Case Number: 3334426/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr C Grant	**v**	**Serco Limited**

Heard at: London Central **On**: 9 -13 March 2020 in person and 27 March 2020 in chambers (via telephone)

Before: Employment Judge E Burns
Ms MB Pilfold
Ms G Gillman

Representation

For the claimant: in person

For the respondent: Ms R Eeley (counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

(1) the claimant's claims of unfair dismissal and wrongful dismissal are dismissed;

(2) the claimant's claims of race discrimination contrary to section 13 of the Equality Act 2010 are dismissed;

(3) the claimant's claims of harassment related to race contrary to section 26 of the Equality Act 2010 are dismissed;

(4) the claimant's claims of victimisation contrary to section 27 of the Equality Act 2010 are dismissed.

This brings the claim to an end.

REASONS

Claim and Issues

1. By a claim form presented on 29 October 2018, at a time when the claimant was still employed, the claimant complained of direct race discrimination, harassment on the grounds of race and victimisation.

2. The presentation of the claim form followed a period of early conciliation against the respondent between 13 August 2018 and 27 September 2018.

3. The claimant was subsequently dismissed by the respondent on 26 February 2019. The respondent rejected the appeal against his dismissal. At a preliminary hearing held on 29 May 2019 it was agreed that the claimant could add claims of unfair dismissal and direct discrimination because of race and/or victimisation relating to the dismissal and appeal decision. The claimant was not required to present a fresh claim nor t prepare an amended ET1. The respondent had already defended these claims in its ET3 in anticipation of these claims.

4. The claimant describes himself as black British and relies on his colour as the basis of his race claim. This was accepted by the respondent.

5. A list of issues was agreed at the case management hearing. It was amended during the course of the final hearing to add a claim for wrongful dismissal. This was at the initiative of the tribunal who considered it should be included and believed the reason it had not been included was an oversight arising most likely because of the lack of an amended ET1. The respondent did not consent to the amendment, but agreed that it would not suffer any prejudice as a result of adding in this claim.

6. The issues were:

1. UNFAIR AND WRONGFUL DISMISSAL

1.1 Reason

1.1.1 What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) ERA 1996.

1.1.2 Did the respondent have a genuine belief that the claimant was guilty of the misconduct?

1.2 Fairness

1.2.1 Did the respondent conduct a reasonable investigation?

1.2.2 Did the respondent have reasonable grounds to believe that the claimant was guilty of the misconduct?

1.2.3 Was dismissal within the range of reasonable responses open to the respondent?

1.2.4 Did the respondent adopt a fair procedure?

1.2.5 If a fair procedure was not used would the claimant have been fairly dismissed in any event and/or to what extent and when?

1.2.6 If the dismissal was unfair, did the claimant contribute to his dismissal by culpable conduct?

1.3 Breach of Contract

1.3.1 Did the claimant fundamentally breach the contract of employment by the act of gross misconduct entitling the respondent to dismiss him without notice or payment in lieu of notice? N.B. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the gross misconduct.

2. REMEDY

2.1 If the claimant's claims are upheld:

2.1.1 What remedy does the claimant seek?

2.1.2 If the claimant seeks reinstatement or reengagement, is it practicable for the respondent to comply with such an Order?

2.1.3 What financial compensation is appropriate in all of the circumstances, particularly given 1.2.5 and 1.2.6 above?

2.1.4 Has the claimant mitigated his loss?

3. DISCRIMINATION – RACE

3.1 **Jurisdiction**

3.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of? – Yes.

3.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

3.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

3.2 **Direct discrimination**

3.2.1 The claimant relies on a hypothetical comparator.

3.2.2 Was the claimant treated less favourably than the comparator would have been? The claimant will rely on the following alleged less favourable treatment, namely:

(a) In relation to the incident on 18 March 2018, the respondent's failure to call the Police immediately following the claimant's call to the control room where he had reported what had happened and had asked for urgent police assistance;

(b) Mark Sammut's statement in his email dated 25 April 2018 to Jack Elson in which he states:

a. "my view (and it is only my view) is that our driver was provoking the incident [on 10 March 2018] by his actions… "

b. "this incident and the abuse etc. is hearsay by the driver, there are no witnesses and no footage as it occurred at the rear of the vehicle";

(c) Amanda Best's disciplinary outcome dated 12 June 2018;

(d) Ian Cousins's disciplinary appeal outcome dated 20 July 2018;

(e) Ian Cousins writing to the claimant on 8 August 2018 and stating that if he doesn't accept the conditions attached to his final written warning, he will be dismissed;

(f) The decision to dismiss the claimant on 26 February 2019; and

(g) The rejection of the claimant's appeal against his dismissal on 5 April 2019.

3.2.3 If so, was the reason for the treatment the claimant's race, colour, nationality or ethnic origin or perceived race, colour, nationality or ethnic origin?

3.3 **Harassment**

3.3.1 Was there unwanted conduct related to race? The claimant will rely on the following alleged unfavourable treatment, namely:

(a) Ian Cousins writing to the claimant on 8 August 2018 and stating that if he doesn't accept the conditions attached to his final written warning, he will be dismissed

3.3.2 Did that conduct have the purpose or effect of:

(a) violating the claimant's dignity, or
(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.4 **Victimisation**

3.4.1 Has the claimant done or do they intend to do, or are they suspected of having done or intending to do, a 'protected act'?

(a) The claimant relies on his grievance dated 1 June 2018, raising a complaint of race discrimination as the material protected act

3.4.2 If so, was he treated less favourably as a result? The claimant relies on the following less favourable treatment:

(a) Amanda Best's disciplinary outcome dated 12 June 2018;

(b) Ian Cousins's disciplinary appeal outcome dated 20 July 2018;

(c) Ian Cousins writing to the claimant on 8 August 2018 and stating that if he doesn't accept the conditions attached to his final written warning, he will be dismissed;

(d) The decision to dismiss the claimant on 26 February 2019; and

(e) The rejection of the claimant's appeal against his dismissal on 5 April 2019.

The Hearing

7. The hearing was held over the course of six days. The claimant represented himself. The respondent was represented by counsel. The start of the hearing was postponed. The hearing began at 2 pm on Monday 9 March 2020 with the rest of that day being a reading day. Witness evidence and submissions on liability were heard over the course of the next 4 days. Judgment was reserved.

8. It has taken several months to finalise this reserved judgment. This was due to the COVID-19 pandemic. The panel were able to have a day in chambers on 27 March 2020 to deliberate, but Judge E Burns has been unable to finalise the written judgment until much later due to her being reallocated to other essential duties during the pandemic. She apologises to the parties for this unavoidable delay.

9. The tribunal heard evidence from the claimant himself. For the respondents we heard evidence from five witnesses in the following order:

- Amanda Best (partnership Director, Citizen Services) – original disciplinary manager
- Ian Cousins (former Managing Director, London Cycle Hire Scheme) – original appeal hearing manager
- Norbert Malec, On Street Team Leader on the London Cycle Hire Scheme
- Greta McCarty, Operations Manager for the London Cycle Hire Scheme

- Jack Elson, (Senior Team Leader, Bicycle Management and Supply) – investigation manager
- Sam Jones (Contract Manager) – dismissing manager
- Simon Bailey (managing Director Leisure) – considered the appeal against the claimant's dismissal

10. At his request and with the agreement of the respondent, the claimant was given permission to read his witness statement to the tribunal.

11. The parties agreed that although the claimant's evidence was ongoing, on Wednesday morning, the evidence of Ms Best and Mr Cousins should be heard. This was because they were only available until the end of that day. We note that they are no longer employed by the respondent and had to return to other employment.

12. Mr Bailey gave his evidence via video link (Skype) as he was at home self-isolating in accordance with medical advice due to the COVID-19 pandemic. He was alone and had access to unmarked copies of the relevant written materials.

13. There was a main trial bundle of documents made up of two lever arch files (1085 pages). We admitted into evidence some additional documents from both parties with the agreement of the other. We read the evidence in the bundles to which we were referred. We refer to the page numbers of key documents that we relied upon when reaching our decisions in this judgment.

14. We explained the reasons for various case management decisions carefully as we went along, including our commitment to ensuring that the claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence. We felt that the claimant represented himself very well and was able to articulate his arguments fully.

Findings of Fact

15. The tribunal's findings of fact are set out below. Where we have had to reach a conclusion in relation to disputed facts, we have made our findings on the balance of probabilities. The inferences that we have drawn and our overall conclusions on the specific matters are set out in the analysis and conclusions section.

Background

16. The respondent is a large employer, employing around 50,000 employees globally. It has an HR function and a large number of employment policies. One such policy is its Code of Conduct.

17. Within this policy, there is a section on Bullying, Harassment and Violence (141). The section says:

"Everyone at Serco has the right to be treated respectfully at all times in a workplace free from any kind of bullying, harassment or violence"

It defines violence as: "*any behaviour that makes someone else feel threatened"* and makes it clear that violence is not just physical violence but *"includes verbal abuse, offensive language, racist or sexist remarks, threatening to do harm, or physical attacks, including spitting and throwing objects*."

18. The section also includes a commitment to staff as follows:

"*We will do all we can to make sure everyone is treated with respect in the workplace.*

We won't tolerate bullying, harassment or violence of any kind whether by a colleague, third party or a member of the public.

Whenever there is violence, we will investigate. If it is appropriate we will encourage police intervention, and pursue criminal charges.

We take violence extremely seriously. If you are a victim of violence, and suffer physical or mental trauma as a result, we will support you in your recovery, and in any civil proceedings against those responsible." (141)

19. The respondent holds the contract to manage the bicycle scheme that operates in London. Known as London Cycle Hire Scheme (LHCS), this is the scheme whereby bicycles are made available to members of the public to use in London. They can collect them from various locations across the City, use them and then return them to any of the locations.

20. The claimant is a black man who describes his ethnicity as black British. He is now 58 years old and has held a full driver's licence since the age of 18.

21. The claimant commenced employment as a Redistribution Operative for the LHCS on the 10 May 2010, from the very beginning of the scheme. His role involved the redistribution of the bikes as directed by the Control Room. The claimant was provided with a company vehicle fitted with a tracking device and vehicle camera.

22. The Control Room was not an emergency control room, but established for operational purposes to monitor the location of bikes and to direct the activities of Redistribution Operatives such as the claimant. Around 200 people were employed by the respondent on the LHCS.

23. Prior to March 2018, the claimant had an unblemished record of service, with no complaints of lateness, absenteeism, arguments, bad attitude or any other non-compliance. He had received praise for his attendance and productivity. He was a union official for the RMT union which meant that he

had a good deal of interaction with the respondent's managers and was known to them.

24. The claimant was passionate about the role which gave him a great deal of job satisfaction. He particularly enjoyed having the opportunity to interact with members of the public.

25. The claimant worked a four days on and four days off shift pattern. The claimant's manager was Derek Wong. He reported to Greta McCarty, Operations Manager. Ms McCarty reported to Sam Jones, then Head of Operations for the LCHS who in turn reported to Ian Cousins, then Managing Director of the LHCS. Mr Cousins left the respondent at around the end of 2018 and Mr Jones moved into the role of Contract Manager for the LHCS in January 2019.

26. The claimant was dismissed without notice or payment in lieu of notice by the respondent, with effect from 26 February 2019, in connection with two road traffic incidents that occurred in March 2018.

First Road traffic Incident - 10 March 2018

27. The first road traffic incident occurred on 10 March 2018. The claimant was driving south along the Strand Aldwych, towards Waterloo Bridge when a driver attempted to undertake his vehicle by forcing him into the bus lane. The claimant held his ground and the driver ended up behind him. The driver then began to tailgate the claimant.

28. The claimant could see the driver behind him through his driver's side wing mirror. The driver was making rude and threatening gestures with his fist and fingers. The claimant braked twice which led to the vehicle behind him running into the back of him.

29. The tribunal viewed the camera footage of this incident which was filmed from the rear vehicle camera. There was no audio available and the view was limited due to the camera angle. The vehicle behind the claimant could first be seen at 10:08:42.

30. As the vehicle got closer to the claimant's vehicle, the claimant braked. This was at 10:08:53. This caused both vehicles to stop momentarily. Both vehicles start moving again. The vehicle behind remained very close to the claimant's vehicle and when the claimant braked for a second time at 10:09:18. On this occasion the vehicle hits the back of the claimant's vehicle.

31. The claimant and the other driver both got out of their vehicles and walked towards each other. The other man accused the claimant of causing the accident and called him a "monkey".

32. The claimant immediately grabbed hold of the other man's lapels and expressed his anger at the racially abusive insult. At this point, a member of the public approached to try and calm the situation down. The claimant

released the other driver's lapels and called the respondent's control room and requested the immediate assistance of the police.

33. The tribunal were provided with a transcript (1011 – 1013) and audio recording of the call. The call was timed at 10:02 am. The controller (Tomasso Di Marcello) did not call the police, but stayed on the line with the claimant. While the claimant was speaking to him, the other driver went over to the claimant and hugged him. He apologised to the claimant apologised and said he was not a racist.

34. The claimant accepted the apology and as there was no damage to either vehicle, he told the controller he no longer needed to call the police. The claimant told the controller that there was no damage to his vehicle.

35. The claimant rang the control room again at 10:11 am and spoke to a different controller, Russell Frost. The tribunal were provided with a transcript (1014 – 1016) and audio recording of the call. The claimant asked to speak to the first controller and explained that he wanted some guidance as he had taken a photograph of the other driver and his vehicle registration number. A short conversation ensued about what had happened. The controller advised the claimant to complete a Vehicle Incident Report, even though there was no damage to his vehicle. The claimant completed a Serco Accident / Internal Incident Reporting Form at the end of his shift (350 – 355).

36. When Paula Barton, Control Room Team Leader learned about the incident following a handover with Mr Frost, she felt that perhaps more could have been done by the controllers on duty at the time. This is reflected in an email she wrote on 11 March 2018 in which she identified that the respondent should consider updating its guidance on street incident management (376Q).

37. Although the claimant felt well supported by both the controllers, Ms Barton was concerned that neither of the controllers who had spoken to the claimant had checked on his welfare and whether he was able to continue working. This led to them have one- to-one meetings about the incident (289 – 290). She also reported the incident to the police, who visited the claimant a few days later to ask him if he wanted to pursue the matter. The claimant told the police that, as he had accepted an apology from the other driver and shaken hands with him, he felt it would be dishonourable to pursue charges and the police accepted that was the end of the matter.

38. When discussing this incident later, the claimant admitted "touching" his brakes twice to try and stop the vehicle behind him tailgating him. He accepted that there was nothing in front of him causing him to need to brake. He said he had been driving for 40 years and he did not believe he did anything that was dangerous or unlawful. The evidence collated by the respondent later showed that the second incident of braking registered as "harsh" braking on the vehicle tracking device (291).

39. The claimant also said later that his actions were influenced by the location of the incident. He described having in mind the recent terrorist incidents in London that had occurred on bridges and told us that he wanted to bring matters to a head with the driver behind him before reaching Waterloo Bridge.

40. We note that he did not mention this or give it as an explanation for his actions in any of the contemporaneous accounts he gave of the incident (1015, 350, 376Q) nor when he was formally interviewed by the respondent about the incident (218 – 285). Our finding is that he developed this explanation, during the course of the subsequent disciplinary process when looking back on the incident. We do not consider this to have been done dishonestly and find that he believed this explanation.

Road traffic Incident No. 2 - 18 March 2018

41. The second road traffic incident occurred on 18 March 2018. The claimant had just dropped off some bikes at one of the respondent's bike stations on Fanshaw Street, Hoxton. He was about to get back into his vehicle when he felt something strike him in the back of his head. The item is later confirmed as a doughnut. He turned around and saw there were two young white men on the footpath behind him.

42. According to the claimant's evidence, which was not disputed by the respondent, the claimant turned to them and said, "You're lucky I didn't see you do that." The young men replied, "Shut up you black cunt." The claimant said, "I beg your pardon" to which the young men repeated "Shut up you black cunt," and casually continued to walk on.

43. The tribunal viewed the camera footage of this incident which was filmed from the front vehicle camera. There was no audio available and the view was limited due to the camera angle.

44. The claimant's vehicle is parked on the left hand side of the road just before a speed bump. There are side roads going off to the left and right about 20 metres away from him and then a zebra crossing about 30 metres away from him. The young men can be seen on the pavement on the right hand side of the road, walking away from the claimant's vehicle. They have reached the zebra crossing and are walking up the road away from it when the claimant's vehicle begins to move (10:39:59).

45. A car in the left hand carriageway has just driven around the claimant's parked vehicle when the claimant's vehicle begins to move. As the car in front of him drives over the zebra crossing, the claimant overtakes the car by moving fully into the right hand carriageway. The claimant's vehicle then mounts the pavement on the right hand side with the vehicle and chases the two young white men (one of them pushing a bike) who run away by crossing the road. The claimant follows them to the other side of the road and comes to a halt as the young men turn back down the street and run the opposite way to which the claimant's vehicle is facing (13:30:09).

46. Although not captured by the vehicle's camera, the claimant's evidence was that, after he had chased them the young men initially ran away. However, while he was stationary at the side of the road, they returned to the claimant's vehicle and threw some further objects (plastic highway road working lanterns) at the vehicle. They ran off however when the claimant got his smart phone out and started taking pictures of them.

47. The claimant's explanation for his actions, contained in his witness statement (paragraph 17) was:

"I was in a state of total disbelief, I was extremely offended, totally humiliated and deeply hurt, I think if they had ran, I would have felt like I still had some dignity but having just both physically and racially assaulted me and then to just casually walk on, offended me further, that suggested they believed they could do whatever they wanted to me and I could do nothing, in that frame of mind, I got into my vehicle and drove towards my attackers, it was an act of self defence and it forced them to run, fortunately, I did not make any contact with them and my vehicle and as they ran away, I came back to my senses."

18 March 2018 – Calls to Control Room

48. After the young men ran away, the claimant then called the control room. The tribunal was provided with a transcript and audio recording of the call (1017-1018). The call was timed at 13:31 and was with Alex Crysostomou.

49. According to the transcript and recording, the first thing the claimant said to Ms Crysostomou was his location and that he needed the police urgently. He then went on to tell her that "*two young lads threw something at me*" and related the conversation that had taken place including that they had said, "*shut up you black cunt*". He began to say "*And I am infuriated so I positioned my vehicle towards them, as if to hit them…*" when Ms Crysostomou asked if the claimant was okay.

50. The claimant confirmed he was, but said that he needed Ms Crysostomou to call the police now. She then asked what was thrown at him. The claimant replied, "*I'm not sure what the item was but then they've come back and threw something else at the vehicle*."

51. Ms Crysostomou did not know what to do and told the claimant that she would call him back in two minutes. Rather than call the police she escalated the matter to Mr Malec, On Street Team Leader. The claimant told us that he did not wish to criticise Ms Crysostomou's response as he understood that Ms Crysostomou was new to the role and had not been fully trained.

52. Mr Malec said in his evidence that when Ms Crysostomou told him that the claimant had called, the only information she had given him was that the claimant had said he was under attack, where the claimant was and that he had asked for the police to be called. Mr Malec specifically denied that Ms Crysostomou had told him that the claimant had been subjected to

racial abuse. We do not think this is likely. We find it highly improbable that Ms Crysostomou would have left out this significant detail. When later interviewed by Mr Elson for the investigation this appeared to be a significant matter in her mind (317 and 383).

53. Rather than instruct Ms Crysostomou to call the police or call them himself, Mr Malec rang the claimant and spoke to him using his work mobile. The call was not recorded because he used his mobile rather than the control room landline. Mr Malec completed an incident report referring to the call later that say day however (293). He was also interviewed by Mr Elson about the call and subsequent events, although this was not until 3 May 2018 (351 and 378 – 381).

54. Mr Malec says and we accept, that he called him back within 6 minutes. We have checked the timing using the camera footage of the incident. According to that, the claimant begins to return to base just over 8 minutes after driving his vehicle towards his assailants.

55. Mr Malec said the reason why he did not call the police was because he was confused. He told us that he could not understand how the claimant was in a position to call the control room and be under attack. He also felt that if the claimant needed to the police, he was best placed to call them as he could answer any questions the police might have about what was happening and his precise location. As Mr Malec wanted to check if the claimant was safe and needed clarification about the attack, he felt the best thing to do would be to call him back rather than call the police straight away. He denied that the reason for not calling the police was because he did not consider racial abuse warranted police intervention.

56. Mr Malec began the call by asking the claimant if he was ok. The claimant refused to answer this question a couple of times as he wanted to know if the police had been called and then when he found out they had not been called, expressed his dissatisfaction. During the call Mr Malec suggested that the claimant call the police himself (293) and (285 – 286).

57. Mr Malec told us that he could not, in his 5 years of service with the respondent recall any incidents, other than the one involving the claimant, when the control room had to deal with an emergency requiring the police to be called. This included the two possible scenarios, when an on-street member of staff called the police themselves or when they called the control room and requested the police be called.

58. Ms McCarty said in her experience there had been occasions when a member of staff contacted the control room in a non-emergency situation and sked the control room to contact the police. She gave the example where staff find needles that had been used for drug taking which needs to be reported to be police, but where the police are not required urgently to assist.

59. Ms Best said in her evidence that, if she had been in Malec's shoes, she would have called the police, but that she understood the guidance to employees was not fully clear at the time.

60. Mr Cousins said that he believed that there were occasions, before the incident with the claimant, when the control room had called the police for a member of on-street staff and when the member of staff had called the police themselves. He felt the guidance in place at the time was unclear. As a result of the incident, and the recommendations made by Mr Elson, the respondent clarified the position and produced refreshed guidance and rolled this out to staff by undertaking training. The clarified guidance made it clear that on-street staff should call the police themselves rather than the control room.

18 March 2018 - Return to Depot

61. The claimant returned to base after the call. Mr Malec contacted the police for the claimant. The police attended the base and the claimant gave them a statement about what had happened. He also gave them the photographs he had taken.

62. Mr Malec sat with him while he gave his evidence to the police. We find that the reason he was there was to offer him support. The reason he did this was not, as later alleged by the claimant, to ensure that the claimant told the police about his own actions. The claimant told us that the police were very sympathetic towards him. They later referred the claimant to a charity called The Monitoring Group who offer support and advocate on behalf of people who have experienced race and religious hate crime.

63. It is not disputed that the police said that it was a shame that they had not been called to the scene and suggested that they would have been able to charge the claimant's assailants with a public order offence.

64. The police did not view the footage on this occasion. They did however return to the control room and view the footage at a later date with Ms McCarty. They went through the footage frame by frame to see if it was possible to get a decent picture of the youths involved. The police were unable to catch the young men who were responsible for the assault on the claimant.

65. Shortly after the incident occurred, an employee approached Ms McCarty and mentioned to her that a son of one of his friends had been chased by a LHCS vehicle in Fanshaw Street. Ms McCarty told us that as soon as she said the young man had been accused of being involved in a racial assault, the employee backtracked and refused to provide any further details. She met with the employee on at least two occasions to try to persuade him to reveal the identity of the young man involved, but he refused to do so. She explained to us that she did not contact the police with this information as she did not think it would be helpful to their investigation, but did seek advice from HR (396). We find her explanation to be genuine and do not infer her motive to be discriminatory.

66. At a later date, the respondent reported the claimant's driving to the police. According to an email exchange between HR and the respondent's Ethics Manager, on 7-8 June 2018, the police did not want to pursue action against the claimant for his driving as they had not had any complaints from the area of the incident (559 – 560).

20 March 2018 – to 5 April 2018

67. During the period immediately following the incident, several things happened.

68. The claimant did not come into work. He called in sick on 19 March 2018 and visited his GP on 20 March 2020. He was subsequently signed off on sick leave with work related stress until 3 April 2018 (406).

69. During this period, the claimant had contact with a number of the respondent's employees. Some of that contact was initiated by the claimant and some of it was initiated by the respondent's employees.

70. Sam Jones, then Head of Operations, had spoken to the claimant on the day of the incident, 18 March 2018, while the claimant was at the depot. The claimant accepted that Mr Jones had acknowledged he had been subject to a racial assault and had showed concern for his welfare. Mr Jones had told the claimant to go home and not work the end of his shift. The claimant had expressed concern about how the control room had responded to his call to Mr Jones, who had reassured the claimant that the response of the control room would be investigated.

71. The claimant also spoke at length with Ms McCarty who rang him on 19 March 2018 when the claimant rang in sick. She had not viewed the camera footage at the time of this call. The claimant told Ms McCarty that the racial assault had caused him to feel unwell and expressing concern about the Control Room's response when he rang them regarding the incident (335). She encouraged the claimant to use the respondent's EAP service and identified that he should be supported by his line manager from a welfare perspective (409-410).

72. By 20 March 2018, Ms McCarty had viewed the camera footage of the incident and formed the view that the claimant's conduct when driving at the young men needed to be investigated. She took advice from HR and commissioned an investigation as a result of that advice. She also spoke to HR about the importance of keeping the investigation separate from offering the claimant support to deal with the abuse he had suffered (405 - 408).

73. Ms McCarty rang the claimant to inform him that the respondent would be initiating an investigation. It is likely that she spoke to him the same day, because he rang Mr Malec later that day to say that he had been contacted by the police regarding the racial assault. The claimant wanted the respondent to know that, unlike the police who were focussing on investigating the racial abuse, he felt the respondent was more focused on

his actions rather than the fact that he was racially abused when working for them on the street (341).

74. Ms McCarty appointed Jack Elson, Senior Team Leader, Bicycle Management and Supply, to conduct the investigation and set him terms of reference for his investigation. The investigation was not to be limited to the claimant's conduct on 10 and 18 March 2018, but was also to include how the respondent's control room had dealt with the incidents. In the terms of reference, which were finalised on 21 March 2018, Ms McCarty specified that Mr Elson was to investigate:

    1. *Whether incident management actions were carried out correctly by control room staff and team leaders.*

    2. *Whether the incident management procedures covered the events that occurred appropriately and whether any changes are necessary.*

    3. *The conduct of the driver in relation to the driving whether they have breached the code of conduct or the law in their actions.* (277)

75. The claimant accepted that Mr Elson was an appropriate person to conduct the investigation. He had not been involved in either of the incidents and worked from a different depot to the claimant and so was sufficiently impartial. Mr Elson also had a significant amount of experience of conducting investigations and dealing with disciplinary and grievance matters.

76. Mr Elson rang the claimant to tell him that he had been appointed to conduct the investigation just under a week later. According to Mr Elson's evidence, the claimant said that he did not want to stay off work for too long and so agreed that it made sense to be given the invite to the meeting with less than 48 hours' notice. Mr Elson therefore sent him an invitation by email on 28 March 2018 to an investigation meeting on 29 March 2018 (346).

77. We note that the letter stated that the investigation hearing is to discuss two incidents involving the claimant on 10 and 18 March 2018 and sets out that what is being investigated includes, but is not limited to:

    - *"the incident management responses from Control Room and/or Team leaders*
    - *A breach of Code of Conduct and/or the law in relation to the use of a company vehicle"*

78. The letter explained that the purpose of the meeting is to provide the claimant with the opportunity to present his version of events for the purposes of the investigation and advises the claimant that he can be accompanied at the meeting by a work colleague or trade union representative. It also included the paragraph:

"*You should be aware that the allegations relevant to your conduct which have been identified alongside your concerns over the management of the two incidents in question are serious, and if substantiated may lead to disciplinary action."*

79. The claimant says he did not agree to meeting with less than 48 hours' notice and alleged that the invite letter attached to the email was deliberately backdated (it is dated 27/3/2018) to make it look as if the respondent had complied with the 48 hours' notice requirement (347). We note that within the the email accompanying the letter Mr Elson included the sentence, "*Please let me know if you are happy to attend tomorrow or alternatively we can hold it at a later if you would prefer*" (346). As it transpired the interview did not take place until 18 April 2018, to accommodate the claimant being well enough to attend and being accompanied by his chosen companion.

80. On 28 March 2018, the respondent referred the claimant to Occupational Health. Ms McCarty received a call from the claimant that day as he rang up to speak to her about the investigation. She told the claimant that Mr Wong would be calling him later that same day about his welfare and asked the claimant's line manager to see how he was and explain about the occupational health referral (355A -355B).

81. The referral to occupational health provided the following information:

"Caul was involved in a public racial abuse and reacted out of character causing serious concerns to the public and the reputation of the company and sponsors"

"Caul is generally a consistent performer, well mannered and punctual individual, for Caul to act out of character in both situations is unusual and therefore we need to understand if Caul can continue to perform his role within the conduct of Serco's policies" (360)

82. The claimant did engage with occupational health, but was unable to attend the first appointment and this was never rearranged.

83. On 29 March 2018, the claimant emailed Mr Elson to complain about the letter inviting him to the investigation meeting. He said:

"…*I want the record to show that I am both deeply offended and insulted for having my conduct called into question having reacted to being physically and racially abused in an unprovoked attack whilst working on street.*

It would appear that [the respondent] gives no weight to the gravity and impact of racism, hence why there was a failure, on more than one occasion, to call the police after being subjected to racial abuse on street, this invite further demonstrates a lack of concern for the welfare and wellbeing of on street personnel, if not, you would not have sent this invite while I'm booked off sick.

Obviously if there was genuine concern for my physical and mental wellbeing, you would have waited for my return to work." (361)

84. The claimant rang Mr Malec on 2 April 2018 to tell him that he would be returning to work on 4 April 2018. The conversation lasted about half an hour (363). Mr Wong rang the claimant on 3 April 2018 for 23 minutes as part of his welfare role and was provided with the same information by the claimant (366-367). In both calls the claimant expressed concern about his treatment by the respondent.

85. The claimant did indeed return to work on 4 April 2018. The respondent suspended him from driving duties because of its concern that he was not safe in that role. Sam Jones confirmed the arrangements in a letter to the claimant which stated that the investigation was confidential and advised the claimant that his welfare contact during his suspension would be Ms McCarty (370).

86. The claimant told us that he did not initially object to this arrangement. He spent the day accompanying another operative. He found it very hard not to discuss the incident with his colleagues who kept asking him about it. He was not permitted to discuss the investigation because it was confidential. He therefore approached Sam Jones and agreed with him that he should not attend work, but be suspended on full pay. The claimant was permitted to undertake his union activities during his suspension.

Investigation

87. Mr Elson's investigation included the following activities:

- An investigation hearing with the claimant on 18 April 2018
- Fact finding meetings with Mr Malec (3 May 2018), Ms Crysostomou (3 May 2018), Mr Frost (25 April 2018) and Mr Di Marcello (25 April 2018)
- He emailed the following individuals with questions regarding the investigation:
    - Mark Sammut (the respondent's Divisional Security Manager)
    - Mr Jones, as he had been the on-call manager on 18 March 2018
    - Claudio Luisi, the on-call manager on 10 March 2018
- Review of the camera footage and audio recordings
- Review of the vehicle tracking information
- Review of various relevant emails between the Control Room and/or Team Leaders relating to the incidents in question
- Review of Accident/Incident Forms completed for the incidents in question
- Review of relevant procedures, including an internal poster communication on display in the depot called LCHS Emergency Protocol

88. The claimant attended an investigation hearing with Mr Elson on 18 April 2018. The claimant was accompanied by a trade union representative

(Mick Crossey) and a note taker took minutes of the meeting (378 – 384). The claimant accepted that the minutes are an accurate reflection of the discussion at the meeting.

89. At the investigation meeting, the claimant was given a full opportunity to describe both of the incidents in his own words and explain what was going through his mind at the time they happened. He was played the camera footage and the audio recordings of the calls.

90. The reason Mr Elson sought input from Mr Sammut was because as was widely regarded as an expert in the field of security given his background as an ex-police office. Mr Elson asked him a series of questions to which he replied in an email dated 25 April 2019 (300-304). The questions and answers did not simply relate to the operational matter of how to respond to incidents involving on-street staff. Mr Elson expressed some views on the two incidents that took place on 10 and 18 March 2018.

91. As explained later, the claimant raised a grievance about this issue. In particular, the claimant was aggrieved at the following comments made by Mr Sammut.

Of the 10 March 2018 incident:

"*My view (and it is only my view) is that our driver was provoking the incident by his actions.*

Each case of vehicles colliding is an individual circumstance and it has been considered in some cases (usually when drivers are looking for compensation so not road traffic legislation) that the driver in front can be at fault. The circumstances of the footage showing a clear road in front show intent to cause an accident and maybe cause damage and injury when there is no need. It would be down to the police to decide, but I believe this was not reported as an incident to the police. I would produce all CCTV at any discipline event." (300)

Of the 18 March 2018 incident:

"*This incident and the abuse etc. It is hearsay by the driver, there are no witnesses and no footage as it occurred at the rear of the vehicle."* (300).

92. The claimant told us that it appeared that Mr Sammut was prejudiced against him. In particular, he found it insulting for Mr Sammut to describe his account of the racial abuse as hearsay as it failed to take account of the claimant's own first-hand account of the incident. We note that Mr Sammut's use of the word hearsay is entirely inaccurate.

93. The claimant was also aggrieved that Mr Sammut's opinion of his behaviour appeared to have been taken into account by Mr Elson, contrary to policy and procedure. He also objected to the fact that Mr Sammut had had previous discussions with other staff about the incidents before

expressing his opinion. This is clear from the beginning of the email where Mr Sammut says:

"*I did sit down with Lihem, Claudio and Greta [McCarty] and we talked through most of these*." (300)

94. The claimant was also aggrieved about the role played by Ms McCarty. When he received the investigation report, the claimant saw that it had been commissioned by Ms McCarty. He felt that this created a conflict of interest for her as she had also been appointed to the role of welfare contact for him and she had had discussions with Mr Sammut about the incidents. The claimant does not dispute that other than commissioning the investigation, Ms McCarty played no other role in the investigation. In addition, he does not dispute that he only had two "welfare" type conversations with Ms McCarty quite soon after the incident occurred. During the later stages of the procedure, others took on this role.

Investigation report

95. The output of the investigation was an investigation report which was completed in late May 2018. (262 -276) Mr Elson included the following findings in it with regards to the claimant's conduct:

- He considered the claimant's conduct on 10 March 2018 could be considered to be a breach of the Code of Conduct, specifically: "Never participate in disorderly behaviour, substance abuse or any other activity which could cause injury to you or others".

- He considered the claimant's conduct could be considered to be a breach the same provision of the Code of Conduct. He also considered that his conduct had potentially breached sections 2 and 3 0 (Le. driving dangerously and driving without due care and attention and without reasonable consideration for other road users) and section 34 (driving on a footpath) of the Road Traffic Act.

96. Mr Elson also made findings relating to the incident management processes including:

    - more could have been done by the Control Room staff to enquire as to the claimant's welfare on 10 March 2018;

    - there was no specific procedure regarding contacting the emergency services in relation to on street staff, but he considered that Mr Malec's actions on 18 March 2018 were in line with the recommendations provided by Mark Sammut and the internal LCHS procedure regarding incident reporting.

    - in his view, the person at the scene of the incident will usually be the best person to contact the emergency services.

97. Mr Elson's report concluded with the following recommendation with regard to the claimant's conduct:

"*consideration be given to instigating disciplinary proceedings against [the claimant] based on the findings of this investigation." (275)*

He also made recommendations about improvements to Control Room management and the processes in place (276). These were implemented by the respondent, including that clearer guidelines should be produced, and training should be provided to on street staff and control room operatives.

Versions of the Disciplinary Procedure and Guidance on Investigations

98. When Mr Elson invited the claimant to attend the investigation hearing he sent him a copy of a booklet called "Problem Solving at Work". It contained details of the respondent's disciplinary and grievance and appeals procedures (50 – 67). Mr Elson did not realise that the procedures contained in the document had been updated.

99. We were told that the correct Disciplinary Policy in place at the time was Country Standard Operating Procedure (CSOP) Disciplinary Version 1.5 July 2017. However, it appears that a different version of the same document, CSOP Version 1.5 June 2018 was provided to the claimant prior to his disciplinary hearing. The most likely explanation is that something went array in the respondent's version controls.

100. In addition, the claimant was provided with a second document that contained investigation guidance for managers and was issued in July 2017.

101. The Problem Solving at Work booklet included guidance on what to do if an employee who is the subject of a disciplinary process raises a grievance (57 and 61). In essence, it says that there may be circumstances when a disciplinary procedure may need to be suspended because an employee has raised a grievance. It notes, however, that the grievance procedure should not be used to raised grievance about dismissal or disciplinary action.

102. It also contains a section about investigation reports which says the following:

"*The report must relate to fact or circumstantial evidence only and must be balanced and fair. All material facts should be included to assist the Manager in reaching a balanced decision. it should not include any expression of opinion and avoid any statement which could be interpreted as an indication of prejudgment.*

The Report should not include any recommendation that Disciplinary Action should be considered, nor any recommendations as to the level of any such action." (67) (original bold emphasis)

103. The version of the policy supplied to the claimant contains similar guidance about opinions, but is ambiguous about whether investigation reports should include recommendations. It suggests they should.

104. All versions of the policy contain the following guidance about when an employee can be dismissed as a sanction:

> "*The matter is so serious as to be considered gross misconduct. This is known as summary dismissal i.e. previous warnings have not been issued and the whole procedure is summarised into one action - dismissal.*
>
> *In exceptional cases where mitigating circumstances exist demotion, salary reduction, loss of seniority or loss of increment in the individual's existing role may be considered as an alternative to dismissal. However, in order to impose a demotion or salary reduction a disciplinary situation must have reached the point of dismissal. This action is a variation of contract and one which the employee must agree to accept as an alternative to dismissal*." (54)

Claimant's Grievance

105. On receipt of the investigation report, Ms McCarty decided that the claimant should be invited to a disciplinary hearing. The respondent initially appointed Sean Manley, Operations Manager to conduct the hearing.

106. In response to the claimant and his trade union representative making representations to the respondent and to the claimant submitting a grievance on 1 June 2018 (452 – 455), the respondent appointed Amanda Best to conduct the disciplinary hearing instead of Mr Manley. Amanda Best was a senior manager with very significant experience of dealing with disciplinary and grievance matters. She was from an entirely different part of the respondent's business. The respondent considered it was necessary to appoint someone more senior that Mr Manley who was independent from the LHSC contract.

107. The claimant's grievance was addressed to Ian Cousins and raised a number of concerns about the decision to initiate disciplinary action against him. It was expressed to be a grievance about Mr Jones, Ms McCarty, Mr Manley, Mr Elson and Mr Malec.

108. The grievance raised a number of complaints against the respondent including that:

- Mr Malec's failure to call the police as requested was a dereliction of his duty of care to the claimant and an allegation that the failure amounted to racial discrimination because Mr Malec did not think a black person being racially abused and physically assaulted warranted calling the police

- The decision to proceed with a disciplinary process, notwithstanding his 8 years of unblemished service and the circumstances of the

assault, was discriminatory and extremely malicious with the aim and objective to dismiss him from his job

- The disciplinary process was subject to a number of procedural flaws, including the alleged conflict of interest in Ms McCarty's position, the fact that Mr Elson had, contrary to policy in the claimant's view, sought the opinion of Mr Sammut when preparing his investigation report that, also contrary to policy in the claimant's view, Mr Elson's investigation report gave a recommendation.

- The respondent had failed in their duty of care towards his wellbeing having been the victim of assault

109. The claimant asked for the disciplinary process to be suspended pending the outcome of his consideration of his grievance.

110. Mr Cousins took the view that the grievance concerned matters that should properly be considered within the disciplinary process and that there was no need to suspend that process. He wrote to the claimant on 5 June 2018 to confirm that Ms Best would consider the matters raised in the claimant's grievance when she met with him. Mr Cousin's mistakenly referred in his letter to the meeting as an investigation interview when it was in fact a disciplinary hearing. Mr Cousins also provided the claimant with information in writing about the respondent's EAP scheme and how to access it (460).

111. Ms Best wrote to the claimant on 7 June 2018 to formally invite him to a disciplinary hearing on 12 June 2018. The letter confirmed that the purpose of the hearing was to discuss the claimant's conduct namely "Improper use of a company vehicle" and "Breach of Serco's Code of Conduct" on 10 and 18 March 2018. The letter (481 – 482) contained the following paragraph:

"*You should be aware that the allegations which will be discussed at the disciplinary hearing are very serious, and could amount to gross misconduct. If these allegations are substantiated as a result of the disciplinary hearing, a potential outcome may be dismissal without notice or pay in lieu of notice.*"

112. The letter also advised the claimant of his right to be accompanied to the disciplinary hearing by a work colleague or trade union representative and as noted above, our finding is that she enclosed the CSOP Disciplinary Version 1.5 June 2018.

Disciplinary Hearing

113. The disciplinary hearing took place on 12 June 2018. The claimant was accompanied, and a note taker was present. The claimant was provided with a copy of the minutes and accepted before us that the minutes of the disciplinary hearing in the bundle were an accurate reflection of the discussions at the hearing (506 – 519).

114. The claimant was given a full opportunity to provide his version of events at the disciplinary hearing. Ms Best also ensured that she went through the points in the claimant's grievance letter with him. When the claimant questioned which disciplinary procedure she would be following, she explained that this would be the one that she had sent him which she believed was substantively the same at the Problem at Work procedure he had been sent previously.

115. Of particular note in the discussion about the incident on 10 March 2020, Ms Best asked the claimant why he had felt he had the right to correct to correct the behaviour of the driver behind him by breaking the law himself. When responding, the claimant said for the first time that he was concerned about the driver's intentions and the proximity of the bridge.

116. Ms Best also asked the claimant why he had felt entitled to break the law in relation to the incident on 18 March 2020 asking him. The claimant responded by saying that his reaction was completely out of character and he accepted wholeheartedly that his reaction was not the appropriate action. He said he was not in a rational state of mind, but was provoked by the assault. The claimant added that he did not believe he could break the law, but thought that the law acknowledged that people can be provoked to act out of character. He added that like any other human being he was susceptible to a breaking point.

117. When going through the points in the claimant's grievance, Ms Best told the claimant that if she had been in Mr Malec's position she would have called the police. She acknowledged, however, that the procedures were not clear.

118. She told the claimant that in her view, the respondent had to investigate all all circumstances where an employee has behaved dangerously and this included his case, even though it appeared to be harsh. The claimant appeared to agree with this.

119. Ms Best said that in light of the claimant's concerns about Mr Sammut's email, she was going to disregard it. Ms Best told us that she believed the claimant's allegations about the racial assault entirely and so Mr Sammut's inaccurate "hearsay" comment had no influence on her. She was also, in her words, perfectly capable of reaching a view on the incidents without reference to his opinion.

120. Ms Best did not accept that Ms McCarty's role commissioning the investigation and acting as the claimant's welfare contact put her in a position of conflict of interest or created any unfairness in the process. Similarly, she said that she did not think Mr Elson's recommendation in the investigation report, that consideration be given to instigating a disciplinary procedure rendered the process unfair. Ms Best said she had spoken to HR about this in advance of the disciplinary hearing. HR reassured her by telling her that investigators often made recommendations and this was

fine, except if they went on to say anything about the outcome of the disciplinary process and sanction. This had not been the case here.

121. Following an adjournment, Ms Best informed the claimant of her decision with regarding to his conduct. She told him that on both occasions, on 10 and 18 of March, she believed the claimant had committed serious traffic violations which broke the law and violated company policies. She considered this constituted gross misconduct. Her decision, however, was that the claimant should not be summarily dismissed, but should instead be given a final written warning for 12 months with some non-negotiable conditions. This was to take into account the mitigating factors which consisted of:

- the claimant's previous good record
- the fact that the incident on 18 March 2018 was provoked by racial abuse and assault
- that fact that the claimant had self-reported the incident on 18 March 2018

122. Ms Best made it clear that if the claimant was unable to accept the conditions, she would have no choice but to summarily dismiss him. Ms Best confirmed this outcome and the conditions in a letter dated 13 June 2018 (520 – 521).

123. The conditions were as follows:

1. *"You are demoted for a period of six months from the date of your return to work. The demotion will be to a non-driving role and with a consequential reduction in pay. The contract will determine what that role is.*

2. *You will accept an immediate referral to the company's occupational health provider. This is to support your general well-being and for support on anger management issues, plus any other areas the contractor sees fit to raise.*

3. *You will comply fully and willingly with recommendations made by the occupational health advisers and any other recommendations from the contract leading from that referral.*

4. *After six months, the contract will take a view on whether or not you can be considered for a return to a driving role.*

5. *You will maintain a professional attitude towards the incidents, your behaviour and the outcomes of this process both within and outside the contract and company."*

124. Ms Best also made two additional recommendations:

- *that the LHCS complied with the five points made by Mr Elson in his investigation report relating to procedural and incident handling matters; and*

- *that it engaged with the Monitoring Group and or the respondent's WorkLife Solutions to establish what additional learning could come from all parties on the matter of handling race-related incidents* (521).

125. For the sake of completeness, she later (27 June 2018) wrote to the claimant to conclude the grievance process saying:

"I discussed the content of your email [1 June 2018] with you as part of the disciplinary hearing on 12 June 2018, reiterating that the issues were not being heard and the grievance policy. The notes demonstrate we discussed your email and you confirmed to me that you were satisfied we had discussed all the points you raised. The issues you raised are therefore considered fully dealt with under the outcome of the disciplinary process."

She also reminded the claimant once again of the EAP assistance available to him (613).

126. The claimant's initial reaction at the disciplinary hearing suggested that he would accept the conditions. He said that he had made up his mind that a final written warning would be a fair outcome. The only concern he expressed was at the loss of income from being demoted (519).

Appeal

127. Having received the outcome in writing, however, the claimant submitted an appeal to Ian Cousins by an email dated 19 June 2018 (544 – 555). Although his suspension was lifted on 18 June 2018 (601), he was signed off with work-related stress from this date. As well as dealing with the claimant's appeal, the respondent started a process to manage the claimant's absence under its sickness management policy. Initially this was led by his line manager, Mr Wong, but was taken over by Mr Jones from 27 July 2018.

128. The appeal hearing was held on 9 July 2018 and chaired by Mr Cousins. The claimant was accompanied at the appeal hearing and a note taker and member of HR staff were present. The claimant was provided with a copy of the minutes and accepted before us that the minutes in the bundle were an accurate reflection of the discussions at the appeal hearing (679 - 689).

129. The claimant was given a full opportunity to explain why he was unhappy with the outcome of the disciplinary process at the appeal hearing. He explained that, in his view, the Ms Best had failed to take account of the fact that he had been a victim of racism on the street. He also said that he found her suggestion that he needed anger management support insulting.

130. Of particular note, the claimant said that he felt that management should have decided, in light of the racial assault, not to have pursued disciplinary action against him at all. He noted that the police had not taken any action against him. The claimant acknowledged that what he did was not acceptable and accepted that he did not act in self-defence, but acted as a result of an emotional response and irrational reaction.

131. The outcome of the claimant's appeal was that Mr Cousin's upheld the decision made by Ms Best in full. He confirmed this in writing to the claimant in a letter dated 30 July 2018 which was sent to him by email on the same date (676 – 678).

132. The letter reiterated that the claimant needed to accept the conditions saying:

"As per the enclosed disciplinary CSOP, where demotion has been considered as an alternative to dismissal, the employee must agree to accept this alternative solution. Therefore, in this unique situation, I would ask you to write to me to confirm receipt of this outcome and also to confirm whether you accept the conditions. If you are unable to accept the new conditions, and we would have no alternative but to dismiss. I would please ask that you respond to me via letter or email within seven working days namely 5 pm on Wednesday, 8 August 2018.

133. The claimant replied on 8 August 2018 by an email sent at 15:26 in which he said:

"*In reply to the additional condition attached to my ongoing employment, I am reluctant to sign any document which seeks to erode my rights.* (733)

134. Mr Cousins responded the following day, 9 August 2019 in an email saying:

"The conditions have been clearly set out in my letter 'Result of Appeal Hearing" dated 30 July 2018.

I need, by return an unambiguous response from you which makes clear that "you are prepared" or "are not prepared" to accept the conditions detailed in the above referenced letter." (733)

135. The claimant replied by sending two emails. The first said:

"As a result of the additional injury caused me by [the respondent] through the disgraceful treatment I've been subjected to since my assault on street, I am, at this moment, unable to answer your question."

with the second adding:

"*In addition to my previous email, could you please refrain from harassing me, as this is only adding to my injury."* (732)

136. The claimant told the tribunal that he considered the emails from Mr Cousins to constitute harassment because he was asked the same question several times, while he was off sick.

Welfare Process and Submission of Claim

137. The claimant had been referred to the respondent's occupational health provider on 21 June 2018. He attended an appointment by telephone in July, but refused to allow the report to be shared with the respondent. Following this he attended a number of welfare meetings with Mr Jones over the course of several months. The claimant received full sick pay throughout this period. He was allowed to be accompanied to all of the meetings and notes were taken.

138. It was during this period that the claimant commenced the ACAS conciliation process (27 September 2018) and submitted his claim to the employment tribunal (29 October 2018).

139. Under the welfare process, Mr Jones encouraged the claimant to use the respondent's EAP service, talked to the claimant about being referred back to occupational health and raised the possibility of the claimant being covered by the respondents' PHI cover or being redeployed. Over the course of the next six months, it became clear that the claimant was not prepared to accept the disciplinary conditions, and this was at the heart of his ongoing absence.

140. Matters came to a head at a meeting held on 7 January 2019. At this meeting, the claimant once again explained that the disciplinary process had caused him stress and said that he did not wish to return under the conditions proposed, which included a demotion to a non-driving role for a period of six months. He indicated that he was concerned that the terms of the demotion, in particular a reduction in his pay, would have a negative impact upon his income and family life. He also reiterated the fact that he was not interested in redeployment or a referral to the PHI provider. At the end of our discussion, Mr Jones adjourned the meeting to consider the position further (895-898).

Dismissal

141. The meeting of 7 January 2019 was adjourned to 8 February 2019 to enable Mr Jones to consider the position fully. At the reconvened meeting, in an effort to find a way that enabled the claimant to return to work, Mr Jones informed the claimant that he was prepared to change the condition that would mean he would suffer a reduction in pay. The claimant said that the offer was insulting and that he felt he had been treated less favourably than the people who had assaulted him.

142. As the claimant became very animated at the meeting, Mr Jones decide to not to proceed with it, but adjourned the meeting and wrote to the claimant with the offer instead. In his letter dated 11 February 2019, sent to the claimant on 13 February 2019 by email (921 – 923) Mr Jones:

- said, in the absence of any OH report saying otherwise, he had concluded that the work-related stress causing the claimant's absence was inextricably linked to the terms of his final written warning and his refusal to accept those terms;

- said he was prepared to change some of the conditions but not the condition that the claimant should not be allowed to return to driving until the respondent was satisfied that he was not at risk of using his vehicle in a dangerous way and not the requirement to have anger management support (which was to be sourced by the respondent);

- acknowledged that the abuse that the claimant experienced was severe and said he had the upmost sympathy for the claimant being placed in the situation he was, but felt that nothing could justify his subsequent behaviour;

- reiterated the offer not to reduce the claimant's pay and to review how he would be assessed as safe to drive;

- asked the claimant to take some time to think about the offer and encouraged him to return to work; and

- warned him that if he did not accept the outcome of the disciplinary procedure, namely the final written warning with the adjusted conditions, the likely next steps was that the respondent would revert to the original disciplinary outcome before mitigation, namely dismissal for gross misconduct

143. The claimant replied on 13 February 2019 rejecting the offer (933-934). He wrote:

"*I have carefully read and considered your proposal, however, my position remains unchanged, if you lived for a hundred years, you would never know what it's like to be called a "BLACK CUNT" therefore I find it extremely offensive that you or [the respondent] should regard my reaction to such abuse as extreme……*

144. The claimant's rejection led to Mr Jones preparing a letter dismissing the claimant for the original gross misconduct offence (944-947). He invited the claimant, however, to attend a meeting with him on 26 February 2019 to discuss the position before handing him the letter. The minutes of the meeting (942 to 943) record that the claimant rejected the offer in the strongest of terms. Mr Jones therefore handed him the termination letter.

145. The letter dated 19 February 2019 advised the claimant that he was being summarily dismissed for gross misconduct committed on 10 and 18 March 2018 when he broke the law and breached company policy. It confirms that the claimant's last day of service with the company would be 21 February 2019 and that he would not receive a payment in lieu of notice or be required to work his notice (924).

Appeal

146. The respondent offered the claimant a right of appeal against his dismissal. His appeal, which was submitted in the form of a very brief email (973) was considered by Simon Bailey, Managing Director of Leisure at an appeal hearing held on 19 March 2019. The claimant was accompanied, and a note taker was present. The claimant was provided with a copy of the minutes and accepted before us that the minutes of the disciplinary hearing in the bundle were an accurate reflection of the discussions at the hearing (974-980).

147. As the claimant's written appeal was so brief, Mr Bailey began the appeal hearing by asking the claimant to outline his grounds of appeal. The claimant accepted in his evidence that he was given a full opportunity to do this.

148. The claimant cited five grounds of appeal:

- He accused the respondent of being guilty of direct race discrimination saying that he felt he had been treated less favourably than the individuals on the street that had racially abused him on 18 March 2018

- He argued that the requirements in Problem Solving at Work had been breached through the inclusion of the opinion contained in Mr Sammut's email and as a result of Mr Elson making a recommendation regarding disciplinary action

- He stated that there had been a conflict of interest through Ms McCarty's involvement through the disciplinary proceedings

- He said that although Ms Best had told him that Mark Sammut's email would be disregarded, he considered that both she and Mr Cousins had been influenced by it. In particular he cited a passage in Mr Cousin's outcome letter that appeared to be directly from Mr Sammut's email

- He argued that he had acted in self-defence on 18 March, but this had been rejected by the respondent

149. Following the meeting with the claimant, Mr Bailey undertook a number of lines of investigation, which included requesting relevant documents from HR. He wrote to the claimant with a very detailed appeal outcome letter on 5 April 2019 (981 – 988).

150. Mr Bailey's conclusion was that the decision to dismiss the claimant was the correct decision. His response to the five grounds of appeal was as follows:

- With regard to the first ground, Mr Bailey concluded that the fact that the claimant had been racially abused had been taken very seriously

by all of the respondent's managers involved and had been taken fully into account. He noted that the individuals responsible for the racial assault were not employees of the respondent. This meant it was not therefore responsible for their actions, nor was it able to hold them to account, other than reporting the incident to the police which had been done.

- Mr Bailey rejected the allegation that there had been any breach of the Problem Solving at Work Procedure. He interpreted the restriction on inclusion of opinion in the investigation report as applying to the person conducting the investigation and not to the others interviewed for the purpose of the investigation. He was also satisfied that it was permissible for investigation managers to recommend whether or not a disciplinary hearing by a separate manager should be convened.

- Mr Bailey rejected the suggestion that the disciplinary proceedings were compromised in any way because of the fact that Ms McCarty was the claimant's point of contact during his suspension, commissioner of the investigation and discussed the matter with managers involved in the investigation. She was not the suspending manager nor was she a decision maker at the disciplinary, dismissal or appeal stages;

- Mr Bailey was satisfied that Ms Best had disregarded Mr Sammut's email. He was unable to speak to Mr Cousins about whether it had influenced him, as he had left the business by this time, but he had checked the notes of the appeal meeting and seen that the email had not been discussed in any detail.

- Mr Bailey rejected the claimant's assertion that had he had acted in self-defence on 18 March 2018. He noted that when asked about self-defence at the earlier appeal hearing, the claimant had said that it was not and added:

  "I do not agree that acting in self-defence gives you the right to 'strike back' and nor do I consider that your actions were intended to 'restrain' the individuals who had assaulted you until such time as the Police had arrived. I consider that your actions demonstrated a clear intention to scare and/or injure the individuals who had, by that point, walked away and were down the road from the scene where they had first insulted you." (987)

Additional Facts

151. Having outlined the events that took place, we want to record two additional facts that are relevant to the case.

152. First, we note that all the managers and other individuals involved in the claimant's disciplinary process and dismissal were white, whereas he is of course black.

153. In addition, the claimant highlighted to us that that three of the managers involved in the process left the company in around December 2018, namely Ms Best, Mr Cousins and Mr Sammut. He argued that this was because of their involvement in his dismissal process, demonstrating that the respondent knew they had behaved badly towards him.

154. Ms Best and Mr Cousins explained that the reason they had left was through redundancy, which had nothing to do with the claimant. We accept their evidence. We were not told why Mr Sammut left, but find that his departure also had nothing to do with the claimant. The claimant's argument is simply not logical as it does not address why, for example, others who were involved such as for example, Mr Jones who was responsible for actually dismissing him, were not removed from their posts.

The Law

Time Limits

155. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates. Alternatively, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

156. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

157. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. An example is found in the case of *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

158. The normal three month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

159. The tribunal has a wide discretion to extend time on a just and equitable basis. Nevertheless, tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so: the exercise of discretion should be the exception, not the rule (*Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576).

160. Factors that the tribunal should consider, when deciding whether or not to extend time, were considered in the case of *British Coal Corporation v Keeble* [1997] IRLR 36, and include:

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the respondent has co-operated with any requests for information;
- the promptness with which the claimant acted once they knew of the possibility of taking action;
- the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

The Protected Characteristics of Race and Disability

161. Race is a protected characteristic under section 4 of The Equality Act 2010 (the Act). According to section 9(1) of the Act, race includes colour, nationality and ethnic or national origins.

Discrimination/Harassment/Victimisation in Employment

162. Section 39(2)(d) prohibits discrimination by A subjecting B to a detriment. Discrimination includes direct discrimination as defined in section 13 of the Act.

163. Section 39(4)(d) of the Act provides that an employer (A) must not victimise against an employee of A's (B). The definition of victimisation is contained in section 27 of the Act.

164. Section 40(1)(a) of the Act provides that an employer (A) must not in relation to employment by A, harass a person (B) who is an employee of A's. The definition of harassment is contained in section 26 of the Act.

Direct discrimination

165. Section 13 of the Equality Act 2010 provides that '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'.

166. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

167. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

168. We must consider whether the fact that the claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

169. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

170. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

171. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. The respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

172. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd* v *Wong [2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the *Madarassy* case. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

173. The Court of Appeal in *Madarassy*, states:

'*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*.' (56)

174. It may be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

175. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

Harassment

176. Section 26(1) of the Equality Act 2010 provides:

> "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."

177. A similar causation test applies to claims under section 26 and to claims under section 13. The unwanted conduct must be shown "to be related" to the relevant protected characteristic.

178. The shifting burden of proof rules set out in section 136 of the Act can be be helpful in considering this question. The burden is on the claimant to establish, on the balance of probabilities, facts that in the absence of an adequate explanation from the respondent, show he has been subjected to unwanted conduct related to the relevant characteristic. If he succeeds, the burden transfers to the respondent to show prove otherwise.

179. Harassment does not have to be deliberate to be unlawful. If A's unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the *purpose* of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

180. If the conduct was not deliberate, it may still constitute unlawful harassment. In deciding whether conduct has *the effect* of creating an intimidating, hostile, degrading, humiliating or offensive environment for B, we must consider the factors set out in section 26 (4), namely:

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that affect.

181. The shifting burden of proof rules can be also be helpful in considering the question as to whether unwanted conduct was deliberate.

Victimisation

182. Section 27(1) of the Act provides that:

> 'A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'

183. The claimant must show the detriments, if they happened, occurred because he had done a protected act.

184. The analysis the tribunal must undertake is in the following stages:

(a) we must first ask ourselves what actually happened;

(b) we must then ask ourselves if the treatment found constitutes unfavourable treatment;

(c) finally, we must ask ourselves, was that because of the claimant's protected act.

185. The test for detriment was formulated in the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 where it was said that it arises where a reasonable worker would or might take the view that they had, as a result of the treatment complained of, been disadvantaged in the circumstances in which they had to work.

186. The shifting burden of proof found in section 136 of the Equality Act sets applies. Initially it is for the claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the respondent, that the reason for any unfavourable treatment was because of the claimant's protected act. If the claimant succeeds, discrimination is presumed to have occurred, unless the respondent can show otherwise.

Unfair Dismissal

187. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason for the dismissal. Conduct is one of the fair reasons found in section 98(2).

188. We also need to decide whether the dismissal is fair or unfair having regard to the test set out in section 98(4) which says that

> '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the

employee, and shall be determined in accordance with equity and the substantial merits of the case.'

189. Tribunals have been given guidance by the EAT in *British Home Stores v Burchell* [1978] IRLR 379; [1980] ICR 303, EAT which is relevant to the application of section 98(4) in conduct cases. There are three stages:

(a) Did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

(b) Did it hold that belief on reasonable grounds?

(c) Did it carry out a proper and adequate investigation?

190. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, [1997] ICR 693).

191. We have reminded ourselves that our proper focus should be on the claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved (*Ham v the Governing Body of Bearwood Humanities College* [UKEAT/0397/13/MC]

192. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

193. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA).

194. When considering the question of the employer's reasonableness, we must take into account the disciplinary process as a whole, including the appeal stage (*Taylor v OCS Group Limited* [2006] EWCA Civ 702).

195. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Wrongful Dismissal

196. When considering a claim for wrongful dismissal, the tribunal must ask itself was the claimant guilty of conduct so serious that it amounted to a repudiatory breach of the contract of employment entitling the respondent to summarily terminate that contract.

197. We must be satisfied, on the balance of probabilities, that there was an actual repudiatory breach by the claimant. It is not enough for the respondent to prove that it had a reasonable belief that the claimant was guilty of such serious misconduct.

198. We must also be satisfied that the respondent did not choose to waive the breach and instead affirmed the contract. This will not arise, however, even in a case where there is a delay between the conduct and the termination, where the respondent has sufficiently reserved its position with regard to the right to terminate summarily.

Analysis and Conclusions

Time Limits

199. The claimant presented his initial claim on 29 October 2018, following a period of early conciliation between 13 August 2018 and 27 September 2018. His claims about anything before 14 May 2018 are therefore potentially out of time.

200. *Hale v Brighton and Sussex University Hospitals NHS Trust* UKEAT/0342/17 is authority for the proposition that there is a continuing state of affairs until the conclusion of the disciplinary process. The judgment of the employment tribunal is that there was a continuing state of affairs which began with the decision to investigate the claimant's conduct of 11 and 18 March 2018 and continued until the conclusion of the second appeal hearing conducted by Mr Bailey on 19 March 2019.

201. The initial disciplinary process had not been concluded with the outcome of the first appeal hearing conducted by Mr Cousins. There remained an outstanding issue, namely the question as to whether the claimant would accept the conditions imposed by Ms Best or not. It was made clear to the claimant throughout that, unless he accepted the conditions, the alternative was dismissal for gross misconduct.

202. If the claimant had not been unwell, the respondent would have moved to dismissal more quickly. The delay was caused by the respondent not wanting to force the claimant to make a decision about his future employment when he was perhaps not in the best frame of mind to do so. The subsequent decision to dismiss the claimant and the appeal by Mr Bailey were effectively additional stages of the same disciplinary process notwithstanding the temporary pause in that process.

203. It follows that all of the claimant's claims are in time and the tribunal has jurisdiction over all of his claims.

204. In any event, even if this decision is incorrect, we would wish to exercise our discretion to extend time on a just and equitable basis in this case. The claimant was unwell for a period of time after the initial disciplinary and appeal hearings. Taking into account his health, he presented his initial claim in a reasonable period of time. There has been no prejudice to the respondent in having to defend the various claims of discrimination before 14 May 2018 as these are part and parcel of the background to the dismissal in any event.

Direct Race Discrimination– General Comments

205. We have considered each of the allegations of direct race discrimination and victimisation separately below. Before doing that, we have considered the background in which they arose and the arguments put forward by the claimant when he explained why he felt they amounted to race discrimination. It is generally rare to find explicitly overt discriminatory treatment occurring in workplaces and so it is important to explore the full context.

206. The claimant told us that one reason he was concerned that the actions towards him were discriminatory was because he was black, whereas all the managers involved in the disciplinary process and his dismissal were white. This is an important factor for us to consider, but cannot of itself lead to a finding of discriminatory treatment. We have kept this fact at the forefront of our minds when considering the specific allegations.

207. The claimant also highlighted that three of the managers involved had now left the company, namely Ms Best, Mr Cousins and Mr Sammut. He suggested this demonstrated the respondent wanted to remove them for exposing it to a race claim. However, as noted above (paragraphs 148 - 151), our finding was that they left for reasons entirely unconnected with the claimant's dismissal.

208. Another matter we have considered when reaching our decision was the failure by Ms McCarty to share with the police that one of the claimant's assailants was the son of a friend of someone employed by the respondent. The claimant felt this showed that the respondent had treated the racist youths who attacked him better than they treated him. Ultimately, the claimant felt that it was unfair and discriminatory that the racist youths who had attacked him were not punished, whereas he ended up losing his job.

209. As noted above at paragraph 65, we accept Ms McCarty's explanation for why she did not contact the police with this further information was because she did not think it would be helpful. She was not trying to protect the white youths and was therefore not acting in either a consciously or unconsciously discriminatory way. She had spent a considerable amount of time assisting the police to take screen shots of the youths involved so that the crime against the claimant would be investigated and she also tried to get further information out of the employee.

210. The positions of the racist youths and the claimant and their respective relationships to the respondent were completely different. The claimant was employed by the respondent and fully accountable to it. The respondent is entitled to lay down rules for its employees and act when those rules are breached. In contrast, the respondent had no ability to take any action against the racist youths, who were not even its customers. All that it could do was to report the incident to the police and provide appropriate assistance to the police.

211. The claimant argues that the respondent should have followed the lead of the police and not taken any action against him for the incidents of 10 and 18 March 2018. He says that if the police did not think the events were significant enough for them to take action against him, the respondent should not have done.

212. We do not have any evidence directly from the police saying why they decided not to take any action against the claimant. The respondent noted in June 2018, however, that the police had said that as they had not any complaints from the area of the incident on 18 March 2018, they would not be investigating it further. We know that the police ensured that the claimant was provided with support following the racist attack on him, by putting him in touch with the Monitoring group.

213. We cannot infer from these known facts that the reason the police took no action was because they were satisfied that the claimant did not behave dangerous and illegally. There could be a variety of reasons why the police decided not to take incident further. We are not engaged in an evaluation of the conduct of the police and so do not need to make a finding why the police acted as they did. Instead we are engaged in an evaluation of the respondent's conduct in the circumstances in which it found itself and what it knew of the possible reasons why the police were not taking action. The police did not advise the respondent that they did not consider the claimant's actions to be unlawful.

214. When considering the specific allegations, we need to consider whether the respondent treated the claimant less favourably than a comparator because of his race. In this case the comparator is hypothetical.

215. According to section 23(1) there must be no material difference between the circumstances of the claimant and the hypothetical comparator. At a superficial level, the obvious comparator is a white man who, having been subjected to an attack while in the workplace, responded as the claimant responded. In this case, however, we consider the analysis in this case needs to be more sophisticated, however, and take into account, as a material circumstance, the deeply upsetting impact of the attack on the claimant. He likened it to feeling as if he had been stabbed. The attack the white hypothetical comparator encountered therefore needs to be as significant to him as the attack the claimant experienced.

216. As a general argument, the claimant's position is that the respondent failed to give sufficient weight to the fact that he had been subjected to such a deeply upsetting racist attack on 18 March 2019. We disagree.

217. The respondent accepted that the attack took place in the way described by the claimant. All of the respondent's witnesses acknowledged the attack and that it provoked the claimant to act in a way that was out of character. Nevertheless, they all felt that his consequential behaviour was so serious that it could not be ignored. Our overall view is that the respondent took the nature of the provocation of the claimant into account and gave it appropriate weight.

218. There was much discussion during the course of the hearing about whether the claimant's actions on 18 March 2018 were taken in self-defence. The respondent considered this and correctly determined they were not. Initially this was because the claimant himself did not try to say he behaved in self-defence. Latterly the respondent considered the matter for itself and concluded that the claimant was not in danger when he drove his vehicles at his assailants. They had walked away from him. He was also not motivated by a desire to try and detain them. His actions in that brief moment were entirely retributive and therefore did not constitute self-defence.

Victimisation – Protected Act

219. The claimant relies on his grievance dated 1 June 2018, raising a complaint of race discrimination, as a protected act. The respondent concedes that this was a protected act for the purposes of section 27 of the Equality Act 2010. The claimant argues that after he raised his grievance, the managers named in it conspired to get him dismissed.

220. We note, as a general comment, that the grievance specially names Mr Jones, Ms McCarty, Sean Manley, Mr Elson and Mr Malec. Of these individuals only Mr Jones had an ongoing involvement in the claimant's case from 1 June 2018 onwards. The involvement of the others ceased at the conclusion of the investigation process.

Specific Allegations – Direct Race Discrimination

In relation to the incident on 18 March 2018, the respondent's failure to call the Police immediately following the claimant's call to the control room where he had reported what had happened and had asked for urgent police assistance.

221. It is not disputed that the respondent did not call the police immediately following the claimant's call to the control room on 18 March 2018. The relevant facts are set out at paragraphs 48 to 60 above.

222. Although there is evidence that Mr Malec was aware that the claimant was black and had experienced a racist attack, we do consider either of these things influenced Mr Malec's behaviour. We do not infer that Mr Malec felt a racist attack on the claimant did not warrant calling the police at all, as

Mr Malec later supported the claimant in contacting the police and reporting the incident to them.

223. We also do not infer that Mr Malec would have called the police had he been presented with a different scenario in which he been contacted by a white employee reporting an attack. Our finding is that he would have behaved in the same way.

224. In our analysis, this is an allegation where the burden of proof does not shift to the respondent as there is insufficient evidence to establish a prima facie case of direct discrimination.

225. In any event, we are satisfied that the respondent has provided a cogent explanation for Mr Malec's behaviour showing it was in no sense whatsoever because of the claimant's race. The reason Mr Malec did not call the police was because the respondent did not have a clear position on whether on-street staff or control room operators should call the police. Mr Malec also wanted to speak to the claimant himself on the phone before involving the police as he was confused about what was happening.

226. This allegation of direct race discrimination is therefore not upheld.

Mark Sammut's statement in his email dated 25 April 2018 to Jack Elson in which he states:

a. "my view (and it is only my view) is that our driver was provoking the incident [on 10 March 2018] by his actions… "

b. "this incident and the abuse etc. is hearsay by the driver, there are no witnesses and no footage as it occurred at the rear of the vehicle";

227. We were unable to question Mr Sammut about the contents of his email of 25 April 2018 and specifically whether he would have expressed different opinions if the claimant been white. On the basis of the evidence before us, however, we consider there is nothing to suggest that Mr Sammut's views would have been expressed any differently if this had been the case and therefore the burden of proof does not shift to the respondent in relation to this allegation.

228. We have reached this conclusion because the first statement is a reasonable opinion for Mr Sammut to have reached, having been provided with details of how the claimant was driving on 10 March 2018.

229. Although the second statement is inaccurate as he uses the term "hearsay" inaccurately, we understand it as a clumsy attempt to note that there were no witnesses to the claimant's racist attack other than the claimant himself. Interpreted in this way, the statement is technically accurate. It was not necessary for Mr Sammut to make the statement, as the respondent had accepted the racist attack happened and was not investigating it. It was an unhelpful statement, but we do not infer that Mr Sammut made it because the claimant was back and would not have

made a similar comment about the hypothetical comparator described above.

230. This specific allegation of direct race discrimination is therefore not upheld.

Specific Allegations - Direct Race Discrimination and Victimisation

Amanda Best's disciplinary outcome dated 12 June 2018

Direct Race Discrimination

231. Ms Best's decision was that the claimant was guilty of gross misconduct, but should be given a final warning with conditions. There was no evidence before us to suggest that Ms Best treated the claimant any differently than she would have treated the white hypothetical comparator we have identified above.

232. The view Ms Best formed of the claimant's conduct was that the claimant's behaviour on 18 March 2018 was extremely dangerous and justified dismissing him. We consider that it was a reasonable view for her to hold. Ms Best also reached the view that because the claimant had a good record and because he had been provoked by the racist attack, she wanted to find a way to keep him employed. We were not presented with any evidence to suggest that Ms Best's opinion of the claimant's driving as a serious matter was influenced by his race or that she would have reached a different conclusion had the claimant been white. The claimant's driving on 18 March 2018 was extremely dangerous and he has admitted this.

233. Having decided that she wanted to retain the claimant as an employee, Ms Best also wanted to ensure that safety measures were put in place to protect the public from possible future occurrences of dangerous driving. This too was a reasonable conclusion for her to reach in the circumstances. The claimant had acted dangerously out of anger on two occasions within a short period of time. Ms best was aware that this was out of character for him. Her approach was to impose conditions that removed him from driving for a period of time (by way of a temporary demotion to a non-driving role) and to encourage him to seek support with anger management.

234. We questioned Ms Best about whether she might have fallen into a trap of unconscious racial bias when suggesting anger management for the claimant. We are satisfied, based on her answers and our understanding of the circumstances, that she did not.

235. The claimant was deeply offended at the idea that someone who experiences a racist attack should be told they need anger management support. His response fails to appreciate the respondent's legitimate concern. The respondent was not suggesting that the claimant should not have become angry in response to the attack. It accepted, as we do, that he was entitled to be angry and deeply upset. It was a natural and understandable emotion for him to have felt. The respondent's point was

that the claimant should not have acted on that anger and carried out such a dangerous act. Ms Best did not want to give the claimant control of a company vehicle again until she was satisfied it was safe to do so. In her her view, encouraging the claimant to explore why he had acted on his anger impulses and not been able to suppress them was an important part of that.

236. We therefore conclude that the claimant has not established a prima facie case of race discrimination sufficient to shift the burden of proof in relation to this allegation, but that, in any event, the respondent has provided a cogent explanation for its actions which were in no sense whatsoever because of the claimant's race.

Victimisation

237. The claimant has presented no evidence that the outcome of the disciplinary hearing was because of his protected act (i.e. because he raised a grievance) rather than the reasons given by Ms Best.

238. Ms Best not named in the grievance and was senior manager to the employees who were. She was from a separate part of the business to them.

239. Ms Best was aware of the grievance, as she considered it as part of the disciplinary process. Her conduct towards the grievance did not suggest that she was upset for herself or for the respondent by the fact of it. In fact, she agreed with the claimant that he was right to raise concerns about the control room's reaction to his assault. She also agreed with some of the procedural concerns raised in the claimant's grievance, the reference to Mr Sammut's email for example, and sought to take account of them.

240. We do not therefore uphold the claimant's claim for victimisation based on this allegation.

Ian Cousins's disciplinary appeal outcome dated 20 July 2018

241. The outcome of the disciplinary appeal was to uphold the decision taken by Ms Best. We have concluded that the outcome of the disciplinary hearing did not constitute direct race discrimination or victimisation. It therefore follows that we do not consider the outcome of the appeal, which was based on the same reasoning by the respondent, can have constituted discriminatory treatment of the claimant either because of his race or because of his protected act.

Mr Cousins writing to the claimant on 8 August 2018 and stating that if he doesn't accept the conditions attached to his final written warning, he will be dismissed

242. The facts relevant to this allegation are set out in paragraphs 131 - 136 above. The initial communication was 30 July 2018 with the follow up communication on 9 August 2018. Mr Cousins did not expressly say the

claimant would be dismissed in the subsequent email, but because it referred to the earlier communication, we find this was implicit in the message.

243. Having upheld the outcome of the disciplinary hearing decided by Ms Best, the respondent was bound to communicate the consequences of that to the claimant.

244. Because the final written warning with conditions was framed as an exception to summary dismissal under the respondent's disciplinary procedure, the natural next step in the process was for the respondent to seek to confirm the claimant's position. The respondent's procedure (all versions) clearly provides that where an employee does not accept the conditions attached to the "alternative" final warning, the default is to revert to summary dismissal.

245. Mr Cousin's actions were entirely consistent with and flowed naturally from the outcome of the disciplinary hearing and appeal. Having concluded that those outcomes were not reached because of the claimant's race or protected act, it follows that we are of the same mind with regard to this allegation.

246. In other words, we consider the claimant has not presented any evidence that Mr Cousins would not have emailed a white employee in the same position as the claimant in the same way. He has also not presented any evidence that Ms Cousins emailed him in this way because of his protected act, rather than because of the circumstances.

The decision to dismiss the claimant on 26 February 2019

247. Mr Jones' decision to dismiss the claimant was because the claimant refused to accept the conditions attached to the final written warning.

248. Before reaching his decision, Mr Jones varied the conditions so that the claimant would not receive a salary reduction or demotion. He was not, however, prepared to vary the conditions that prevented the claimant from driving until he could be assessed as safe to do so. Describing this as his "red line", he effectively applied the same reasoning as Ms Best, but with slight adaptations to try and encourage the claimant to accept the conditions and return to work. Ultimately, he did not consider it was safe to let the claimant have control of a large company vehicle without taking precautions.

249. We consider it is significant that Mr Jones took personal responsibility for the claimant's case, despite having been promoted to a more senior role. He spent a great deal of time trying to support the claimant and find a resolution that would help the claimant return to work, but ensure he did so safely.

250. We have not been presented with any evidence that Mr Jones would have treated a white employee in the same position as the claimant more

favourably. We conclude that the claimant has not shown facts which shift the burden of proof to the respondent in respect of this allegation. In any event, we are satisfied that the respondent's explanation for its decision to dismiss the claimant is sufficiently cogent to demonstrate that it was in no sense whatsoever because of the claimant's race.

251. We reach the same conclusion in relation to the allegation that the claimant was dismissed by Mr Jones because of his protected act. We note that Mr Jones was named in the grievance, but it does not contain any specific allegations against him. In any event, Mr Jones has provided a cogent explanation why he decided to dismiss the claimant which shows that it was not because of the claimant's protected act.

The rejection of the claimant's appeal against his dismissal on 5 April 2019

252. The outcome of the appeal was to uphold the decision taken by Mr Jones to dismiss the claimant. We have concluded that the reason the claimant was dismissed was not because of his race or his protected act. It therefore follows that we do not consider the outcome of the appeal, which was based on the same reasoning by the respondent, can have constituted discriminatory treatment of the claimant.

Harassment

Mr Cousins writing to the claimant on 8 August 2018 and stating that if he doesn't accept the conditions attached to his final written warning, he will be dismissed

253. To constitute harassment under section 26(1) of the Equality Act, unwanted conduct needs to be connected to a relevant protected characteristic. As noted at paragraph 136 above, the reason the claimant was upset by this communication from Mr Cousins was because Mr Cousins emailed him twice while he was off sick. The claimant has presented no evidence that there was a connection between Mr Cousin's conduct in writing to the claimant and the protected characteristic of race and this claim therefore fails for this reason.

Overall Position

254. Having considered each allegation separately, we have also stepped back to the consider the position overall against the general context. This does not change our view.

Unfair Dismissal

Reason

255. The respondent's genuine reason for dismissal was the claimant's dismissal was his conduct on 10 and 18 March 2018. This is a fair reason for dismissal.

Reasonableness

256. Applying the *Burchell* test, we consider the respondent had a genuine belief in the claimant's misconduct.

257. In relation to the 10 March 2018 incident, the claimant admitted braking twice in his company vehicle, but he did not admit that this constituted dangerous or unlawful driving. The respondent investigated this incident and reached its view that it constituted misconduct based on the vehicle camera footage, the vehicle tracking data which measured the second breaking as harsh, what the claimant said about the incident during his calls with the control room, the incident report completed on the day of the incident and what the claimant said later in the investigation meetings and various hearings. In our judgment it was was within the range of reasonable responses of a reasonable employer for the respondent to reach the view that the claimant drove dangerously on 10 March 2018 and this amounted to gross misconduct.

258. The claimant admitted his behaviour on 18 March 2018 constituted dangerous driving, but argued both that the respondent should take into account that it was provoked by a racist attack on him and later that he acted in self-defence. The respondent investigated this incident and reached its view of the claimant's misconduct based on the vehicle camera footage, the vehicle tracking data, what the claimant said about the incident during his calls with the control room, the incident report completed at the time of the incident and what the claimant said later in the investigation meetings and various hearings. In our judgment it was was within the range of reasonable responses of a reasonable employer for the respondent to reach the view that the claimant was drove dangerously on 10 March 2018 and this amounted to gross misconduct.

259. The respondent did take into account that the claimant was provoked by a racist attack, as well as that his behaviour was out of character given his good record. It did this, not at the stage of categorising the seriousness of the misconduct, but when considering the appropriate sanction. This too was within the range of reasonable responses of reasonable employer.

260. The respondent did not accept that the claimant acted in self-defence. This was also reasonable. Our finding is that the claimant did not believe he was acting in self-defence at the time of the incident. His attempts to later argue he acted in self-defence were based on a misunderstanding of the law of self-defence and he actually acted retributively.

261. It was reasonable for the respondent to hold its belief in the claimant's gross misconduct, notwithstanding that the police did not take any action against the claimant with regard to either incident. As noted above, there may be many reasons why the police did not take any action. The police appear to have informed the respondent that the reason action was not taken was because there had not been any complaints from the area of the incident. The police did not at any time advise the respondent that they considered the claimant's behaviour to be safe or lawful.

262. The procedures followed by the respondent were in accordance with the ACAS Code on Disciplinary and Grievance Procedures.

263. The claimant was able to exercise his right to be accompanied to all meetings held at each stage of the process. This included at the initial investigation stage, the disciplinary hearing, the first appeal hearing, the welfare meetings conducted by Mr Jones, the dismissal meeting and the final appeal stage.

264. The claimant's paid suspension was with his agreement.

265. The respondent did not hold any meetings in the claimant's absence. Whenever the claimant said he was not well enough to attend a meeting, or sought to have it delayed because he had not had sufficient time to prepare or wanted to be accompanied, the respondent delayed the meeting. At each meeting he was able to give his version of events including commenting on the notes of the meetings afterwards for accuracy.

266. Each stage of the process was conducted by someone different who had not previously been involved in a significant way. There was also an escalation of seniority. Significantly Ms Best and Mr Bailey were from entirely different parts of the business. Although Mr Cousins and Mr Jones had some knowledge of the earlier stages of the process before becoming more involved, this was very limited. We are satisfied they approached the stages they conducted with fresh minds. We do not consider there to be any problem arising from the fact that Ms McCarty was at one point assigned to be the claimant's welfare contact and was also responsible for commissioning the investigation report. Her role was minor and she was not responsible for taking any decisions about the claimant's future once the decision had been taken to instigate a disciplinary process.

267. There was some confusion over the version of the disciplinary procedure that should have been followed. This did not have an impact on the overall outcome because the essential substance of the various different versions was the same.

268. The overall process was unusual in that there were two initial stages (the disciplinary hearing and appeal) followed by a gap and then two further stages (the dismissal and final appeal). In our view, this extended process offered extended protection to the claimant.

269. Rather than implement the decision taken by Ms Best and upheld by Mr Cousins immediately, the respondent, aware that the claimant was unwell, delayed. It sought to offer the claimant support and assistance during this period, including referring the claimant to occupational health. At the stage when the claimant was well enough and prepared to engage with Mr Jones, the respondent did not simply implement the earlier decision. Instead Mr Jones conducted additional meetings with the claimant, offering the same protections as seen in a disciplinary process including the right to be accompanied, and sending him detailed written invitations warning

him of the possible outcome. The respondent also gave the claimant a right of appeal against Mr Jones' decision when technically, it did not need to do so under the terms of its policy.

270. Turning to the procedural defects highlighted by the claimant in his grievance and before us, we consider that it is entirely reasonable for an investigation officer to say, in conclusion to their investigation report, whether they think the next stage should be to instigate a disciplinary process. This does not offend the principles of natural justice. Mr Elson's recommendation in this case did not say anything about the level of disciplinary sanction that should be applied.

271. In our view Mr Elson's inclusion of Mr Sammut's opinions in his investigation report was contrary to the respondent's procedure. It was not appropriate for the report to include his opinion on the claimant's conduct as if he was some form of expert witness. We are satisfied, however, that his opinions did not influence Ms Best's decision making. This was not a situation where damage was done. Ms Best was able to form her own view on whether the claimant's driving on 10 March 2018 was dangerous based on the objective evidence available. She did not consider the claimant's account of the racist attack to be hearsay, but accepted everything the claimant said about it as true.

272. We consider it was within the range of reasonable responses for the respondent to deal with the claimant's grievance of 1 June 208 as part of the disciplinary process. This is expressly permitted in the ACAS code which says: "*Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently*." The grievance and disciplinary cases were closely related in this case. A large part of the grievance was a complaint about the respondent's decision to proceed with disciplinary action. It also contained details of the claimant's procedural concerns,

273. Finally, turning to the sanction imposed by the respondent, we consider it was also within the range of reasonable responses of a reasonable employer. The respondent determined that the claimant's conduct was so serious that it constituted gross misconduct. However, because the claimant had a good record and because his behaviour had been provoked, the respondent applied the specific provision in its policy that allowed it to reduce the sanction from summary dismissal to a final written warning with conditions. The claimant did not accept the conditions. The respondent explored the claimant's reluctance to accept the conditions and agreed variations to them, but the claimant's position did not change. It was therefore reasonable for the respondent to revert back to the original sanction of summary dismissal.

274. Taking all of the above circumstances into account, we conclude that the claimant was dismissed fairly.

Wrongful Dismissal

275. Our finding is that the claimant's behaviour on 18 March 2020 was so serious that it constituted a fundamental breach of the claimant's contract. Although the conduct was provoked, this does not reduce the seriousness of the claimant's behaviour.

276. The respondent chose not to accept the breach by the claimant immediately, but delayed while expressly reserving its position for several months. We are satisfied that the respondent's reservation was sufficiently clear initially, and on a continuing basis throughout the period of delay, so that the delay did not result in the respondent affirming the contract and waiving the breach. The respondent was therefore entitled to terminate the claimant's contract of employment without notice or payment in lieu of notice.

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Employment Judge E Burns
13 August 2020

Sent to the parties on:

13/08/2020.

For the Tribunals Office - OLU