.17 Did the claimant have his requests for training constantly refused by AS and AB? In contrast were CR and IP given time to learn new skills?

3.18 In the period March 2017 until July 2017 did the claimant have his requests for Prince2 certification refused by AS?

3.19 Was the claimant dismissed whilst he was working on a project to automate Subject Access Requests for client information about loans which would have had substantial benefit for the business of the respondent?

Legal Issues in respect of the direct discrimination claims

3.20 Was the claimant treated less favourably by the respondent in any or all of the above situations? In particular was the claimant treated less favorably by being dismissed?

3.21 If so, is there a difference in the race of the claimant to that of his comparator?

3.22 Is there sufficient to shift the burden of proof to the respondent to explain any less favorable treatment?

3.23 If so, what is the explanation of the respondent? Was the treatment of the claimant materially influenced by his race?

3.24 Is the explanation accepted?

Factual allegations in respect of the claims of harassment related to race

3.25 Did IP make comments to the claimant at least once per month alleging that the claimant was "stealing jobs" and that he should "go and work in a corner shop" and comments in relation to the brown skin of the claimant?

3.26 Did David Armstrong tell the claimant in August 2017 that he had heard IP make a racist comment about him but he would not tell the claimant what the comment was?

3.27 Did CR tell the claimant in July 2017 that he had heard IP say that the claimant should be working in a corner shop and that he was like all Indians in that he drove a Mercedes car? Did CR tell the claimant the comments were uncalled for and should not have been said?

3.28 Did the claimant hear IP in May 2017 make a comment as to why the claimant was in the country and did AB laugh at that and reply "Ian, man!"?

Legal issues in relation to the claims of harassment

3.29 Were any of the alleged comments unwanted by the claimant and did any of the alleged comments relate to the race of the claimant?

3.30 Did any such conduct have the purpose or effect of:

(i) violating the Claimant's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

General Legal Issues

3.31 In respect of any act of direct race discrimination or race related harassment, were proceedings instituted within three months of the date of such act?

3.32 If not, was there conduct extending over a period of time which should be treated as done at the end of such period?

3.33 If not, have proceedings been brought within such other period as the Tribunal concludes is just and equitable?

3.34 In respect of any act of discrimination or harassment, does the respondent show that it took all reasonable steps to prevent its employees doing such things or things of that description as set out in section 109(4) of the 2010 Act?

Witnesses

4. In the course of the hearing we heard from:

4.1 The claimant who produced a witness statement of 36 paragraphs and 6 pages. At the outset of the hearing the claimant was ordered to provide a further statement to deal with the question of mitigation of loss and injury to feelings. That statement was prepared and produced to the respondent and to the Tribunal on 29 November 2018. The claimant called no other witnesses.

For the respondent:

4.2 Andrew Mark Stokoe ("AS") – a director and shareholder of the respondent company.

4.3 Christopher Errington-Barnes ("CB") who at the material time was the HR Director of the respondent company. This witness was recalled after the conclusion of his evidence to deal with the provenance and date of creation of certain policies of the respondent company and of notes of board meetings which he had attended and which were made by him. These notes were only disclosed during the hearing.

4.4 David Armstrong ("DA") – Customer Service Manager of the respondent company.

4.5 Andrew Christopher Bowman ("AB") – who is currently Head of IT for the respondent company and who for some of the time material to this matter was employed as the Technical Operations Manager of the respondent company.

Documents and Interpretation

5. We had an agreed bundle of of documents running to over 248 pages. Any reference in this Judgment to a page number is a reference to the relevant page from the trial bundle.

Findings of fact

6. Having considered the oral and documentary evidence placed before us and having considered that evidence and the way in which it was given, we make the following findings of fact on the balance of probabilities:

6.1 The claimant was born on 26 October 1986. He began employment with the respondent on 3 October 2016. The claimant was interviewed by AS and AS took the decision to appoint him to his role in the respondent company. The claimant was employed as Senior Data Analyst based in the Newcastle office of the respondent. In order to attract him to the respondent company, AS agreed to pay the claimant £2000 per annum more than the other data analyst (CR) employed by the respondent and gave him the title of "Senior Data Analyst". The claimant was issued with a contract of employment (pages 64-80) which he signed on 3 October 2016. The claimant had a three-month probationary period (page 90) which he successfully completed. The respondent used a recruitment agency to find the claimant and paid a fee of £4320 to that agency for its services (page 93). The claimant describes himself as being "*of Indian origin"* and all the actual comparators on whom he relied in respect of certain of his allegations of direct discrimination were of a different racial origin to the claimant.

6.2 The respondent company specialises in the processing of consumer claims predominantly dealing with financial mis-selling and other regulated services. The headquarters of the company is in Newcastle but it has offices in other parts of the country. When the claimant was employed, the respondent had around 280 employees but that has now increased to around 400 employees.

6.3 The claimant had previously worked for larger organisations such as Barclays and he found the way the respondent dealt with its IT administration in particular difficult to accept. He found it difficult to understand how the IT systems of the respondent had developed as he did not find the same level of documented changes as he was used to in previous employment and he considered this hampered him in his work. The way the respondent organised its work was very different to the experience of the claimant in his previous employment.

6.4 The respondent company has various policies including an equal opportunity policy (pages 81-82), an anti-bullying and harassment procedure dating from February 2016 and a performance management policy (pages 85A-85B) issued in October 2017 after the claimant

was dismissed but before the claimant intimated any claim.

6.5 Before the claimant started work for the respondent he requested a certain computer for his use and he was provided with a desktop computer. In January 2017 he requested a laptop computer instead and this purchase was authorised by Steven Bell (page 93a).

6.6 From as early as January 2017 concerns were raised by the directors of the claimant in relation to his work (page 94). Andy Bowman wrote to AS on 26 January 2017 an email which ends: "*I know Will rates him but even he is fed up with the amount of time he wastes/tangents he goes off on etc".* These concerns were not made known to the claimant at the time.

6.7 In February 2017 the claimant was authorised to work from home for one day when he was feeling unwell (page 99). In June 2017 CB raised questions as to the daily work start time of the claimant (page 101).

6.8 In March 2017 the respondent dismissed an employee ("MM") and the circumstances of her dismissal were not dissimilar to those of the claimant (page 99A-C). The employee was not required to work a notice period but was paid in lieu and there was an agreement to provide a reference if needed notwithstanding that the reason for dismissal was related to capability. MM had worked for the respondent for less than two years.

6.9 On 17 August 2017 an issue arose with a report prepared by the claimant for AS which AS told the claimant did not "*feel right".* The claimant checked his report and found he had included certain figures by mistake and he corrected the report (page 104). Whilst AS did not make it clear to the claimant at the time, we accept that the error of the claimant caused AS considerable concern.

6.10 In August 2017 the claimant requested an extended period of leave with the last five days being unpaid. AS authorized the request "*rather reluctantly…please avoid such extended periods on the future".*

6.11 The claimant was "*let go effective immediately"* by AS on 15 September 2017 and he agreed to pay to the claimant two weeks' notice pay. The contract provided for one week. In an email written after the dismissal to Steven Bell AS wrote: *"He put up quite a fight, wanted to know if we would let him work as a part-time contractor, let him work an extended notice period etc. he was very civil and understandably upset but he accepted it in the end. He is a nice guy but we're just not getting value from him"* (page 111).

6.12 The claimant prepared a note of the dismissal meeting (page 113). The note records AS as saying the claimant had done nothing wrong but that the relationship was just not working and it could be the environment is not right for you coming from Barclays and *"we're not a good fit".* The note records AS referring to the error made by the claimant in August 2017 in a simple report and so wondering what other mistakes the claimant was making. The note goes on to record AS saying words to the effect that the "*culture"* was not right for the claimant and goes on: *"You're a great guy, I find you easy to talk to, I can talk to you for ages about guns whereas I can't talk with anyone else here…."* The claimant and AS shared an interest in shooting. We accept the accuracy of that note and in so far as AS denied any words attributed to him, we reject that evidence in favour of the content of the contemporaneous note.

6.13 A letter was sent to the claimant by CB on 18 September 2017 (page 117) which did not reflect the agreed notice payment and referred to a disciplinary procedure when the reason for dismissal was stated to be "*performance related issues".* The claimant was offered the right to appeal his dismissal. He did not exercise that right. The error in respect of notice pay was

corrected. An issue arose during the hearing as to whether the claimant received that letter shortly after it was sent to him. The claimant denied that he had done so and thus had not appealed his dismissal. We reject that evidence. That assertion was only made by the claimant in answer to a question from the Tribunal. That assertion found no place in the claimant's pleadings or witness statement and was not referred to by him during his cross examination. We conclude the claimant fabricated that evidence when asked to explain why he had not appealed his dismissal. That fabrication adversely affected our assessment of the reliability and credibility of the claimant and we therefore considered each element of his evidence with particular care.

6.14 On or shortly after his dismissal, the respondent prepared a reference for the claimant (page 135). The reference was in positive terms and made no reference to performance issues. The claimant was scored at the highest level for attendance, punctuality, conduct and performance (page 137).

6.15 When ACAS contacted the respondent for early conciliation in December 2017, issues in respect of race discrimination were raised for the first time. The issues raised related to allegations of harassment but did not relate to the claimant's dismissal.

6.16 CB conducted a speedy investigation into the allegations of harassment. He interviewed Ian Pearson on 7 December 2017 (page 128). IP accepted making jokes in respect of the colour of the claimant's skin and that he should be working in a shop but only after the claimant had said words to the effect: "*is it because I am brown?".* He denied any remark about asking why the claimant was in the country or about him driving a Mercedes motor car.

6.17 CR was interviewed (page 130) and he accepted he had heard IP say the claimant should be working in a shop about 2/3 weeks before the claimant was dismissed.CR characterized the remark as a bit of banter which got too much. CR stated he had not heard any other remarks made of a racial nature.

6.18 An employee "*David A(rmstrong)"* was seen (page 133) and he stated the claimant had told him he had received racist remarks and he advised the claimant to raise it with HR.

6.19 On 18 December 2017 AB was interviewed (page 135) and denied overhearing IP making racial remarks to the claimant and himself saying "*Ian man*".

6.20 On 12 December 2017 IP was given further training in respect of Equality and Diversity (page 135A).

6.21 The staff handbook of the respondent includes the Equal Opportunity Policy and procedure and the Harassment policy and procedure (page 153). A victim of harassment is told to raise the matter with his line manager or another manager if the concern relates to the line manager (page 157).

6.22 Equality and diversity training had been given by the respondent to its staff at various times. That training included a slide on what could be considered to be harassment (page 193) and included "*offensive jokes, suggestive or degrading comments".*

6.23 Minutes of board meetings at which the conduct of the claimant was discussed were disclosed as the hearing proceeded (page 225-249). We had to consider whether these minutes were genuine. They had not been disclosed during the process of disclosure and only came to light when referred to by CB in the course of his cross examination. The failure to disclose the minutes at the appropriate time was of considerable concern to the Tribunal. However, we listened to the explanation of CB which was to the effect he had left the

respondent company and it was only as he listened to the case at the Tribunal before he was called that he realised he would have evidence on his computer which would show the performance of the claimant had been the subject of discussion before the dismissal. We accept that explanation and accept the notes which CB effectively made for his own use as an aide-memoire are genuine and were made at the time they are dated. These notes showed:

1. The question of the claimant working in meeting rooms when he had not booked to do so was discussed on 10 April 2017 (page 225).

2. Issues in relation to the conduct of the claimant in distracting other employees and requesting access to a database of employee details which he did not need to be concerned with were discussed on 24 April 2017 (page 226).

3. Issues about the claimant's conduct and performance were discussed on 8 May 2017 and it was stated the claimant should be placed on a performance improvement plan (page 229). This was never done.

4. Concerns about the claimant not providing accurate reports and distracting other members of staff were raised on 12 June 2017 (page 234).

5. Concerns as to the claimant's performance were raised again on 19 June 2017 (page 235) and AS was told to "*follow process".* AS did not do so in any formal way.

6. On 11 September 2017 (page 249) the claimant was the subject of discussion and concerns were expressed about the claimant frequently requesting guidance from AS, distracting others, turning into work late and not being accurate with his work. The minute ends: "*Discussion needed with owners to decide what to do moving forward".*

6.24 We are satisfied that such discussion did take place subsequent to the meeting on 11 September 2017 and so it was that AS met the claimant on 15 September 2017 to dismiss him summarily. A decision was reached that the claimant could be dismissed without following any process given that he had not worked for the respondent for two years and so did not qualify to bring a claim of ordinary unfair dismissal. During the course of that difficult meeting AS agreed to pay the claimant two weeks' notice pay and to provide an "*amazing reference".*

Submissions - Respondent

7. On behalf of the respondent Ms Niaz-Dickinson filed written submissions extending to 19 pages which were supplemented by oral submissions. The submissions are very briefly summarised:-

7.1 The relevant legal provisions were identified. Reference was made to **Shamoon -v- Chief Constable of the Royal Ulster Constabulary 2003 AER 26** and **Efobi -v-Royal Mail Group 2017 UKEAT/0203/16** in respect of the claims of direct race discrimination. In respect of the claim of harassment related to race, reference was made to **Weeks -v- Newham College of Further Education 2012/UKEAT/630/11**. In respect of the statutory defence advanced by the respondent pursuant to section 109(4) of the 2010 Act reference was made to **Canniffe -v- East Riding of Yorkshire Council 2000 EAT/1035/98.** We noted for ourselves that the decision in **Efobi** was subsequently revered by the **Court of Appeal 2019 EWCA Civ 18** but nothing turns on that in light of our conclusions.

7.2 It was submitted that the claimant lacked credibility and that he had exaggerated his claims. If his claims were credible, he would have contacted ACAS much sooner than December 2017 and there is no adequate explanation for the delay. When he did contact ACAS the claimant did not raise the question of his dismissal being an act of race discrimination but referred only to the comments made to him in the workplace by IP. The claimant's evidence that he did not receive the dismissal letter lacks credibility and he said nothing about that when taken to the letter during cross examination. It was submitted that on balance the claimant had received the letter of dismissal and he had not appealed against his dismissal. It is clear that the claimant lacked credibility in relation to the question of the choice of laptop given to him during his employment.

7.3 It was submitted that the witnesses for the respondent gave credible honest and consistent evidence.

7.4 Detailed submissions were made in respect of each allegation of direct race discrimination and these have been considered by the Tribunal in reaching its conclusions. In particular, it was asserted that the act of dismissal was not an act of race discrimination. AS had appointed the claimant and if he had been out to get rid of the claimant, he could easily have dismissed him following the probation period. The only evidence relied on by the claimant to show his dismissal was an act of discrimination was the reference made by AS to the culture of the respondent. It was clear when considered in context that that did not relate to the race of the claimant. The dismissal of MM some months earlier in the same manner as the claimant was dismissed shows that this is how the respondent dealt with matters when employees had less than two years' service.

7.5 In respect of the claims of harassment, detailed submissions were made and these have been considered by the Tribunal in reaching its conclusions. It was further submitted that the respondent had in place all appropriate policies and that all employees had been appropriately trained. The respondent had taken all reasonable steps to prevent harassment taking place and the statutory defence is made out. It was submitted that there were time issues in relation to the earlier allegations of harassment and the claimant had not presented any evidence in respect of the time limit being extended.

7.6 It was submitted that the claimant had stated he would have left the employment of the respondent anyway and therefore any compensation should be reduced to reflect that position and any award for injury to feelings should be at the lower band of the **Vento** guidelines.

Submissions - Claimant

8. On behalf of the claimant Mr Owen made oral submissions which are briefly summarised:

8.1 It was submitted that the claimant was a clear and credible witness. The matters which the claimant spoke about with ACAS were not necessarily wholly referred to in subsequent discussions with the respondent. The evidence of AB was not credible in respect of the claimant disturbing colleagues whilst they worked. The evidence in relation to the car journey in which it is said the claimant was taken to task in relation to his performance is not credible. The claimant says that did not happen at all.

8.2 It was accepted that the notes of CB were genuine and whilst it was possible to amend notes created on “Notebook”, it was noted and accepted that CB denied doing so and that point was not pursued at all.

8.3 Reference was made to pages 113 and 114. The reference to the mistake made by the claimant in August 2017 was made late on in that meeting and it is not credible that the respondent would have tolerated mistakes over a period of six or seven months. It is clear that there were no such mistakes on the part of the claimant.

8.4 It is not accepted by the claimant that there were performance issues in relation to his performance. He states that the only issue raised with him was the incorrect report August 2017 and that was quickly put right. No formal process of any kind in respect of performance was undertaken and it is not credible for the respondent to say that there were issues from the beginning of his employment. The very late production of the notes taken by CB is very suspicious.

8.5 It was submitted that if the claimant’s performance was as bad as the respondent says then the question to ask is why was he not dismissed earlier when he was. It was submitted that the evidence from the respondent in respect of performance had been concocted to counter the allegations of race discrimination. If the performance of the claimant was as bad as the respondent asserted why had it been agreed to pay him one extra week in notice pay and for him to have been given what was described as an *“amazing reference”.* All that is sufficient to raise prima facie evidence of race discrimination and for the respondent to be expected to explain - the burden of proof having shifted.

8.6 It is clear evidence that the claimant was treated less favourably than CR and there is sufficient for the Tribunal to infer that this was on the grounds of the claimant’s race.

8.7 In respect of his dismissal, it is clear the claimant has been treated less favourably than others would have been treated. AS agreed that the mistake made in August 2017 was not in itself sufficient to dismiss and so the claimant was dismissed when others would not have been. The example given in relation to MM was not convincing as no details have been given in respect of her alleged poor performance. Insufficient evidence has been adduced to show the claimant was dismissed because of his performance and so, if it was not performance, what was the reason for dismissal?

8.8 There is clear evidence of racist banter in the workplace. This is a workplace where race discrimination was taking place and that is sufficient to enable the Tribunal to infer that the dismissal also was an act of race discrimination.

8.9 It would be just and equitable to extend time relation to allegations of harassment. The explanation given by the claimant as to the delay in contacting ACAS should be accepted. No prejudice has been caused to the respondent by having to deal with the allegations which it has been able to do without difficulty in respect of witnesses. The allegations of the claimant in respect of the remarks made to him were unwanted conduct and clearly had the effect of violating his dignity or creating the prohibited environment.

8.10 The reasonable steps defence is not made out. The training given in 2015 had not been refreshed and that is not sufficient to make out the statutory defence.

8.11 In terms of remedy, the injury to feelings award should take account of the fact that the harassment took place over several months and that there was ultimately a discriminatory dismissal. The award for injury to feelings should not be less than the bottom half of the middle **Vento** band.

9 The Law

Direct Race Discrimination

9.1 We have reminded ourselves of the provisions of section 9 of the 2010 Act and also of section 13 which reads:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

9.2 We remind ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of 'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1) (a), the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant has received less favourable treatment. This is a crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision would have to be deduced, or inferred, from the surrounding circumstances".

9.3 The Tribunal has reminded itself of the provisions of section 136 of the 2010 Act and the detailed guidance in **Igen -v- Wong & Others 2005 IRLR 258.** That case of course was dealing with sex discrimination under the Sex Discrimination Act 1975 but is equally applicable to race discrimination claims under the 2010 Act

9.4 In **Madarassy v Nomura International Plc**, in the Court of Appeal, Lord Justice Mummery said at paragraph 56:

*"The court in **Igen v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment 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".

And later at paragraphs 71 and 72:

"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in ***Liang*** *(at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

9.5 The Tribunal has reminded itself of the guidance in the decision of Underhill J in **Amnesty International –v- Ahmed 2009 IRLR 844** who after dealing with cases of inherently racist behaviour went on to give this guidance in relation to cases which are not inherently discriminatory:

But that is not the only kind of case. In other cases – of which ***Nagarajan*** *is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in* ***James v Eastleigh****, a benign motive is irrelevant.*

9.6 The Tribunal has reminded itself of the words of Lady Hale in the Supreme Court decision in **R-v- JFS** (above):

"The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as

"merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in Nagarajan, "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did . . . Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1) (a) " (p 512)".

Harassment related to race: section 26 of the 2010 Act

9.7 The relevant provisions of section 26 of the 2010 Act provided:

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--.race;

9.8 In relation to what is required to establish a case of discrimination by harassment the Tribunal has reminded itself of the guidance given by Underhill J in **Richmond Pharmacology Limited –v- Dhaliwal 2009 IRLR 336** and in particular that the Tribunal should focus on three elements namely:

(a) unwanted conduct
(b) having the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him and
(c) being related to the claimant's race.

9.9 We have reminded ourselves of the provisions of section 123 of the 2010 Act in respect of time limits. We have reminded ourselves of the distinction between continuing discrimination extending over a period of time and a series of distinct acts. We have reminded ourselves of the decision in **British Coal Corporation -v- Keeble 1997 IRLR 336** and the provisions of **section 33 of the Limitation Act 1980** in respect of the exercise of discretion to extend time in which to allow a claim of discrimination to be considered for remedy.

9.10 We have reminded ourselves of the decision in **Canniffe** (above) and the necessity to adopt a structured approach to the question of whether a defence under section 109(4) of the 2010 Act is made out by a respondent. We note that the availability of that defence suggests the necessity that someone will have committed an

act of discrimination notwithstanding the taking of reasonable steps. On the other hand, a respondent will not avoid liability if it has not taken reasonable steps simply because, if it had taken such steps, they would not have led anywhere or achieved anything or in fact prevented anything from occurring.

Discussion and Conclusions

10. We approach our conclusions by considering first the allegations of direct race discrimination. Some of these allegations require us to make findings of fact which we have not already made in section 6 above. The findings in Section 6 of this Judgment are our basic findings of fact and if we find it necessary to supplement those findings, we will do so in respect of each allegation of direct race discrimination and make plain what our additional findings of fact are. Having dealt with the allegations of direct discrimination, we will turn to deal with the allegations of harassment related to race. We will deal with time issues and the question of the statutory defence at the end of our conclusions. We heard evidence from the parties in relation to remedy and we will therefore consider that aspect of the matter at the end of our conclusions if it is relevant to do so.

10.2 Before moving on, we set out our general conclusion in respect of the relationship of the claimant to the respondent. It is clear that the claimant had previously worked for large corporate employers such as Barclays and had been used to a system of working which was much more regimented and structured than that which he encountered working for the respondent. An example is the fact that the claimant found it very difficult to understand some of the respondent's IT programmes given an absence of change records which he had been used to having available to him in former employments. The respondent is an organisation which is much smaller than anything for which the claimant had previously worked and in many ways pays lip service only to procedures which the claimant had been used to being applied to the letter. We find that the personal relationship between the claimant and AS was a good one. They shared a common hobby outside work and often spent time discussing that matter during working hours. We find that AS was a supporter of the claimant and argued his case with his fellow directors but ultimately the dissatisfaction which there was from others - and also finally from AS himself – with the role for which the claimant was employed and the way he carried it out, lead to a decision that the claimant should be dismissed. We have looked carefully at the evidence placed before us. We looked carefully at the minutes (or more accurately notes) made by CB at so-called board meetings. The notes were produced very late in the day and there was a suspicion that they had been produced for the purposes of these proceedings. We gave detailed consideration to that possibility but note that Mr Owen for the claimant did not ultimately advance that submission to us and we conclude that he was right not to do so. We are satisfied that the notes are genuine and we are satisfied as to the reason why they were not previously disclosed namely that CB had left the employ of the respondent and that the respondent simply did not know that such notes existed until CB came to the Tribunal to listen to the evidence on the day before he was due to give evidence himself. Those notes were of considerable assistance to us in dealing with this matter.
10.3 We have concluded in relation to the allegations of direct discrimination and given the nature of those allegations that it is appropriate for us to look for the reason why the

claimant was treated as he was. We take this approach from the decision in **Shamoon** (above) and so as to avoid the *"arid and confusing disputes about the identification of appropriate comparators"* and looking primarily on why the claimant was treated as he was. Was the claimant treated as he was because of his race or was it for some other reason? Ultimately, we conclude that the claimant was the victim of harassment related to his race but not of direct race discrimination. In reaching that conclusion we have taken account of the fact that this was a workplace where the claimant was subjected to unlawful discrimination and that is a factor we have taken into account in deciding whether or not to accept the reason advanced by the respondent as to why the claimant was treated as he was. Notwithstanding acts of harassment related to race from a colleague of the claimant and others not reacting to such matters as they should have done, we ultimately accept the explanation proffered by the respondent as to why the claimant was treated as he was in terms of the allegations of direct race discrimination.

Allegations of Direct Race Discrimination: Legal Issues 3.20-3.24

11.1 **Exclusion from high level meetings: Issue 3.1**

We do not accept that the claimant has established that he was excluded from high level meetings during his employment. We accept the evidence of the respondent that the claimant was invited to all the meetings which he needed to attend as part of his role. We accept that CR was invited to different meetings but we accept that CR was only invited to the meetings which he was required to attend as part of the role he was undertaking which involved different areas of the business to those with which the claimant was concerned. We accept that the claimant and SR worked on different projects and in different areas of the business of the respondent. We accept that the claimant was paid more than CR to the extent of £2000 per annum and to that extent was senior to CR but we accept that CR and the claimant effectively carried out different roles and therefore were not required to attend the same meetings. We do not accept that the claimant was treated less favourably than CR in this regard. In any event we accept the explanation of the respondent as to why the claimant and CR attended different meetings and conclude that it was not because of his race that the claimant was invited to certain meetings but not others.

11.2 **Failure to give direction: Issue 3.2 and Issue 3.14**

11.2.1 We do not accept that the claimant has established that there was a failure to give him direction in respect of the tasks he was expected to perform. We note that the organisation of the respondent's business was very different to the businesses in which the claimant had previously worked and that there was generally an approach of allowing employees to get on with their allotted tasks without close supervision. We accept the evidence of AS that the claimant would often seek guidance from him as to the tasks he was undertaking and that in effect the claimant was treated more favourably than other employees in this regard. We accept that the claimant was told that certain matters on which he began to work were not his concern and that he should not involve himself with such projects. We accept that when the claimant sought to review the payroll administration of the respondent he was told not to concern himself

with the matter. We accept the respondent's explanation that the claimant was told that because he was not required to have any involvement in such matters because that was not part of his role. We do not accept the claimant was treated less favourably in this regard but in any event we accept the explanation of the respondent as to why he was told not to involve himself and the reason was not in any way related to the race of the claimant.

11.2.2 We accept that the claimant was not subject to the same closely supervised and managed regime as he had experienced with former employers and to that extent his work was not closely supervised. However, we accept the evidence of AS that the claimant would often seek guidance from him informally and that he gave that guidance. We have no evidence before us, or indeed material from which we can infer, that the claimant was treated any differently in this regard to other employees. The matter was not pursued in any detail in cross examination and whilst we accept the claimant's evidence that he did not receive the degree of supervision and management which he had expected to receive, there is no evidence from which we can conclude or infer that the claimant was treated any differently in this regard than other employees and nothing whatever to suggest that the race of the claimant had any influence at all on the way the claimant's work was managed and supervised.

11.3 **Weekly and monthly business review pack: Issue 3.3**

We accept that the claimant was asked to make a presentation to board meetings of the respondent on two occasions in late 2016 and was then told not to do so. We accept the explanation from the respondent to the effect that the reports were discontinued because the board felt it gained no value from the reports, that the reports contained inaccurate information and that the reports were taking too long to complete by the claimant and that it was not a good use of resources. We do not accept that CR was treated more favourably by the respondent in this regard. We do not accept that CR was given more instruction than the claimant in respect of reports he was required to prepare and there was no less favourable treatment of the claimant in this regard compared to CR.

11.4 **Computer monitors: Issue 3.4**

We accept that the claimant was told that he was not to involve himself with the question of computer monitors. There is no evidence whatever that the claimant was treated less favourably in this regard when he sought to involve himself again in an area of the respondent's business which was not his concern. Any other employee would have been treated in the same way. Any employee who suggested the respondent was acting in a way which may provoke claims from its staff would doubtless be treated in the same way. There was no less favourable treatment of the claimant in this regard.

11.5 **Automation of DSAR – Issue 3.5 and Issue 3.7 and Issue 3.8**

11.5.1 These issues are all related. We do not accept that the claimant was told that he did not know the business when he attempted to present his ideas in relation to DSAR and we do not accept that the idea advanced by Mark Hawkins in June 2017 was virtually identical to an idea previously advanced by the claimant which had been rejected. The idea advanced by Mark Hawkins did not relate in any way to DSAR. We accept that the idea advanced by the claimant in respect of DSAR was not taken forward by the respondent and we accept that the reason for that decision is that the respondent did not think the solution suggested by the claimant would work. That is a decision which the respondent was entitled to make and we accept that it did so without being influenced in any way by the race of the claimant. We accept that the respondent would have taken up any suggestion which they considered would make them more money but in this case they did not do so as they saw no such prospect.

11.5.2 We accept the evidence from the respondent to the effect that the claimant presented an idea related to reactivating dormant claims by contacting clients whereas Mark Hawkins put forward an idea to prevent claims becoming dormant in the first place. The two ideas were very different. There is no evidence of less favourable treatment of the claimant in this regard.

11.6 **IT Procurement Policy: Issue 3.6**

11.6.1. We accept that the claimant did make a suggestion to the respondent of adopting an IT procurement policy. This was not something which he had been asked to carry out but rather was something that he had chosen to do of his own volition. We accept that the claimant was thanked for his suggestions by AS but also told to concentrate on the matters which he had been charged to carry out which if he did successfully could and would add value to the business of the respondent. We identify no hint of less favourable treatment of the claimant in this regard given that he was doing something he had not been asked to do. The reason the claimant's ideas were not taken up (and it was the claimant's evidence that he had only spent 5 minutes considering the matter in any event) had clearly nothing to do with the race of the claimant but everything to do with the respondent's wish that the claimant concentrate on the role he had been given.

11.6.2 We reject the allegation that the claimant was not allowed to purchase a computer for his requirements when he began work for the respondent. We refer to our findings of fact at 6.5 above and it is clear that the claimant did choose the computer he wanted to use. We accept that IP was allowed to purchase from the respondent a computer he had used over a 12 month payment period but there was no less favourable treatment of the claimant in this respect because the claimant did not ask to purchase a computer from the respondent as IP had done.

11.7 **The acquisition of "airFair": Issue 3.9**

We accept that it was not part of the claimant's role to be involved in acquisitions whereas it was part of the role of CR. We accept that the claimant was not very much involved in the acquisition of "a irFare" simply because that was not part of his role. That is the explanation advanced by the respondent for any less favourable treatment and we accept it: it has nothing whatever to do with the race of the claimant.

11.8 **Visiting of other offices: Issue 3.10**

11.8.1.We do not accept that CR visited other offices of the respondent more frequently than the claimant. Both the claimant and CR were contractually based in Newcastle and we do not accept CR visited other offices frequently as the claimant alleged. There was clear evidence before us that the claimant did attend the respondent's north west office in Manchester in July 2017 (with AS and AB) and no evidence that CR did so. In any event, and even if the failure to visit other offices could be said to be a detriment, we accept the explanation of the respondent that it required its Newcastle staff to visit its other offices only when there was a business need so to do. We accept the explanation that any less favourable treatment of the claimant in this regard was because there was no business need for the claimant to visit other offices further than he did and this was not because of the claimant's race.

11.8.2 This particular allegation was not put in cross examination to the witnesses for the respondent and was not therefore tested. We accept the explanation for this treatment of the claimant given by the respondent at paragraph 39 of its response to the further information filed by the claimant (page 53).

11.9 **Denial of Internet Access – Issue 3.11**

We accept the claimant's evidence that he did have difficulty accessing certain sites on the internet to which he needed access for work purposes. The respondent explained, and we accept the explanation, that controls were put in place across the business to restrict access to sites which were considered to pose a security risk. The claimant accepted in cross examination that when he raised his difficulties with the IT team of the respondent, the problems were resolved and he was allowed access to the sites in question. We heard evidence from DA and CB to the effect that they too had access to certain sites restricted and had to request specific access from the IT department. We find no evidence that the claimant was subjected to less favourable treatment compared to any other employee in this regard. In any event we accept that the reason the claimant (and others) found difficulty accessing sites was because of the policy of the IT department and there was nothing at all to suggest that the claimant's race had any influence on the restrictions which he (and others) faced.

11.10 **Verbal warning in June 2017 and requirement to work on the third floor – Issues 3.12 and 3.13**

11.10.1 We do not accept that the claimant was given a verbal warning in June 2017 by AS in respect of his habit of working away from his desk: however, we accept that the claimant was spoken to informally about the matter. We accept the respondent's evidence that the claimant was assigned to a desk on the third floor of the Newcastle office and was required to work there. We accept the evidence that the claimant often took himself off to work in a meeting room on the first floor of the office and that people who had booked that room for meetings would often find the claimant working there with consequent disruption. That matter had been raised by several people and had been referred to at the so-called board meetings as was evidenced at page 225: we accept that there were other occasions when this matter had to be addressed. We accept that the claimant was told on more than one occasion to desist from using the meeting rooms and yet he persisted in so doing. We accept that he was spoken to about the matter by AS in June 2017 (and on other occasions) but that conversation did not have the characteristic of a verbal warning nor was any such warning recorded on the claimant's record (paragraph 17 of the witness statement of AS). We find no less favourable treatment of the claimant in this regard. We accept the explanation that any employee working in rooms required for other purposes without authority would have been treated in the same way by the respondent. We do not accept that CR worked elsewhere other than when he was required to do so and there was no evidence before us that CR took it upon himself, as the claimant did, to use offices which were set aside for meeting rooms. We accept the explanation of the respondent for its requests to the claimant to desist from working away from his desk namely that his presence in meeting rooms was causing disruption to others.

11.10.2 We accept that the claimant was told on several occasions by AS not to work away from his desk before June 2017 and we accept that the claimant nonetheless did so. The claimant accepted before the Tribunal that he did work in meeting rooms without specific authority. Again, we see no evidence of less favourable treatment of the claimant in being expected to and being told to work from his allotted desk.

11.11 **Questions about lunch breaks: Issue 3.15**

This allegation was not explored in cross examination with AS. We accept the evidence of the claimant that from time to time AB and IP did ask him if he had been out for lunch and where he had been. If such questions can be said to be a detriment at all, then we accept the explanation advanced by the respondent to the effect that such questions were part of general conversation in the workplace and not in any way related to or influenced by the race of the claimant. There is no evidence before us or from which we can infer that in asking such questions of the claimant AB and/or IP were treating the claimant less favourably than any other colleague. In reaching this conclusion we have considered and taken account of our conclusion that IP did commit acts of harassment related to race against the claimant but we conclude not in respect of the questions asked about lunch.

11.12 **Detailed knowledge of the respondent's IT systems: Issue 3.16**

We accept the claimant's evidence that his role meant he needed to have an understanding of certain aspects of the respondent's IT system and we also accept the claimant's evidence that the respondent did not maintain a register of IT changes which would have set out all previous changes to and adaptations of the respondent's IT system over the years. We accept also that CR who had worked for the respondent longer than the claimant could remember more changes and to that extent had a greater knowledge than the claimant. We had no evidence presented to us or evidence from which we could infer that the claimant was treated by the respondent less favourably in this regard. The lack of process maps and a register of changes was the same for all employees and that is the way the respondent chose to carry on business. It did not meet the standards which the claimant had been used to with previous employers but that was the same for all employees of the respondent. There is no evidence of less favourable treatment of the claimant in this regard and, in any event, we accept the explanation of the respondent that that was the way it chose to carry on its business and the claimant was not set up to fail in this regard.

11.13 **Training: Issues 3.17 and 3.18**

We do not accept that the claimant had his requests for training in the period March 2017 until June 2017 constantly refused as he asserted and we do not accept that CR and Ian Pearson were given time to learn new skills generally as was asserted. The evidence to support this allegation was not sufficient to enable us to make any finding on these issues. We accept that the training package prince2 was an expensive package and that it did not bear any direct relevance to the work of the claimant and that the claimant's request to undertake that training was refused but there was no direct evidence or evidence from which we could infer that the claimant was treated less favourably in this regard by the respondent. We conclude that any employee asking for expensive training in relation to an area not of direct relevance to his area of work would have that request refused. The claimant simply failed to establish any facts in this regard from which we could conclude there was less favourable treatment let alone detrimental treatment because of his race.

11.14 **Dismissal: Issue 3.19**

11.14.1 The claimant was dismissed by the respondent on 15 September 2017 and we accept at the time he was working on a project to automate Subject Access Requests which might have had benefit for the business of the respondent. No other employee was dismissed when the claimant was dismissed and there is prima facie evidence of less favourable treatment.

11.14.2 To deal with this allegation we have gone to the question of the reason why the respondent asserts the claimant was dismissed. It is fair to say that this matter has caused us to consider that question in considerable detail and at length. On the face of it, the dismissal is problematic. The respondent asserts the reason for dismissal was the capability or performance of the claimant. The claimant had had no formal performance reviews or meetings and this was contrary to the advice given to the directors of the respondent by CB. : AS had not followed "*process"* as he had been told

to do at the board meeting on 19 June 2017 (paragraph 6.23.5 above). In moving to dismiss the claimant, the respondent paid no attention whatever to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). Contrary to the respondent's stated position that the claimant's performance was not acceptable, it agreed through AS to provide a very positive reference for the claimant and agreed to pay to the claimant twice as much notice pay as that to which he was contractually entitled. All that suggests on the face of it that there was nothing wrong with the performance of the claimant and yet that is said to be the reason for the dismissal. We accept the evidence of the claimant that in the meeting at which the claimant was dismissed, AS made reference to the "*culture"* of the respondent not being right for the claimant. There is more than sufficient there to shift the burden of proof to the respondent for it to explain why the claimant was dismissed.

11.14.3 We have considered that explanation. We accept that there was evidence of dissatisfaction by the respondent with the performance of the claimant notwithstanding that those matters were not fairly and reasonably discussed with the claimant. The minutes of the board meetings produced by CB clearly evidence issues being raised several months before the dismissal (paragraph 6.23 above) albeit that those matters were not known to or discussed with the claimant. We accept that there was a discussion with the claimant on the way back to Newcastle from Manchester in July 2017 when AS made known in a difficult conversation the shortcomings which he perceived in the performance of the claimant. We accept the evidence of AS in respect of that conversation supported as it was by the evidence of AB and we particularly note and accept the evidence from AB that he found that conversation difficult and embarrassing to witness. We reject the claimant's evidence that no such conversation occurred.

11.14.4 We have considered the use by AS of the word "*culture"* in his meeting with the claimant on 15 September 2017. We accept the submission of Ms Niaz-Dickinson that the use of that word must be seen in context and that context is that the word followed earlier words speaking of the environment and pace of the respondent. When seen in context, we accept that the use of that word is not objectionable and is not sufficient in itself, or even taken together with other factors, to persuade us that the reason advanced by the respondent for the dismissal of the claimant should be rejected. We accept that AS was referring to the fact that the way the respondent carried on its business was not something that the claimant was used to coming as he did from working with much larger employers where the pace and manner of working was different.

11.14.5 We accept the evidence of AS that he was concerned about the basic mistake which the claimant had made in the straight forward report he had requested in August 2017 and that that error went a considerable way to persuade him to share the views already being urged on him by his director colleagues that the claimant was not providing value for money in his role.

11.14.6 We accept the evidence of the respondent that AS employed the claimant and fought the claimant's corner for a considerable time whilst his director colleagues and

others were raising issues with him about the performance of the claimant generally. We accept that the claimant was treated favourably by AS in that he was paid £2000 per annum more than CS, he was allowed to take an extended period of leave and to work from home from time to time notwithstanding the policy of the respondent which precluded that possibility. In addition, we accept that the respondent dismissed MM in March 2017 in not dissimilar circumstances to the claimant. We accept that the common denominator between the case of MM and that of the claimant was that the two employees did not have two years' service and could not therefore bring a claim for ordinary unfair dismissal. We accept that such was the advice provided to the respondent by CB notwithstanding that such advice gave no consideration to the possibility of claims for automatic unfair dismissal within the provisions of the Employment Rights Act 1996 or claims of discrimination under the 2010 Act such as this present claim. We accept that that was the approach adopted by the respondent and that that is why it disregarded the provisions of the ACAS Code when moving to dismiss both MM and later the claimant. That was dangerous advice and a dangerous approach to adopt but we accept that that is what the respondent did.

11.14.7 Without question, the dismissal of the claimant was unreasonable giving no heed whatever to the ACAS Code or any hint of a fair and reasonable procedure but we remind ourselves that we are not dealing with a claim of unfair dismissal but looking at a discrimination claim and looking for the reason why the respondent acted as it did. We accept the respondent acted as it did on the basis that it was advised and thought it could remove an employee with less than two years' service without any consideration of procedure. In doing so the respondent exposed itself to detailed scrutiny as to the reason why it acted as it did in the context of any discrimination claim (or automatic unfair dismissal claim) for which no period of service by the claimant is required. In acting as it did the respondent is the author of its own misfortune.

11.14.8 We have taken account of all the above factors. We have concluded that the reason advanced by the respondent for its actions is accepted by us as the true reason it acted in dismissing the claimant. We take note of the notes produced by CB and the fact that the performance of the claimant was being questioned for several months before the dismissal and we also take note of the fact that the claimant did not appeal his dismissal and indeed did not raise any question about his dismissal with the respondent until these proceedings were filed some four months after the dismissal took effect.

11.14.9 We accept the reason advanced by the respondent for its action in dismissing the claimant namely the performance of the claimant and we accept that the reason for dismissal was not influenced in any way by the race of the claimant.

11.15 With those conclusions in place, the claims of direct race discrimination advanced by the claimant fall away and are dismissed. That said, there were valid reasons for those claims to be advanced and they have detained the Tribunal for a considerable time in considering each allegation. In acting as it did and in failing to follow a reasonable procedure in its treatment of the claimant, the respondent opened itself to detailed scrutiny and for that it only has itself to blame.

12. **The claims of harassment related to race: Legal Issues 3.29 and 3.30**

12.1 **Comments in respect of stealing jobs and working in a corner shop: Issue 3.25**

12.1.1 We did not hear evidence from Ian Pearson ("IP") and only saw the result of the investigation of CB with the employees of the respondent including IP. In the course of that investigation IP accepted that he had engaged in some limited so called "*racial banter*" with the claimant. We did hear the evidence of the claimant and in this respect we found the claimant to be a truthful witness. We accept that comments were made to the claimant on a regular basis by IP to the effect that the claimant should go and work in a corner shop and references were made by IP (and indeed the claimant) to the fact the claimant has brown skin. We also accept that IP made references to the claimant driving a Mercedes car like all Indians and asked why the claimant was in the country.

12.1.2 We reach this conclusion because we had the evidence of the claimant to this effect and that evidence was not damaged in cross examination (unlike some other aspects of the evidence of the claimant which were). We conclude that it is highly unlikely that the claimant would make up such allegations and we note that IP made limited admissions when asked about these allegations by CB in the course of his investigation. We accept the evidence of the claimant that these comments were ongoing on a regular basis throughout his employment up to the date of his dismissal in September 2017.

12.2 **Did David Armstrong ("DA") tell the claimant he had heard IP make a racist remark in August 2017? Issue 3.26**

We did hear evidence from DA and we accept his evidence that he did not hear IP making any racist remarks to or about the claimant. However, we accept his further evidence that the claimant told him in August 2017 that IP had made racist remarks to him and that DA had told the claimant to report the matter to HR. We note that DA himself did not report the matter further which given his position as a manager (Customer Service Manager) could have been expected. This gives us further grounds for our factual findings in paragraph 12.1 above.

12.3 **Did CR tell the claimant about racist comments by IP in August 2017: Issue 3.27**

We did not hear from CR. We heard the evidence from the claimant about his conversation with CR and we accepted that evidence. Once again, we see no reason why the claimant should make up such evidence and we are satisfied that he did not. We conclude that CR did tell the claimant in August 2017 that he had heard IP making comments about the claimant working in a corner shop and being like all Indians in driving a Mercedes motor car. We conclude that CR recognised that such comments were uncalled for and should not have been said and again that gives us further grounds for our findings of fact at paragraph 12.1 above.

12.4 **Did the claimant hear a remark from IP in May 2017 and the comment in reply from AB?: Issue 3.28**

We heard from AB who denied having heard any comment from IP and denied having said "*Ian, man*". We prefer the evidence of the claimant on this matter. We did not find the evidence of AB credible or reliable on this matter. The evidence was given in a somewhat defensive manner and on balance we preferred the evidence of the claimant on this point. We are satisfied that AB, like CR, heard the remarks of IP and took him to task about them in a relatively relaxed way but took no further action to address the matter of the comments which we conclude AB knew should not have been made.

12.5 **Legal Issues in respect of the harassment claims: issues 3.29 and 3.30**

12.5.1 We conclude that the remarks made by IP to the claimant were unwanted by the claimant. We accept that the claimant responded to IP and did make comments referring to his (the claimant's) brown skin. That does not mean to say the comments of IP were not unwanted by the claimant. The claimant was a new member of the respondent's workforce and was trying to become established as a member of the team with whom he was required to work: the claimant and IP worked in close proximity and in such circumstances, we accept that the claimant himself made remarks to seek to achieve his integration into and acceptance by the team but that does not mean to say he found such comments acceptable. We are satisfied from his evidence to us that he did not find such remarks acceptable and that they were unwanted.

12.5.2 We did not hear from IP and cannot assess whether he intended to violate the claimant's dignity or create for the claimant the prohibited environment by his remarks and so we have considered the effect of those remarks on the claimant taking account of the factors set out in section 26(4) of the 2010 Act.

12.5.3 We are satisfied that the claimant perceived the remarks of IP to be unacceptable and we conclude that it is reasonable that the remarks of IP towards the claimant were perceived by the claimant as violating his dignity and creating for him an environment which was certainly intimidating, hostile, degrading, humiliating and offensive. Given that IP was an established member of the respondent's workforce and given that we accept two other members of that same workforce heard those remarks and did nothing to address them, we are satisfied that it was reasonable for the remarks to have the effect on the claimant which he said they had.

12.5.6 We conclude that the remarks made by IP to the effect that the claimant should work in a corner shop and that he was like all Indians in that he drove a Mercedes car and questioning why the claimant was in the country were all remarks which related to the race of the claimant. We therefore conclude that each and every such remark made by IP was an act of harassment related to the race of the claimant. The remarks were made by IP as an employee of the respondent in the respondent's workplace and in the course of his employment and the respondent carries liability for such remarks.

Time Issues and the statutory defence: Issues 3.31-3.34

13.1 We conclude that the remarks made by IP were made on a regular basis throughout the employment of the claimant and we accept the evidence of the claimant that such remarks were made at least once per month. We reject as not credible the evidence of the respondent that the remarks were one off remarks. If that were so it would be highly unlikely that such remarks were overheard on the two occasions they were uttered by AB and by CS as we accept they were. We accept the evidence of the claimant that the remarks were made regularly.

13.2 The claimant could not say the exact times and dates when the remarks were made but we accept that there were a series of remarks made by the same person throughout the claimant's employment and that there was conduct extending over a period of time bringing the matter within the provisions of section 123(3) of the 2010 Act. The question then to be asked is when the last such remark was made and thus whether this claim of harassment is in time.

13.3 Given the date of contact with ACAS in this matter for early conciliation, any remark made on or after 7 September 2017 was in time for the purposes of section 123 of the 2010 Act. The claimant was dismissed on 15 September 2017 and given that we accept the remarks of IP were made on a regular basis, we infer that such a remark was made between 7 and 15 September 2017 and thus proceedings have been advanced in a timely fashion.

13.4 In case that conclusion is wrong, then we have considered whether it is appropriate to extend time on the basis that the proceedings have been advanced within such other period as we consider just and equitable within section 123(1)(b) of the 2010 Act. If we take the case at its most favourable to the respondent, we conclude that the last remark made by IP would have been made on 15 August 2017 and thus the proceedings should have been filed or ACAS contacted by 14 November 2017 and in fact proceedings were instituted on 30 January 2018 some 10 weeks out of time.

13.5 We have considered the factors required to be considered as set out at paragraph 9.9 above and note that the prejudice to the claimant in not extending time is greater than that to the respondent in extending time. We take account of the fact that the respondent has been able to deal with these allegations before the Tribunal and call whichever of the witnesses it so chose to deal with them. There was no apparent difficulty in that regard. The reason for the delay we accept was because it was only after his dismissal that the claimant had realisation that his race could have been a factor in what had happened to him given that he considered his dismissal had been unfair. We can understand why he would think so given the circumstances of the dismissal as set out above. The claimant effectively put two and two together by taking account of the remarks he had received from IP and the inaction of others in addressing such remarks and then raised those matters with ACAS in early conciliation and thus triggered the investigation of CB. Taking all those matters into account, we conclude that in advancing proceedings when he did, the claimant brought his claim to the Tribunal within such further period as we consider just and equitable to allow the claims

of harassment to be considered for remedy – if, contrary to our initial conclusion, time needs to be extended at all.

13.6 We have considered the defence advanced by the respondent in respect of the remarks of IP and the reaction of AB and CR to them. We note and accept that all three employees had received training by the respondent in race discrimination and how it should be avoided in the workplace. We accept that that training had covered harassment related to race. However, in all cases the training which had been delivered was several years before the events in question and was clearly stale. We do not accept that the respondent had taken all reasonable steps to avoid discrimination in the workplace for a reasonable step would have been to refresh that training. The fact that it needed to be refreshed is amply demonstrated by the remarks made by IP and the way both AB and CR and DA failed to properly react to the harassment or allegations at least of harassment. The training had made plain to the employees what they should do if they heard unacceptable remarks and they all failed to follow that guidance. The training patently needed to be refreshed and it would have been a reasonable step to do so. The statutory defence advanced by the respondent is not made out.

13.7 The claimant was subjected in the workplace to harassment related to his race and is entitled to a remedy.

Remedy considerations

14.1 We conclude that the remarks made to the claimant should result in an award to the claimant for injury to his feelings. No other financial losses are attributable to the acts of harassment.

14.2 At the outset of the hearing, and despite the fact the parties knew the matter was listed for both liability and remedy, we had no evidence before us from the claimant as to the effect on his feelings of the discrimination which he claimed had occurred.

14.3 We required a statement to be produced. That statement in our judgment sought to exaggerate the effect of the discrimination on the claimant. We accept the submissions of the respondent in this regard.

14.4 We have considered the extent of the remarks made by IP. We note the remarks came from one source and that the claimant did to some extent encourage those remarks by his reaction to them.

14.5 We have concluded that the claimant's feelings were injured by the remarks but not excessively so for had it been otherwise he would have raised the matter in the workplace whilst still employed and certainly before he did in December 2017 through ACAS. The remarks of IP and the reaction to them by managers were unacceptable but they are far from being the worst examples of race related harassment seen by this Tribunal.

14.6 We assess the level of injury to feelings within the lower Vento band and place the award at £6000. We note the claimant put the level of injury in the middle band but that was to include a discriminatory dismissal which we have not upheld. We think the appropriate band is the lower band but towards the top of that band.

14.7 We note that the claimant did not grieve the matter at any time in the workplace. There was a grievance procedure open to him and he did not use it: his contract of employment at clause 33 (page 74) refers to grievances and he was told to raise matters with his line manager which in his case was AS. The claimant signed his contract on the first day of his employment (page 80). We accept he had regular contact with AS and could have raised these matters without difficulty but he did not choose to do so. We take account of the fact that he was new to the respondent's workplace but we consider that it was clear to the claimant that he could raise these matters either with HR (paragraph 6.21 above) or AS and we accept that both routes of potential complaint had been drawn to his attention when being inducted into the respondent company when his employment began in October 2016.

14.8 We have considered the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") and Schedule A2. We consider that given the avenues of complaint open to the claimant, which included the provisions of the ACAS Code, the claimant was unreasonable not to grieve the allegations of harassment whilst still employed or at least earlier than he did and that it is just and equitable to reduce the award for injury to feelings by 25% pursuant to section 207A(3) of the 1992 Act.

14.8 We award £4500 for injury to feelings having reduced the initial award of £6000 by 25% namely £1500.

14.9 We award interest on the sum of £4500 at 8% pursuant to Regulations 3 and 4 of the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 from 15 September 2017 until the anticipated date of promulgation of this Judgment on 7 March 2019 namely 538 days at 0.98630 pence per day namely £530.63p

14.10 We accordingly award the claimant the total sum of £5030.63 as compensation for harassment related to race and that sum is payable by the respondent to the claimant forthwith.

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7 March 2019

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2500144/2018**

Name of case(s): **Mr S Gehlen** v **Allay (UK) Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **7 March 2019**

"the calculation day" is: **8 March 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.