EMPLOYMENT TRIBUNALS

Claimant: Mr F Kabengele

Respondent: Amazon UK Services Ltd

FINAL HEARING

Heard at: Leicester & Nottingham **On:** 23 to 26, 29 & 30 April 2019

Before: Employment Judge Camp Members: Mr ME Robbins
Dr G Looker

Appearances
For the claimant: in person
For the respondent: Miss L Quigley, counsel

RESERVED JUDGMENT

The claimant's claim fails and is dismissed.

REASONS

Introduction

1. After a period of working for the respondent through an agency, the claimant was employed by the respondent at its Coalville site from July to 20 December 2017 as the Customer Services Associate. His employment ended by dismissal. The given reason for dismissal was misconduct. By a claim form presented on 2 March 2018, following a period of early conciliation from 3 January to 3 February 2018, the claimant brought complaints of direct race discrimination, victimisation and unauthorised deductions from wages.

Complaints & issues

2. A case management preliminary hearing took place on 31 July 2018, coincidentally before Employment Judge Camp. The Employment Judge set out within the written record of that preliminary hearing what was intended to be a definitive statement of the claims and the issues. Included was a list of the things relied on by the claimant in support of the allegation that the reason for his mistreatment was that he is black. The Employment Judge made what is his usual case management order: that if the statement of complaints and issues

was inaccurate and/or incomplete in any important way, the parties had to notify the tribunal of this within 21 days of the date the written record of the case management hearing was sent out. Neither side wrote to the tribunal pursuant to that case management order.

3. In November 2018, there was a preliminary hearing to deal with preliminary issues before Employment Judge Britton. Employment Judge Britton struck out five allegations of direct race discrimination and one allegation of victimisation. The Employment Judge also effectively gave permission to the claimant to amend to add one complaint of victimisation and one of direct discrimination. The direct discrimination complaint that was added related to a remark allegedly made by the claimant's line manager, Miss K Jablonska ("KJ"), to the effect that the claimant was a big and tall black man and she feared that he might break her back.

4. The additional complaint of victimisation that Employment Judge Britton permitted the claimant to pursue was put by the Employment Judge in the following way, "*That Alex Ali* [his surname is actually spelt "Aly"] *made up allegations – this relates to telling KJ that the claimant would sexually harass him*". This appears to us to be an error by Employment Judge Britton. It has never been alleged in these proceedings that Mr Aly told Miss Jablonska that the claimant would sexually harass him. The actual allegation is (from the list of issues in the written record of the preliminary hearing of July 2018): "*KJ and (at KJ's instigation) a colleague called* [Mr Aly] *made up allegations against the claimant on the basis of which he was suspended and ultimately dismissed*". Our understanding of the situation is therefore that Employment Judge Britton gave the claimant permission to pursue that allegation as an allegation of victimisation, in circumstances where he was already pursuing it as an allegation of direct race discrimination.

5. After the preliminary hearing before Employment Judge Britton, there was a further case management preliminary hearing before Employment Judge Dyal, on 15 January 2019. It is evident from the written record of that hearing that Judge Dyal found it difficult to work out which of the claimant's complaints remained, in light of Judge Britton's decision.

6. Within the written record of the hearing before Employment Judge Dyal, he set out what he understood the complaints being made were. The complaints of direct race discrimination are set out, we think entirely accurately, in sub-paragraphs (a) to (o) of paragraph 7 of the written record of that hearing. He also set out, under paragraph 8 of the written record of the hearing, what he understood the claimant's remaining victimisation complaints to be. At the start of day two of the final hearing before us (day one was a reading day), both parties – the respondent through counsel – agreed that Judge Dyal had accurately set out all the remaining complaints, including those of victimisation. Nevertheless, we think Judge Dyal fell into error.

7. The result of the case management preliminary hearing of July 2018 was that the claimant had one and only one victimisation complaint. This was about the respondent allegedly making deductions from the claimant's wages. That complaint was struck out by Employment Judge Britton. As explained above, Judge Britton allowed the claimant to add one further complaint of victimisation: the complaint relating to Mr Aly allegedly making up allegations. Employment

Judge Britton did not give any further permission to amend or add to the claim, and the claimant has not asked us, and did not ask Employment Judge Dyal, for permission to do so. It follows that the only complaint of victimisation that is still before the tribunal is that complaint relating to Mr Aly allegedly making up allegations.

8. However, Employment Judge Dyal identified a number of additional victimisation complaints. It is clear to us that these were identified because of something that was written in the written record of the hearing that had taken place before Employment Judge Britton. When setting out the complaints which he made subject to deposit orders, Employment Judge Britton referred to the list of complaints that Employment Judge Camp had prepared. That was a list of complaints of direct race discrimination. However, when referring to them, Employment Judge Britton labelled some of them complaints of victimisation as well. As Employment Judge Britton did not suggest he was giving permission to amend and nor did he say why, if he was giving permission to amend, he thought it was in accordance with the overriding objective to allow the amendment, we can only assume that Employment Judge Britton made a mistake in this respect.

9. In conclusion on this point, only one victimisation complaint is before the tribunal. Nevertheless, for the sake of completeness, we shall within this decision briefly address the other victimisation complaints identified by Employment Judge Dyal as if they were before the tribunal.

10. With those qualifications, the complaints are as set out by Employment Judge Dyal and they are as follows:

Direct discrimination

10.1 Miss Jablonska's alleged comment that the claimant is a big and tall black man and that she feared he might break her back;

10.2 on or about 16 October 2017, Miss Jablonska removed the claimant's name from an email distribution list;

10.3 on the same day, Miss Jablonska did not provide him with the form that staff on probation filled in at the end of each month;

10.4 his probation period was extended;

10.5 his probation period was extended after only 78 days, sooner than anyone else's;

10.6 his 3 month probation review meeting was arranged only two weeks or so after his 2 month probation review meeting, in circumstances where he was on holiday for one of those two weeks;

10.7 he was underpaid on 3 November 2017 by 8 hours' worth of pay: £81.20. These underpayments were never corrected. He was also underpaid by £81.20 on 1 December 2017 and this underpayment was corrected, but not until 2 weeks' later;

10.8 Miss Jablonska and (at Miss Jablonska's instigation) Mr Aly made up allegations against the claimant on the basis of which he was suspended and ultimately dismissed;

10.9 he was suspended from work from 7 November 2017;

10.10 his suspension was unreasonably prolonged – 43 days;

10.11 a Mr W Griffith decided that the claimant's employment should be terminated, with effect on 20 December 2017 (on the respondent's case, he took the decision, albeit the claimant's case seems to be that Miss Jablonska was responsible for him taking it);

10.12 Mr L Cooke, who dealt with the claimant's grievance, failed to get evidence from people who supported the claimant;

10.13 on 20 December 2017, Mr Cooke did not uphold the claimant's grievance;

10.14 on 9 February 2018, Mr S Lumsden, who dealt with the grievance appeal, did not uphold the claimant's grievance;

10.15 on 5 March 2018, Mr C Sorensen, who dealt with the appeal against dismissal, did not overturn the decision to terminate the claimant's employment.

Victimisation

10.16 Miss Jablonska and (at Miss Jablonska's instigation) Mr Aly made up allegations against the claimant on the basis of which he was suspended and ultimately dismissed;

10.17 he was suspended from work from 7 November 2017;

10.18 Mr Griffith decided that the claimant's employment should be terminated, with effect on 20 December 2017;

10.19 Mr Cooke failed to get evidence from people who supported the claimant;

10.20 on 20 December 2017, Mr Cooke did not uphold the claimant's grievance;

10.21 on 9 February 2018, Mr Lumsden did not uphold the claimant's grievance;

10.22 on 5 March 2018, Mr Sorensen did not overturn the decision to terminate the claimant's employment.

11. The issues are listed in the written record of the preliminary hearing before Employment Judge Camp (the relevant part of which should be deemed to be incorporated into these Reasons), with one slight change: Judge Camp identified two particular documents as being the things relied on by the claimant as protected acts for the purposes of the victimisation claim. It was accepted by both sides (and by us) at this final hearing that, in fact, the claimant was relying on a series of written communications with the respondent in October 2017 as the relevant protected act or acts, and not just on those two particular documents.

The law

12. In terms of the relevant law, this is to be found, first and foremost, in the wording of the relevant sections of the Equality Act 2010 ("EQA"), in particular sections 13, 23, 27, and 136.

13. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

14. So far as concerns the burden of proof, there is a helpful summary of how [the predecessor to] EQA section 136 ("section 136") operates in Islington Borough Council v Ladele [2009] ICR 387, at paragraph 40(3), which we adopt.

15. Section 136 invites us to look for, "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination or victimisation has taken place. The threshold to cross before the burden of proof is reversed under section 136 is a relatively low one: "*facts from which the court could decide*". However, it is not reversed simply by: unexplained or inadequately explained unreasonable conduct; a difference in treatment and a difference in status[1]; apparent incompetence. See: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility, but that it has in fact occurred: see South Wales Police Authority v Johnson [2014] EWCA Civ 73, at paragraph 23.

16. Another way of dealing with the burden of proof in relation to a direct discrimination or victimisation complaint is effectively to ignore the burden of proof altogether and simply to ask: "why was the claimant treated in the manner complained of", i.e. what was the 'reason for the treatment'? See: Ladele at paragraph 40(5); paragraphs 60, 71, 72 and 75 of the decision of the EAT in Laing v Manchester City Council [2006] ICR 1519. For every complaint, we have tried to make a decision as to what the reason for the treatment in question was.

17. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

18. Finally, we note that in a direct discrimination complaint, there must be less favourable treatment and not merely unfavourable treatment. Subject to section 136, we have to be satisfied that the claimant was treated worse than someone else in the same circumstances – a 'comparator' in accordance with EQA section 23 – was or would have been treated. Merely proving that the respondent treated the claimant badly is, by itself, not enough.

The facts

19. Many of our findings of fact are not contained in this section of the Reasons but are contained, instead, in the section of the Reasons where we specifically address the issues and individual complaints.

20. By way background, we refer to the cast list and chronology prepared by the respondent, both of which should be deemed to be incorporated into these

[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc., or, in a victimisation case, who did not do a protected act.

Reasons. At the start of the hearing, we had a bundle containing 13 witness statements and an email which was being relied on by the claimant as a witness statement. The majority of the claimant's proposed witnesses did not, though, give oral evidence before us.

21. For the claimant, we had oral evidence from: the claimant himself; and from former colleagues of his called Mr Conte, Mr Aden and Mr Mawhassa. On the third day of the hearing, the claimant asked whether he could call as a witness, another former colleague: Mr G Dixon. No witness statement from Mr Dixon had been prepared. We asked the claimant and Mr Dixon to prepare one so that the respondent could see what evidence Mr Dixon was intending to give and to decide whether or not it was going to object to him giving evidence. A short written statement from Mr Dixon was then prepared and, having seen that statement, the respondent did not object to Mr Dixon giving evidence. Indeed, counsel did not cross-examine him at all.

22. For the respondent, we heard oral evidence: from Miss Jablonska, Mr Cooke, and Mr Lumsden; via video link, from Mr Griffith; and from Mr Sorensen, who no longer works for the respondent and who also gave evidence via video link.

23. The claimant started working at the respondent's Coalville site – a call centre – in September 2016. At the time, it was a new site for the respondent. Everyone, or almost everyone, the claimant included, started off as agency workers. Staff at the claimant's level were, as we understand it, dealing with queries from delivery drivers rather than from customers. The claimant was in the "French" team, taking queries from, predominantly, French drivers, in French. There was also, possibly amongst other teams, a "German" team and a "British" or "English" team.

24. All staff at the claimant's level went through what amounted to a trial period, working through an agency, before, if the trial was successful, being made permanent staff, with contracts of employment with the respondent. For the claimant and five of his colleagues in the French team, the conversion from being agency staff to permanent staff occurred on 23 July 2017, with the rest of the team converting during August 2017. The contracts of employment of the claimant and his colleagues with the respondent included a probation period. There was what was described as a "30 day", a "60 day" and a "90 day" review, however they would not necessarily take place exactly on day 30, on day 60 and on day 90.

25. At the 90 day review, staff would either be dismissed, their probationary period would be extended, or they would be deemed to have passed probation. The understanding of the respondent's relevant managers at the time was that if a member of staff got to 91 days after the commencement of their employment, they would automatically be deemed to have passed their probation period unless there had previously been a probation review meeting at which they were either dismissed or had had their probationary period extended.

26. In October/November 2017, nine out of the eleven members of the French team were black, the remaining two being, respectively, what is described as "Moroccan" and white. The composition of the German team is also relevant because Miss Jablonska was responsible for that team too at the time. There

were six members of that team: three were black, two white and one is described as "Sri Lankan".

27. Nothing of very much significance happened before October 2017. The claimant's 30 day probationary review meeting was on 22 August 2017; his 60 day probationary review meeting was on 3 October 2017. Both passed off without apparent incident. The one potentially relevant thing that happened around late September/early October 2017 was that the whole, or most, of the French and German teams raised a complaint about how Miss Jablonska was dealing with rotas. Miss Jablonska was upset at the way that this had been raised and referred to the team members, including the claimant, as having 'stabbed her in the back'.

28. The 90 day probation review included an assessment, against set criteria, of three telephone calls, conducted in the normal course of their work, by the employee being reviewed. The calls chosen for assessment in the claimant's case were on 16 October 2017. Another part of the assessment was looking at whether the employee carried out a particular task at the end of the call, known as "wrap-up compliance". Employees were expected to meet or exceed a percentage target for wrap-up compliance. Whether or not there was wrap-up compliance in relation to a particular call was assessed completely objectively, by computer.

29. Ninety days from the claimant's start date of 23 July 2017 was 21 October 2017. Miss Jablonska was on holiday from 17 October 2017. On 16 October 2017, Miss Jablonska emailed the claimant to tell him that the two of them would be having a meeting – which was understood to be the 90 day probation review meeting – on Wednesday, 18 October 2017, i.e. that Miss Jablonska would be coming in during her holiday in order to have this meeting.

30. Also on 16 October 2017, Miss Jablonska emailed the claimant and the other members of the French and German teams telling them that she would be on annual leave from 17 to 30 October 2017. That email about annual leave includes the following: "*I will be in the office twice this week for urgent meetings, otherwise I will see you in a few weeks!*". The urgent meetings she was referring to were the 90 day meeting with the claimant and, we think, a proposed 90 day probation review meeting with Mr Conte, which did not in the end take place. Of the six individuals whose probationary periods expired on 21 October 2017, the claimant and Mr Conte were the only ones who had their probation periods extended. The other four passed.

31. On 16 October 2017, between emailing the claimant about their meeting and emailing the whole of the team about her annual leave, Miss Jablonska emailed all relevant members of the French and German team apart from the claimant. The subject of the email was "*Probation Review*". The relevant part of the body of the email is as follows: "*… Please start completing this form again with your next review in mind. I will start another round when I'm back from vacation at the end of the month. Please ensure ALL forms are back to me by 29th October. …*"

32. Although it is not clear whether she actually did so, Miss Jablonska's intention was clearly to send with that email a particular form. The form was a form that staff filled in with their own comments in preparation for a 90 day probation review meeting. The same form was used at 30 day and 60 day review

meetings. It was a form the claimant was familiar with. He could easily have obtained a copy of it for himself.

33. The claimant's 90 day meeting took place on 18 October 2017. We refer to the detailed meeting note, which we have no good reason to doubt the substantial accuracy of. In short, the claimant's probationary period was extended, primarily because he had not performed satisfactorily in relation to the three calls of his which had been assessed for the purposes of the review and because he had failed to meet the 95 percent wrap-up compliance target.

34. Almost immediately after that meeting, the claimant raised a complaint or grievance about the fact that his probationary period had been extended. He did this in various telephone calls with and emails to HR. His complaints were detailed in emails of 18, 24 and 26 October 2017 in particular.

35. The claimant's grievance was in the first instance dealt with by Mr Cooke. By a letter of 2 November 2017, Mr Cooke summarised the claimant's grievance (incorporating in his summary some additional points that had been raised by the claimant in response to an earlier written attempt to summarise it) and invited the claimant to a grievance meeting, which took place on 6 November 2017. We refer to the grievance meeting notes.

36. A few days earlier, on 3 November 2017, there was allegedly an incident involving the claimant, Miss Jablonska, and Mr Aly. This is the alleged incident that ultimately led to the claimant's dismissal.

37. It is common ground that an incident of sorts occurred. The claimant was returning to work from a short period of sickness absence and Miss Jablonska wanted to have a meeting with him. The claimant did not want to be in the meeting by himself with Miss Jablonska and said that he wanted a companion as a witness. Mr Aly said that if the claimant really needed one, he would be the witness, but the claimant refused to go into the meeting without a companion of his own choice. Evidently, something out of the ordinary happened because the claimant emailed HR about it some half an hour or so afterwards.

38. Later that day, Mr Aly voiced his own concerns about the incident, in an email of 3 November 2017, sent at 10:23 hrs: "*… Felly* [the claimant] *came to my desk telling me that his refusal was not against me, but that he should be choosing his witness. He then told me that he has something going on against Karolina* [Miss Jablonska] *at the minute and being in a room with her, she could take advantage of it, with her being a woman and him being a man e.g. she could pretend he sexually harass* [sic] *her…"*.

39. Mr Aly's allegations were deemed to be allegations of misconduct which needed to be investigated. The claimant was suspended from work on 7 November 2017. The suspension letter of that date stated the allegation was: "*…that the following conduct and behavioural issues have been demonstrated during your probationary review process and this requires investigation: Intimidating tone, behaviour and conduct used during probationary period towards members of the leadership team; Refusal to follow reasonable requests"*.

40. The individual in charge of the disciplinary process, which was referred to as a probation review process, was Mr Griffith. A probation review meeting between Mr Griffith and the claimant took place on 13 November 2017. Again, there are

meeting notes, to which we refer. We also take into account and refer to the claimant's comments on those notes, contained in an email from him of 22 November 2017. Following the meeting, Mr Griffith interviewed various people in relation to the claimant's situation, including most of his colleagues in the French team.

41. Mr Cooke used Mr Griffith's notes for the purposes of dealing with the claimant's grievance. By a letter of 15 December 2017, Mr Cooke informed the claimant that he had made a decision relating to the claimant's grievance and that he wanted to discuss that decision with the claimant on 20 December 2017. The detailed outcome of the grievance, set out in a letter dated 20 December 2017, was delivered by hand on or about that date. Small parts of the grievance were upheld, particularly complaints relating to Miss Jablonska's management, but the grievance as a whole was substantially rejected.

42. Also on 20 December 2017, the claimant was dismissed. The reasons for dismissal were set out in a letter of that date from Mr Griffith, which states: "*The reasons for your termination are set out below and relate to your actions on 3 November 2017.*" They were, in summary:

    42.1 that the claimant had inappropriately commented to Mr Aly that if he was left in a room alone with Miss Jablonska, she could claim that he had sexually harassed her;

    42.2 that the claimant had refused to follow a reasonable request, namely that he attend a meeting with Miss Jablonska;

    42.3 that he continued to refuse the request for the meeting with Miss Jablonska even when offered Mr Aly as a companion;

    42.4 that he was intimidating in tone and behaviour and conduct during the incident on 3 November 2017.

43. The claimant appealed both his dismissal and the grievance outcome. The appeal against dismissal was contained in a document of 28 December 2017 and the grievance appeal in a document of 1 January 2018. We refer to both of those documents. As already mentioned, the grievance appeal was dealt with by Mr Lumsden and the dismissal appeal by Mr Sorensen.

44. Mr Sorensen met with the claimant on 17 January 2018. Mr Sorensen interviewed 15 people on about 23 January 2018. Mr Lumsden interviewed 7 people on 22 and 23 January 2018 and also met with the claimant on 22 January 2018. Mr Lumsden and Mr Sorensen interviewed various other people during late January and early February 2018.

45. The outcome of the grievance appeal was that the appeal was dismissed. Mr Lumsden's decision is set out in a letter from him dated 7 February 2018.

46. Mr Sorensen held an appeal outcome meeting with the claimant on 5 March 2018. Once again there are meeting notes. The outcome was that the claimant's appeal was unsuccessful overall, although, unlike Mr Griffith, Mr Sorensen felt unable to reach a conclusion as to whether or not the claimant had made the statement Mr Aly alleged he had made about Miss Jablonska potentially fabricating allegations against the claimant. Mr Sorensen's detailed reasons are set out in a letter dated 29 February 2018.

Decision on particular issues & complaints

47. Before we deal with some individual issues, we would like to make some general comments.

48. This claim arose against a background of general discontent at the Coalville site, within the French and German teams in particular. As the respondent recognises, and to a significant extent realised at the time, there were problems which stemmed from the fact that the site was a new set-up, that the managers on site lacked experience, and that at the time HR and senior managerial support was provided remotely.

49. On the evidence, those problems were problems for everyone – or at least everyone within the French and German teams. In the claimant's case, they have become problems that have ultimately produced this tribunal claim, because he took deeply personally the fact that his probation period was extended. He has come to convince himself that the things he did not like that happened to him happened because of his race. It is clear he genuinely believes this is so.

50. However, this case is not about what the claimant believed or believes, nor is it even, really, about what happened. It is much more about why things happened: what was going on inside the heads of the people who did the things and made the decisions that the claimant is complaining about. Neither the claimant, nor any of his witnesses, know why things happened, or what was going on in other people's heads. The claimant can tell us what he thinks and feels, but to prove his case he must point to some evidence that people may have acted against him because of racial prejudice.

51. Part of the claimant's case is that the respondent rejected his evidence and that of his black colleagues and accepted all the evidence of white managers. That is simply wrong. In most respects, there was little or no dispute as to what happened as a matter of fact. The question for the respondent (and it is much the same for us) was about people's motives. In not ascribing a racially discriminatory motive to individuals' actions, the respondent was not rejecting the claimant's or anyone else's evidence, it was merely deciding that that evidence did not prove unlawful discrimination.

52. We note that there has been some evolution of the claimant's discrimination case. It started with straightforward allegations that he had been mistreated because he is black. As it has developed, it has become about being mistreated because, specifically, he is (in his own words) a "*large black man*".

53. In theory, this could work as a race discrimination claim. If the claimant was mistreated in a particular way because he is a large black man, in circumstances where a large white man would not have been similarly mistreated, that would potentially be race discrimination. However, upon analysis and on the evidence, this alternative claim based upon his race and his sex and his size does not work either, for reasons we shall now explain.

54. It seems to us that, looked at objectively, the claimant's case is not actually one of race discrimination at all. It is, instead, all about how, regardless of his race,

the claimant as an individual was treated. For example, in closing submissions the claimant was at pains to emphasise how Mr Conte – someone the claimant identified at times during the hearing as another mistreated "large black man" – had a different case from his own and was not a valid comparator. The claimant had to do this because most of his case is about things that happened to him and to him only. He complains about being singled out compared to his colleagues, the majority of whom are also black, and some of whom are also – according to the claimant himself – "large" black men. If he has been treated less favourably than a group of individuals most of whom are the same race as him, that is very unlikely to be race discrimination.

55. From the first preliminary hearing in this case, the claimant has been asked to explain how, if most of his potential comparators are the same race as him, his race discrimination claim could succeed. His answer has always been that he could be being singled out because of his race on a particular occasion, even though black colleagues were not, on that occasion, mistreated in the same way that he was. That is a theoretical possibility. But for us to be satisfied that it was actually what happened, there would have to be some evidence of racially discriminatory mistreatment, either of the claimant or of others, on at least one occasion, and, with one possible exception which we shall address, there is simply no such evidence.

56. During the course of the hearing, the claimant made allegations to the effect that management within the respondent is disproportionately and overwhelmingly white. We are not satisfied that that is so. We note that the respondent was ambushed by those allegations and could not reasonably have been expected to deal with them. But even if it were the case that, within the respondent generally, there are disproportionately few black managers, that fact alone would take the claimant's case no further.

57. The claimant makes no tribunal complaint about not being promoted to a managerial position. Moreover, there is no substantial evidence that any of the individuals against whom the claimant makes allegations of race discrimination were themselves involved in recruitment to any significant extent. Certainly, Miss Jablonska was not involved in recruitment. If it is part of the claimant's case, which it seems to be, that Miss Jablonska was appointed to her position because of her race, we note that the fact that somebody may be the beneficiary of discrimination does not make them a discriminator themselves.

58. In a case like this one, it does not help the claimant's case even if he is able (and he isn't) to show that the respondent is racist at a corporate level. He has to satisfy us that particular things, done by particular individuals, were done for racist motives. That requires us to look at the evidence against those individuals.

59. With those observations in mind, we turn to the claimant's specific allegations.

60. It is convenient to deal first with the allegation that Miss Jablonska said of the claimant that he is, "*a big and tall black man*", and that she feared that "*he might break my back*". The claimant alleges that somebody (who the claimant will not name) told him that Miss Jablonska had said this.

61. We start by thinking about the inherent probabilities of the situation. In our experience, in modern workplaces, and particularly in diverse workplaces like

that in which Miss Jablonska and the claimant worked, racists do not generally vocalise their racism. In addition, even if Miss Jablonska were foolish enough to make such an obviously racist comment openly in the workplace, the alleged comment itself is a strange one. Miss Jablonska is a fluent British English speaker. In British English "*break my back"* is not a phrase that is used in connection with the fear of violence.

62. We also note that, as mentioned above, the alleged comment was not something the claimant himself overheard Miss Jablonska saying. We have to consider not only the evidence surrounding what the claimant was allegedly told had been said, but also the evidence around what, if anything, the person who passed on the information to the claimant actually heard Miss Jablonska say. There is, it seems to us, no real evidence at all that Miss Jablonska said anything. We do not know who it was who allegedly overheard her making the comment; we do not know when and in what circumstances she allegedly made it and it was overheard; we can have no idea how much scope there was for the unnamed person who allegedly overheard it to mishear or misunderstand anything that was said, or to have invented the comment for their own reasons.

63. Moving on to what was allegedly said to the claimant, we don't know anything of the circumstances in which he was told about the comment. We had no detailed evidence about that at all. Again, we cannot assess the scope for the claimant to mishear or misunderstand. The claimant's own approach to this part of the case and evidence on the point has been inconsistent. In relation to this, we refer to paragraphs 31 and 32 of respondent's counsel's written outline submissions.

64. In conclusion on this point, we are not satisfied that the claimant's present recollection of what he was told about the comment is accurate. Moreover, we are not remotely satisfied that the alleged comment, or anything along those lines, was actually said by Miss Jablonska.

65. The alleged comment was the only piece of evidence from which an inference of race discrimination against any of the people accused of it could potentially be drawn.

66. During the grievance and probation review/disciplinary process, witnesses, including almost all of the claimant's black colleagues, were asked to identify examples of racially discriminatory treatment. Most of them came up with nothing, and none of them came up with anything other than the treatment the claimant complains about. Unfortunately for the claimant, what he complains about is simply what he perceives as unfair treatment. Unlawful discrimination cannot be inferred from unreasonable or unfair treatment by itself. There has to be something more – something that in and of itself is suggestive of a racist motive – and there is nothing in that category.

67. As we are not satisfied that the alleged comment was made, we take it out of account. When we do so, the claimant's case becomes, essentially that the mistreatment (as he perceives it) that he suffered was to do with his race because it was mistreatment and he is a black man. We are sure that that is genuinely how he feels; but it is not, objectively assessed, support for a race discrimination claim.

68. In his written closing submissions, the claimant stated: "*How can it be 9 people of colour were dismissed between May 2017 and May 2018 in customer service department alone, and 5 other black people left because of bullying, discrimination.*" Those allegations were not made in any evidence that was before us. Moreover, the things the claimant said he was relying on to support his case that his mistreatment was because of his race were set out in the written record of the preliminary hearing in front of Employment Judge Camp in July 2018. None of these allegations was mentioned. As explained above, the claimant was ordered to inform the respondent and the tribunal in writing within 21 days from the date that written record was sent to him, providing full details, if he was relying on anything else in this respect. He did not respond to that order.

69. Given we are not satisfied that the alleged comment was made, the claimant's discrimination complaints cannot succeed, because there are no facts from which we could decide, even in the absence of any other explanation, that the respondent breached EQA section 13. But we shall nevertheless consider all of the complaints.

70. The next allegation is: "*On or about 16 October 2017, Miss Jablonska removed the claimant's name from an email distribution list*". This is a reference to the email sent to everyone other than the claimant that may have had a probation review form attached to it.

71. There is no dispute that the claimant was not sent the email. On the evidence, this was not a case of Miss Jablonska removing the claimant's name from an email distribution list or prepopulated address field, but of her neglecting to add his name to a list of names to which the email was to be sent.

72. The email in question was not relevant to the claimant. It was for those who were going to have their probation reviews after her holiday and after 29 October 2017, the date by which Miss Jablonska wanted the forms returned to her. The claimant's probation review was going to be before she got back. Had it been sent to the claimant, it could have been positively misleading. Arguably, Miss Jablonska's mistake was not the failure to include the claimant's name, it was including the name of his colleague, Mr Conte, who, like the claimant, was having this probation review meeting before 29 October 2017.

73. The claimant was specifically asked by the tribunal whether there was any prejudice caused to him by the email not being sent to him, over and above the psychological effect on him of discovering it hadn't been. He could not identify any. He did not complain at or before the meeting that he had with Miss Jablonska that he was disadvantaged by not having the form in advance. It was, as we have already mentioned, the same form that had been used for the 30 and 60 day probation review meetings. No one from the management side took him to task for not having filled it in before the 90 day meeting. The first time the claimant complained about anything to do with the email or the form was, we note, after his probationary period was extended.

74. We also note that if Miss Jablonska had wanted to 'get at' the claimant in some way, then not sending him this email was a bizarre way to go about doing so, given that he was not disadvantaged by this, nor was there any evidence that Miss Jablonska sought to cause him disadvantage.

75. Technically there are two issues here: was there less favourable treatment?; if there was, was it because of race?

76. Although we appreciate that 'less favourable' means something different from 'unfavourable' or detrimental, we are not satisfied that this was even unfavourable or detrimental, let alone less favourable, treatment.

77. Miss Jablonska could not say why she had not sent the email to the claimant. (This is something that does not surprise us in the slightest; why would she remember?). We think the most likely reasons for what happened were either: oversight, of the kind that happens every day, in businesses up and down the land (we note there is no allegation of the claimant or other black colleagues being repeatedly missed out of email communications – on the evidence, this only happened once to the claimant); alternatively, the claimant was deliberately not included because that email did not apply to him, because his probation review meeting was going to be before 29 October 2017.

78. As to the suggestion that this was, or might have been, to do with race, this is an example of something we mentioned above: that the claimant's real complaint is about him being singled out as an individual. The majority of the recipients of that email were black. We can see no logical basis for saying that the reason the claimant was not included, when they were included, was something to do with race.

79. The next allegation is that: on the same day, Miss Jablonska did not provide the claimant with the form that staff on probation filled in at the end of each month. The "*form that staff on probation filled in at the end of each month*" means the probation review form, filled in at roughly 30 day intervals.

80. If this is a separate allegation from the one that we have just dealt with, it is not made out on the facts. The evidence suggested that the claimant had a copy of the form, or at least had access to one. In any event, this was not race discrimination, for the same reason that failing to send the email to the claimant wasn't.

81. The next allegation is: the claimant's probation period was extended.

82. The claimant's probation period was extended because he failed to meet a performance target which was computer monitored and which, we accept, could not be manipulated by any relevant manager, and because the claimant failed three out of four calls that were assessed.

83. The claimant all but accepted that he was fairly judged to have failed those three calls. Whether he accepts that or not, we do. Given this, the only way in which a manager could have been responsible for his failure would be if his worst calls were deliberately chosen for assessment, or something like that. There is no evidence to support the claimant's allegation that the calls to be assessed were deliberately chosen in this way. The respondent's evidence was that they were chosen at random and were not chosen by the manager(s) to whom this complaint relates: Miss Joblonska and (possibly) Mr Aly. That allegation is anyway fanciful, as it would require a manager to devote many hours of their time, to the exclusion of all their other duties, listening into the claimant's calls; and it would have to be a manager who was French speaking, which rules out Miss Jablonska.

84. Moreover, all the evidence around this whole probation process contradicts the claimant's case that management, and Miss Jablonska in particular, wanted him to fail. First, had they wanted him to fail, why extend his probation period rather than just have him fail it and dismiss him? Secondly, when we look at what Miss Jablonska said to the claimant at and in connection with the 90 day probation review meeting, she comes across as doing her best to be positive and encouraging and to have the claimant look at the extension of the probation period as an opportunity. Thirdly, why on earth would the respondent want to 'get rid' of an employee who was performing as well as the claimant believes himself to have been, and have to recruit someone else, and train them up?

85. In addition, this is yet another example of alleged discrimination where most of the obvious comparators – those in the French teams who passed their probation periods at the first attempt – are the same race as the claimant. The evidence is that of the ten individuals who started as employees around the same time as the claimant, eight or nine (including the claimant) were black, and five of those eight or nine passed.

86. In summary, there was no less favourable treatment here and nothing that happened was anything to do with race.

87. The next allegation is: the claimant's probation period was extended after only 78 days, sooner than anyone else's.

88. This allegation is factually incorrect. His probation period was extended after 87 days, not 78. Even if we take out of account an individual identified, in a document produced by Mr Lumsden showing what happened to members of the claimant's team at their 90 day probation reviews, as "*Associate 7*" (someone who the claimant seems to be alleging has been invented), we still have two individuals whose probation periods were extended prior to the 90 days, one on day 84 and one on day 87, as well as the claimant's colleague Mr Conte who was supposed have had his probation review meeting on day 87, but whose meeting was put off to day 90 only because of the unavailability of HR.

89. There was, then, no less favourable treatment here. And as with all other allegations, not only is there no basis for inferring a discriminatory motive, there is evidence positively suggesting that race was not a factor – in this instance, the fact that a number of the claimant's black colleagues had their probation meetings on day 90 or later.

90. The next allegation is: the claimant's 90 day probation review meeting was arranged only two weeks or so after his 60 day meeting, in circumstances where he was on holiday for one of those two weeks.

91. There were fifteen days between the meetings. This was due to the lateness of the 60 day meeting, not because the 90 day meeting was early. The claimant has made no allegations, let alone put forward any evidence, about the 60 day meeting being deliberately held late. As explained above, managers at the time believed 90 day meetings had to be on day 90 at the latest where someone's probationary period was going to be extended. The claimant's meeting was not on day 90 because Miss Jablonska was going on holiday. Even if it had been on day 90, there would still only have been 18 days between the two meetings. The extra three days could not have made any difference.

92. We do not think the closeness of the two meetings would have been a problem had the claimant passed his probation. The key issue for him was that he did not pass. We have already explained why the probationary period was extended and why we think race had nothing to do with it.

93. The next allegation is: the claimant was underpaid on 3 November 2017 by 8 hours worth of pay: £81.20. That underpayment was never corrected. He was also underpaid by £81.20 on 1 December 2017 and this underpayment was corrected, but not until 2 weeks later.

94. This is a confused and confusing complaint, which seems to have been put slightly differently every time it has been advanced. Before us, the claimant was alleging that two deductions had been made, although whether they were the same deductions referred to in the list of issues was unclear.

95. The first alleged deduction the claimant raised with us stemmed from a tax code issue. The claimant believed he had been told by HMRC that tax code issues were a matter between him and the respondent. If that is what he was told, it is incorrect. The claimant's tax code is a matter between him and HMRC. The respondent is obliged to make particular deductions of PAYE based on the tax code given to it by HMRC. If the tax code is wrong, then the claimant can claim the money back on a tax return. It is nothing to do with the respondent.

96. The second allegation of a deduction, as explained to us, was about the two-week period between the respondent's payroll department making a mistake and that mistake being corrected. There is no evidence whatsoever that this was anything other than a payroll mistake – the kind of thing that happens within large companies and organisations from time to time, due to ordinary human and/or computer errors. The claimant has not identified any individual within payroll, or not in payroll but who might have had power over payroll, who might have wanted to deny him £81.20 for two weeks out of racially motivated spite. Anyway, we find the idea that such an individual might have existed almost preposterous.

97. The next allegation is: Miss Jablonska and (at Miss Jablonska's instigation) Mr Aly made up allegations against the claimant on the basis of which he was suspended and, ultimately, dismissed.

98. There is no evidence at all that the allegations made by Mr Aly came from Miss Jablonska. The only evidence is that they came from Mr Aly himself. The sole basis for making this as an allegation against Miss Jablonska is the claimant's apparent belief that it is so; and he seems to believe this because he thinks, without evidence, that she was the architect of a conspiracy to do him down.

99. We note it is the claimant's own case that: he did not want to be alone in a room with Miss Jablonska (or, indeed, with Miss Jablonska and Mr Aly); the reason for this was that she (or they) might make something up about what happened. He may not at the time have said this in terms, but that is what it amounted to. We also note the lack of any evidence to the effect that Mr Aly had anything personally against the claimant, to do with the claimant's race or otherwise. We also note that it was not just Mr Aly who suggested there was a conversation between the claimant and him during which the claimant said something about why he had not wanted to have a private meeting with Miss Jablonska. For

example, Mr A Aden told Mr Sorensen that the claimant had said, "*he didn't want to go with her because anything can happen*".

100. In the absence of direct evidence from Mr Aly, we are not satisfied that the claimant specifically mentioned sexual harassment. We note that Mr Aly himself changed his account a little in relation to this, in that what he told Mr Sorensen was that the claimant had said "*she could make anything up*", and that he merely believed this to be a reference to sexual harassment. However, Mr Aly had no discernible reason completely to invent something.

101. We also ask ourselves why it was that the claimant did not want to be in a room with Miss Jablonska, if it was not because he feared that she would make something up to his detriment.

102. In all the circumstances, we think the claimant did say something to the effect that he did not want to be alone in a room with Miss Jablonska because of the fear that she would invent allegations, of some kind, against him.

103. Addressing the claimant's complaint specifically:

103.1 nobody made anything up;

103.2 Miss Jablonska had nothing to do with it;

103.3 Mr Aly made his allegation, probably, because he thought that is what had occurred. He may have misunderstood or misheard or jumped to the wrong conclusions, but that is not the same as making it up;

103.4 the key to this for us is that the claimant refused to comply with a management instruction because he thought, without any objective basis, that his managers would conspire against him to make allegations up about him;

103.5 whether the allegations that he thought were going to be made up about him were to do with sexual harassment or something else, it remains a very serious matter that, it seems to us, the respondent could not, as a reasonable employer, ignore.

104. We might not ourselves have done as the respondent did, but this is not an unfair dismissal case and there is no reason at all in the evidence to think that race had anything to do with it, nor, indeed, to think that a relevant comparator in accordance with EQA section 23 would have been treated any differently.

105. The next allegation is: that the claimant was suspended from work from 7 November 2017.

106. On the evidence, what the respondent did here was to follow its standard practice. Perhaps it should not be the standard practice and perhaps it was not necessary to suspend the claimant, but there is no evidence that it was racially motivated, nor that the claimant was being less favourably treated in this respect. We also accept that, around this time, other employees, of different races, were also suspended.

107. There was, in summary, no less favourable treatment and the claimant was not suspended because of anything to do with race.

108. The next allegation is that the claimant's suspension was unreasonably prolonged, in that it was 43 days' duration.

109. Although we entirely understand why it felt to the claimant like an unreasonably long period of suspension, a 43-day suspension is not remotely out of the ordinary in our experience. Again, there is no evidence of less favourable treatment, nor of any possible racist motivation by anyone.

110. The next allegation that has not been struck out is about the decision to terminate the claimant's employment.

111. Rightly or wrongly, fairly or unfairly, Mr Griffith decided the claimant's employment should be terminated for the reasons he gave, outlined in the letter of dismissal. The claimant's case against him, and against all of the other decision-makers, boils down to a conviction that they should have made a different decision.

112. If and to the extent the claimant is pursuing any allegation that Miss Jablonska maliciously manipulated Mr Griffith into deciding to dismiss the claimant, we reject it as completely unfounded.

113. As already mentioned, the claimant suggests against Mr Griffith, and various others, that they ignored his black witnesses and only listened to white managers, but that is not the case. The fact is that the claimant's witnesses did not support the claimant's case to the extent the claimant believes they did. Moreover, Mr Griffith (and other managers) took into account, and indeed accepted, most of what the claimant's witnesses had to say about things which they could speak to from their own knowledge, e.g. about Miss Jablonska's weaknesses as a manager, brought about by inexperience.

114. Again, there was no relevant less favourable treatment, nor anything that had anything to do with race.

115. The next allegation is: Mr Cooke failed to get evidence from people who supported the claimant.

116. There is no dispute that Mr Cooke did not interview a number of people, and relied instead on the interviews that Mr Griffith had carried out. He conceded that with hindsight it might have been fairer had he spoken directly to those individuals himself. He only interviewed the claimant and Miss Jablonska.

117. It seems to us that if Mr Cooke's investigations were inadequate, the inadequacies were not biased one way or the other. He had evidence from most of the claimant's colleagues. To an extent, that evidence, collected by Mr Griffith, supported the claimant. To accept the claimant's case that there was unlawful discrimination, we would have to assume Mr Cooke thought that if he spoke to the claimant's colleagues himself, they would support the claimant and not support Miss Jablonska, and would say something materially different from what they had said to Mr Griffith. Why would Mr Cooke have thought this?

118. In any event, there is no basis at all in the evidence for us to conclude that the reason Mr Cooke decided not to interview people himself, but simply to rely on the notes of Mr Griffith's interviews (which had been passed on by HR), was anything other than expediency, or had anything to do with race. Equally, we

have no good reason for thinking that there was any relevant less favourable treatment, i.e. for thinking that Mr Cooke would have acted differently in connection with a similar grievance from someone else.

119. The next allegation is about Mr Cooke not upholding the claimant's grievance.

120. Mr Cooke partly upheld the claimant's grievance. The parts of the grievance that were not upheld are, to the extent they form complaints in these proceedings, allegations we have not upheld either. On the evidence that was before him, we do not find it at all surprising that Mr Cooke made the decision he did. On that evidence, we would have found any other decision surprising.

121. The claimant believed and believes the evidence of direct discrimination to be overwhelming. Objectively, that is not so; the truth is the opposite; the evidence of direct discrimination was and is non-existent.

122. There was no less favourable treatment and, again, nothing here to do with race.

123. The next allegation that has not been struck out is about Mr Lumsden not upholding the claimant's grievance on appeal.

124. What we have just said in relation to Mr Cooke's decision not to uphold the grievance applies at least equally to Mr Lumsden's decision. Mr Lumsden was a very senior and experienced manager who did not know any of the individuals involved in the claimant's grievance. He undertook what was, in relation to an employee with less than 2 years' service and whose employment had ended, a very thorough investigation. He produced a detailed, reasoned outcome letter. We can find nothing worthy of criticism in what he did or how he did it. Again, the claimant's case against him is simply that the claimant disagrees with his conclusions. But his conclusions seem to us to have been fair and reasonable, based on the evidence he had gathered. It is simply not the case that he ignored the claimant's points, or the claimant's witnesses, or the claimant's own evidence. Once again, there was no less favourable treatment, nor any treatment that had anything to do with race.

125. The final direct discrimination complaint that has not already been struck out is about Mr Sorensen not overturning the decision to dismiss the claimant.

126. Mr Sorensen flew across North America and the Atlantic to deal with the claimant's appeal, and dealt with it extremely conscientiously. Again, we note that the claimant was a member of staff who had been on their probation period and had had less than 2 years' service. In many companies, such an individual would simply have been summarily dismissed with pay in lieu of notice and without appeal. That would not have been fair in the claimant's case, but it would have been perfectly lawful.

127. We cannot identify anything specific that the claimant says Mr Sorensen should have done differently other than reach a different conclusion about dismissal. Although we might not ourselves have concluded dismissal was appropriate, it was an understandable and not unreasonable decision to make, given the claimant's allegations of conspiracy against Miss Jablonska and Mr Aly.

128. Mr Sorensen, just like all the other decision-makers, made the decision he made in good faith, simply because he thought it was the correct one, based purely on

the merits of the issue he was dealing with. On the evidence, he did not treat the claimant less favourably than he would have treated anyone else in the same position, and his decision was not materially influenced by the claimant's race, or by racial considerations more generally.

Victimisation

129. We have already noted our view that there is, in fact, only a single complaint of victimisation, but that we are going to proceed as if all of the complaints identified by Employment Judge Dyal as victimisation complaints are before the tribunal, even though we do not think they are.

130. The first issue is whether the claimant did one or more protected acts. The alleged protected acts are his grievances of October 2017. We find that the claimant did do a protected act, if only because of the fifth potentially relevant email, sent by him on 26 October 2017, at 22:11 hours, to a Ms Boxall. In that email there is reference to someone making a comment about "*common little monkeys*". That comment has obvious potentially racist connotations in the context and what the claimant seems to us to have been complaining about in relation to the comment was those connotations.

131. The first victimisation allegation we need to deal with is about Miss Jablonska and Mr Aly making up allegations against the claimant on the basis of which he was suspended and ultimately dismissed.

132. In relation to the identical direct discrimination complaint, we have already made findings about what happened and have already identified the reasons things happened as they did. Those reasons had no more to do with the claimant's grievances than they had to do with his race. In addition, there is no evidence that on or before 3 November 2017, the date Mr Aly made the allegations, he or Miss Jablonska were even aware of the grievance or grievances, let alone that they were about race discrimination.

133. The next potential victimisation complaint is about the claimant's suspension. Again, we have already dealt with this as a complaint of direct race discrimination and made relevant findings.

134. The decision to suspend was made by Mr Griffith. He told us he was not aware of the grievances at all at the time of the suspension. The evidence around this is inconclusive, in that Mr Cooke suggested he was appointed to investigate the grievance(s) by Mr Griffith. We are, though, satisfied that Mr Griffith, even if he knew the claimant had raised a grievance, did not know the details of it, nor that it involved allegations of unlawful discrimination.

135. In any event, the sole reason the claimant was suspended was that that was the standard process when there were allegations of misconduct of this kind. There is no basis in the evidence for an inference that the suspension had anything to do with the fact that the claimant had raised a grievance of discrimination.

136. The potential victimisation complaint about underpayments of wages has been struck out.

137. The remaining potential victimisation complaints all duplicate direct discrimination complaints that we have already dealt with. They concern

dismissal, Mr Cooke's handling and decision not to uphold the claimant's grievance, and Mr Lumsden's and Mr Sorensen's decisions. In relation to these potential complaints, we refer to everything stated above in connection with the identical discrimination complaints, in particular about why they took the decisions they took.

138. Further, none of Mr Cooke, Mr Lumsden, and Mr Sorensen, was aware of the grievance or grievances of discrimination relied on as the protected act or acts by the claimant. Even if there were some evidence suggesting their decisions might have had something to do with the claimant's grievances of October 2017 – and there is no such evidence – we would be entirely satisfied that, in fact, they had nothing to do with them.

139. For all these reasons, the claimant's entire claim fails and is dismissed.

Employment Judge Camp

29 July 2019

Sent to the parties on:

For the Tribunal: