



EMPLOYMENT TRIBUNALS

Claimant: Mr G Chittick
Respondent: Total Gas and Power Limited

Heard at: Leeds Employment Tribunal by CVP
Before: Employment Judge Deeley, Mr R Stead and Ms S Norburn
On: 9-13 November 2020 and on 20 November 2020 (in chambers via CVP)

Representation
Claimant: Mrs F Almazedi (Solicitor)
Respondent: Miss V von Wachter (Counsel)

JUDGMENT

1. The claimant's claim for direct race discrimination, harassment related to race and victimisation under sections 13, 26 and 27 of the Equality Act 2010 fail and are dismissed.

REASONS

INTRODUCTION

Tribunal proceedings

2. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was "V" (i.e. CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
3. We considered the following evidence during the hearing:
 - 3.1 a joint file of documents, with additional documents submitted by the claimant and by the respondent on 10 November 2020 (please see comments below);
 - 3.2 witness statements and oral evidence from:
 - 3.2.1 the claimant;

- 3.2.2 Mr Darren South;
- 3.2.3 Mr Paul Sidebotham;
- 3.2.4 Miss Jacqui Fowler;
- 3.2.5 Mrs Victoria Lowe;
- 3.2.6 Mr Adam Rose;
- 3.2.7 Mr Peter McLeod; and
- 3.2.8 Mrs Elizabeth Gregson.

4. We also considered the oral submissions made by both representatives and the written submissions provided by the respondent's representative.

Additional disclosure

5. Both parties applied to disclose additional documents on 10 November 2020. The Tribunal gave both parties the opportunity to discuss the other party's additional documents and to raise any objections that they wished to make regarding this late disclosure.
6. Having considered submissions from both representatives, the Tribunal concluded that the additional documents from both parties would be submitted. Unfortunately, the Tribunal hearing suffered significant delays resulting from the late disclosure of documents from both parties.

Adjustments

7. The parties confirmed at the start of the hearing that neither they nor their witnesses requested any adjustments.
8. I reminded both parties and their witnesses that they could request additional breaks during the hearing at any time if required.
9. Due to the respondents' witnesses' technical difficulties, the Tribunal offered that the respondents' witnesses may attend the Tribunal's office to observe and/or provide evidence during the hearing from the second day of the hearing onwards. Mr South provided his evidence via videolink from the Tribunal's office. The Tribunal panel, the parties' representatives and all other witnesses attended the hearing via CVP.
10. Ms Norburn's speech to text reporters also attended the hearing via CVP to assist her during the hearings and the panel's deliberations. They did not form part of our decision-making process.

CLAIMS

11. The claimant brought a claim for race discrimination, harassment and victimisation under the Equality Act 2010 ("**EQA**").

ISSUES

12. The factual complaints issues to be considered during this hearing were set out in the Annex to the case management summary from the Preliminary Hearing held

by Employment Judge Cox on 27 May 2020, as amended by the claimant's second Further and Better Particulars of Claim dated 15 June 2020.

13. A draft list of issues was discussed with the parties in detail at the start of the hearing. The revised list of issues that the Tribunal considered in reaching its conclusions on this claim is set out below.

List of issues

14. The Claimant describes himself as being from a dual heritage background. He states that he defines himself as mixed race, i.e. white and black Caribbean. The claimant's complaints stem from an image that a colleague (Mr Neil Rogan) sent to him on 15 October 2019. Mr Rogan no longer works for the respondent and did not provide witness evidence during this hearing.

Direct discrimination (s13 EQA) or harassment related to race (s26 EQA)

15. Factual issues:

- 15.1 **Allegation 1:** The respondent accepts that on 15 October 2019 Mr Rogan sent the Claimant a Teams message attaching a photograph of a mixed-race rapper frowning and holding a large gun, with the wording: "Gavin Chittick = Ice T".
- 15.2 **Allegation 2:** On or around 27 January 2020, did Mrs Lowe respond to the Claimant's complaint about being sent this image by:
 - 15.2.1 saying that, if he were white, he would have perceived the image differently;
 - 15.2.2 implying that he was being overly sensitive in being offended by the image?

16. Legal issues – direct discrimination:

- 16.1 If the respondent did the acts complained of above, was that less favourable treatment? The claimant compares himself to a hypothetical comparator.
- 16.2 If so, was it because of the claimant's race?

17. Legal issues – harassment:

- 17.1 If the respondent did the acts complained of above, was that unwanted conduct?
- 17.2 If so, did it relate to the claimant's race?
- 17.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 17.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (s27 EQA)

18. The respondent accepted that the claimant did the following protected acts:

- 18.1 on 15 October 2019 the Claimant complained orally (and in writing on 16 October 2019) to Mrs Lowe and Mr South about having been sent the image, which he said he found racially offensive;
 - 18.2 on 27 January 2020 the Claimant raised a grievance in writing complaining about having been sent the image, which he said he found racially offensive.
19. Did the respondent do any or all of the following, as alleged by the claimant:
- 19.1 **Allegation 1** - Mrs Lowe and Mr South failed to take the Claimant's complaint of 15 October 2019 seriously, by failing to get him to record his complaint in writing or explain how he could make a formal grievance.
 - 19.2 **Allegation 2** - On an unknown date between 15 October 2019 and 27 January 2020, Mr Sidebotham decided that the image the Claimant had been sent was not racist and no further action should be taken.
 - 19.3 **Allegation 3** - On unknown dates between 15 October 2019 and 27 January 2020, Mr South and Mr Sidebotham reported to management that in conversations they had had with the Claimant he had told them that he was content with the Respondent's position that the image was not racist and no further action would be taken.
 - 19.4 **Allegation 4** - In the course of the formal grievance process, Mr South produced notes of a conversation he had had with the Claimant that did not reflect the fact that the Claimant had told him that he was not happy with the Respondent's actions and falsely represented that the Claimant had said he was content with the Respondent's position that the image was not racist and no further action would be taken.
 - 19.5 **Allegation 5** - On an unknown date after 27 January 2020, an unknown person appointed Mrs Lowe to oversee the grievance process, even though Mrs Lowe and Mr South are close friends of Mr Rogan.
 - 19.6 **Allegation 6** - In December 2019 Mrs Lowe assigned two projects that the Claimant had been working on to develop his skills to Mr Rogan and Mr Phil Clayson, with the intention that he would be less likely to be able to show he had the skills he needed to be promoted.
 - 19.7 **Allegation 7** - On unknown dates after the grievance hearing on 3 February 2020, Mrs Lowe and someone in the Respondent's HR department told Ms Natalie Ather, who was supporting the Claimant in his grievance, not to provide the Claimant with information, including the email contact details of the Managing Director (Mr McLeod) that he needed to pursue his grievance.
 - 19.8 **Allegation 8** - On an unknown date after 27 January 2020 Mrs Lowe, Mr South and someone in the Respondent's HR department accepted Mr South's notes (referred to in allegation 4 above) as accurate even though they were not.
 - 19.9 **Allegation 9** - Mr South, Mrs Lowe and someone in the Respondent's HR department failed to take appropriate disciplinary action against Mr Rogan.
 - 19.10 **Allegation 10** - At the final Appeal Hearing on 2 April 2020, Mr McLeod told the Claimant that it was fine for him to return to work from sick leave

because he did not sit near Mr Rogan, even though Mr Rogan was by this time the Claimant's line manager.

- 19.11 **Allegation 11** - Mr Rose and MR McLeod failed to address the Claimant's concerns, raised on 11 March 2020, that the Respondent's managers were all white British and that employees of ethnic minority backgrounds lacked opportunities to progress.
20. By doing so, did it subject the claimant to a detriment (or detriments)?
21. If so, was it because either:
- 21.1 the claimant did a protected act; and/or
- 21.2 the respondent believed the claimant had done, or might do, a protected act?

RELEVANT LAW

22. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' written submissions.

Discrimination and harassment (race)

23. Claims of discrimination and harassment related to race are governed by the Equality Act 2010 ("**EQA**"). Section 39 states that it is unlawful for employers to discriminate against their employees, including in relation to the terms of their employment and by subjecting them to a detriment. Section 40 states that it is unlawful for employers to harass their employees.
24. Discrimination includes direct discrimination and victimisation. Direct discrimination, harassment and victimisation are defined by the EQA as follows:

13 Direct discrimination

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

...

26 Harassment

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

...

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

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

...

27 Victimisation

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

- (2) Each of the following is a protected act –

...

- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

25. In addition, s23 of the EQA states in relation to comparators for direct discrimination cases that:

23 Comparison by reference to circumstances

- (1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.

...

Direct discrimination

26. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

26.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

26.2 if so, was such less favourable treatment because of the claimant's race?

27. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

28. In relation to less favourable treatment, the Tribunal notes that:

28.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Police v Khan* 2001 ECR 1065 HL);

28.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

28.3 the motive and/or beliefs of the parties are relevant to the following extent:

- 28.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, *Shamoon*);
 - 28.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and
 - 28.3.3 for direct discrimination to be established, the claimant's race must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).
29. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Harassment

30. There are three elements to the definition of harassment:
- 30.1 unwanted conduct;
 - 30.2 the specified purpose or effect (as set out in s26 EQA); and
 - 30.3 that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336.
31. A single act can constitute harassment, if it is sufficiently 'serious' (cf paragraph 7.8 of the EHRC Code).
32. The burden of proof provisions apply (see below). When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of race. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.
33. In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant.
34. In *Dhaliwal*, the EAT considered the question of whether unwanted conduct violated a claimant's dignity and held that:
- "while it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct...it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase...if, for example, the tribunal believes that the*

claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.”

35. The EAT in *Dhaliwal* also stated that:

“Not every...adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended”.

36. The EAT in *Weeks v Newham College of Further Education* (UKEAT/0630/11) considered the question of whether unwanted conduct created an intimidating, hostile, degrading, humiliating or offensive environment. The EAT held that:

“...although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding...An ‘environment’ is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the workplace.”

Victimisation

37. There are four key questions which the Tribunal must bear in mind when considering a claim for victimisation:

37.1 Did either:

37.1.1 the claimant do a protected act; or

37.1.2 the respondent believe that the claimant had done or might do a protect act?

37.2 Did the claimant suffer a detriment (or detriments)?

37.3 If so, what was the reason for such detriment (or detriments)?

37.4 Did the respondent subject the claimant to such detriment (or detriments) because the claimant did (or might do) a protected act?

38. The respondent in this case accepts that the claimant did the protected acts set out in the List of Issues and does not seek to advance any defence under s27(3) EQA.

39. The House of Lords in *Shamoon* held that whether or not an act amounts to a detriment requires:

39.1 Would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?

39.2 If so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

40. The House of Lords also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a 'detriment'.
41. We also note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.
42. In terms of causation, the respondent must subject the claimant to a detriment because he did (or might do) a protected act. The Court of Appeal held in *Greater Manchester Police v Bailey* [2017] EWCA Civ 425 that the 'but for' test does not apply.
43. If detriment is established, the issue of the respondent's state of mind is relevant to establishing whether there is a necessary link in the mind of the alleged discriminator between the doing of the protected acts and the less favourable treatment (see *Nagarajan v London Regional Transport* [1999] IRLR 572 and *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830). However:
 - 43.1 there is no requirement for the claimant to show that the alleged discriminator was wholly motivated to act by the claimant's protected act (*Nagarajan*). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of 'sufficient weight' (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA); and
 - 43.2 the respondent will not be able to escape liability by showing an absence of intention to discriminate if the necessary link between the doing of the acts and less favourable treatment exists.

Burden of proof

44. The burden of proof for discrimination, harassment and victimisation complaints is dealt with by s 136 Equality Act 2010, as follows:

136 Burden of proof

...

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to -

- (a) an employment tribunal;

...

45. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. The guidance outlines a two-stage process:
 - 45.1 First, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. That

means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA.

- 45.2 The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act.
46. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

FINDINGS OF FACT

Context

47. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, I have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.
48. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case: *"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*
49. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

50. The respondent is part of the Total Group. The respondent sells gas and power to businesses in the UK from three sites, namely Redhill in Surrey, Leeds and Newcastle. The respondent employs around 548 employees, of which 23 were based at the Leeds office at the relevant time. It has a HR function, headed by Mrs Gregson as HR Director.
51. The claimant is a sales executive, based in the respondent's Leeds office. The claimant was originally engaged via Kelly Services under a fixed term contract on

2 October 2017, but was later offered a permanent contract with the respondent which commenced on 1 December 2018. The claimant was still employed by the respondent as at the date of this hearing.

52. The claimant accepted that he was provided with a copy of the respondent's handbook (including its grievance procedure) when his employment started and that he could access it on the respondent's intranet. However, he stated that he did not read the grievance procedure when his employment started.
53. The respondent's Leeds office consisted of two floors, with a central services area in the middle of each floor (including the lift shaft, kitchen area and toilets). The teams sat in an open plan lay out, which was shaped like a doughnut.
54. There were around 23 employees working in the Leeds office at the relevant time. They were split into two teams as at the start of October 2019, one managed by Mr South and the other managed by Mrs Lowe. Mr South and Mrs Lowe reported into Mr Sidebotham. Mr James Blakely was the HR Business Partner for the Leeds office at that time, although he was not physically based in the Leeds office.
55. The claimant was managed by Mr South until Mr South left to take up a new role on 1 November 2019. From 1 November 2019 until early January 2020, the claimant's line manager was Mrs Lowe.
56. In November 2019, the respondent's management decided not to appoint another manager in the Leeds office. Instead, the respondent created three new Team Leader roles to report into Mrs Lowe. The claimant and six other colleagues (including Mr Rogan) applied for those roles. The successful candidates were Mr Rogan, Ms Ather and Mr Clayson.
57. Mrs Lowe divided the claimant and his colleagues into three teams, each of which was headed by a new Team Leader. The claimant was placed into Mr Clayson's team with effect from early January 2020.

Incident on 15 October 2019

58. The claimant received a Teams message from Mr Rogan on the morning of 15 October 2019. The Teams message contained an image of a man of dual heritage, who was frowning and holding a large gun. The text below the image stated:
"Gavin Chittick = Ice-T", followed by a smiling emoji.
59. The claimant was taken aback as to why Mr Rogan had sent him that message. On 11 October 2019, he had exchanged some brief messages with Mr Rogan regarding his office music playlist. However, he regarded Mr Rogan as a colleague and did not regard him as a friend. The claimant showed the Teams message to Osman Lewis (a new starter who was shadowing the claimant at the time) and a few other colleagues with whom he was friends. None of those colleagues could explain what the message meant.
60. The claimant sent a message to Mr Rogan on Skype, asking what he meant by the Teams message. The claimant then went on his lunch break. When the claimant returned from his lunch break, he saw that Mr Rogan responded. Neither party had retained a copy of Mr Rogan's response, but we accept the claimant's recollection of Mr Rogan's response set out in his statement of complaint (which he sent to Mr South on 16 October 2019):

"no joke pal...you have a real look of Ice T at the moment. More of a compliment".

61. The claimant emailed Mrs Lowe at 1pm, stating:
*"I just wanted to share this message with you that Neil sent to me.
It's made me uncomfortable and I'm not sure what the message is, I'm hoping it's nothing racial but can't help feeling offended.
What should I do?"*
62. Mrs Lowe responded by email, stating:
*"It is completely up to you what way you want to address this.
If it has made you feel uncomfortable and you want to take this further then we can do this. Have you spoken to him/Darren about it?"*
63. The claimant then met with Mrs Lowe in private. The claimant said that he did not know how to interpret the message. He told Mrs Lowe that he had a professional relationship with Mr Rogan and that he had not previously discussed anything with Mr Rogan that could have led to Mr Rogan sending him the image.
64. Mrs Lowe noted that the claimant was 'visibly upset' by the situation. Mrs Lowe suggested that the claimant take a break whilst they waited for Mr South to return from lunch.
65. Mrs Lowe and Mr South then met with the claimant. The claimant explained what had happened and said that he did not understand why Mr Rogan had sent him the message. The claimant said that there was no previous discussion with Mr Rogan, which led him to the conclusion that he had been racially abused.
66. Mrs Lowe said that the claimant's options included:
66.1 dealing with the issue informally; and
66.2 raising the issue formally via HR. Mrs Lowe did not clarify whether this would be by way of a disciplinary process or a grievance process.
67. The claimant said that he did not feel comfortable speaking to Mr Rogan about the message and that it should be dealt with via HR.
68. Mrs Lowe noted that the claimant was still 'distressed'. She asked the claimant how he felt about returning to the sales floor. The claimant said that he did not feel comfortable with this and Mrs Lowe suggested that he take the rest of the afternoon off, whilst Mrs Lowe and Mr South spoke to HR and to Mr Rogan. The claimant agreed to take the afternoon off and left the office.
69. Mr South then spoke with Mr Blakely and arrange an investigation meeting with Mr Rogan

Mr Rogan's disciplinary investigation meeting – 15 October 2019

70. Mr South and Mr Blakely then held a disciplinary investigation hearing on 15 October 2019 with Mr Rogan to discuss the image. Mr Rogan said that there was no motivation for sending the picture to the claimant. He said that he noticed that the claimant had 'changed his look' and that the claimant 'looked good'. Mr Rogan said that he thought that the claimant looked like Ice-T and that he did not mean to cause offence.

71. Mr Blakeley pointed out that the image showed Ice-T holding a gun. Mr Rogan stated that he had not realised this and that he would be happy to apologise to the claimant when he next saw him.
72. Mr Rogan confirmed that he did not regularly send pictures to other team members. Mr Rogan said that other team members shared photos or emails within the team on the 'odd occasion'.

Events on 16 October 2019

73. Mr South met with the claimant on the morning of 16 October 2019. The contents of that meeting are disputed and the brief note of the meeting was not provided to the claimant until his second grievance appeal.
74. We find that during the meeting:
 - 74.1 Mr South asked the claimant what outcome he was looking for;
 - 74.2 Mr South specifically asked if the claimant wanted Mr Rogan to be dismissed at Mr Sidebotham's request, as stated in Mr South's email to Miss Fowler on 3 February 2020;
 - 74.3 the claimant said that he felt able to return to work and continue working in the office whilst the process continued.
75. Mr South asked the claimant to provide a written statement of his complaint. The claimant emailed a statement to Mr South later that morning. The claimant said:

"...I was very thrown by the picture as there was no context to it and myself and Neil have a professional relationship which has never involved discussing music, football, hobbies or anything else outside of our working environment. For around 20 mins I tried to make sense of the meaning or intention of the picture and the only thing I kept coming back to was the ethnicity of Ice T being similar to mine. The more I looked at the picture, the more I was getting wound up as I couldn't work out why this would be sent to me out of the blue.

Around 20 mins after receiving the original message, I replied to Neil via Skype saying "If that's a joke I don't think I get it".

The more I thought about it, the more I felt racially abused and the more uncomfortable I became.

After returning from lunch, I'd received another message from Neil saying "no joke pal.....you have a real look of Ice T at the moment. More of a compliment". I find it difficult to explain why but I found that response almost as offensive as the original picture and it didn't help eradicate my concerns."
76. The claimant's witness statement (prepared for this hearing) described his reaction to Mr Rogan's message in much stronger terms, than the language noted by Mrs Lowe during their meeting on 15 October 2019 and by the claimant's statement of 16 October 2019. For example, the claimant refers in his witness statement to Mr Rogan's message as: "*a horrific racial incident*". However, the claimant said in his oral evidence: "*My statement is a reflection of the accumulation of the last 12 months, rather than just the instance itself*". We accept the claimant's oral evidence that the stronger terms used in his witness statement reflects how he feels about the message and the respondent's handling of the complaint now that he has had over 12 months to consider these matters, rather than his reaction when he received the message on 15 October 2019.

Mr Rogan's disciplinary hearing

77. Mr Sidebotham wrote to Mr Rogan to invite him to attend a disciplinary hearing in a letter dated 17 October 2019. He stated that the purpose of the hearing was to discuss:
- *“Lack of courtesy and respect towards colleagues – by sending an unsolicited and offensive picture to a member of staff.*
 - *Potential racial harassment of a fellow employee – by sending a photo of rapper “Ice T” to Gavin Chittick”.*
78. Mr Sidebotham's letter stated that the sending of the image may be regarded as gross misconduct, which could lead to disciplinary action up to and including dismissal.
79. Mr Rogan wrote to Mr Sidebotham before the hearing took place. His letter stated:
- “I would like to put on record prior to the disciplinary meeting how truly sorry I am that I have made someone feel racially abused. This was not my intent and I am deeply ashamed that the action I took in good faith have caused such offence.*
- ...
- Given the opportunity I would whole heartedly apologise to Gavin Chittick for my actions...I was attempting to give Gavin Chittick a compliment, this could have been no different with any other member of the team regardless of skin colour.*
- I feel I have naively sent this image without considering the image that was sent or the consequences of how this message could be/and has been received...”*
80. Mr Sidebotham heard Mr Rogan's disciplinary on 18 October 2019. He considered the Teams message from 15 October 2019, the notes of the disciplinary investigation meeting with Mr Rogan, Mrs Lowe's note of the meetings with the claimant and Mr South on 15 October 2019, Mr South's note of his meeting with the claimant on 16 October 2019 and the claimant's statement.
81. During the hearing, Mr Rogan agreed that it was not appropriate for colleagues to send each other pictures but said that it happens. He admitted that he had sent a picture of Jimmy Carr (a white comedian) to a colleague who looked a bit like Jimmy Carr, but said that was not something he tended to do. Mr Rogan said that he did not send the image to the claimant because of his 'colour'. Mr Rogan said that someone had mentioned in the office that they thought he had an 'uncanny likeness to a mass murderer' but he did not raise any concerns regarding this comment. We also accept Mrs Lowe's evidence that other colleagues in the office had exchanged messages in the past, comparing each other to famous people that they resembled.
82. Mr Rogan also said that he did not want to build personal relationships with his colleagues because his long-term plan was to become a manager. Mr Rogan said that he had been 'stupid' and had done something that he would not normally do.
83. Mr Sidebotham stated in his oral evidence that he concluded that no disciplinary action would be taken against Mr Rogan. Mr Sidebotham wrote to Mr Rogan on 21 October 2019 stating:

“I have carefully considered the evidence available and have concluded that your behaviour was unacceptable, however there was no intent to cause offence or racially harass another person and that you by your own admission have learnt lesson from this incident. Therefore, I advise you that there will be no further action taken under the disciplinary policy at this time.”

84. There was confusion amongst the respondent’s own witnesses as to the status of the outcome letter. Some of the respondent’s witnesses attempted to suggest that the letter of 21 October 2019 amounted to an ‘informal warning’. Mr Sidebotham said in his evidence that it was not an informal warning. We find that Mr Sidebotham did not state that Mr Rogan was subject to any warning under the respondent’s disciplinary process. The respondent’s process sets out specific requirements for any warnings given and none of those requirements were met by Mr Sidebotham’s letter of 21 October 2019. However, we accept the respondent’s evidence that the outcome letter would remain on Mr Rogan’s file and would be considered as part of any future disciplinary processes.
85. Mr Sidebotham’s letter also stated that the respondent was considering Equality and Diversity training for all employees.
86. Mr Sidebotham met with the claimant following the disciplinary outcome and offered the claimant the opportunity to attend a mediation with Mr Rogan. Mr Sidebotham did not inform the claimant that Mr Rogan wished to apologise to the claimant. The claimant refused to attend a mediation because he felt it was “too soon”.

Claimant’s meeting with Mr Rogan

87. The claimant and Mr Rogan met in late October 2019 to try to ‘clear the air’ because there was a ‘bad atmosphere’ in the office. The claimant said that the reason for the ‘bad atmosphere’ was that everyone knew that he had raised a complaint regarding Mr Rogan’s message to him on 15 October 2019. We find that Mr South did attend this meeting (despite the claimant stating that Mr South did not attend), because Mr South was able to give a detailed account of the discussions in his oral evidence which broadly matched the claimant’s account in his oral evidence of the meeting.
88. We find that Mr Rogan did not apologise to the claimant during the meeting. Mr Rogan explained to the claimant why he had sent the message. The claimant did not accept Mr Rogan’s explanation. However, they agreed to move forwards in a ‘professional’ manner.

Claimant’s request for information regarding Mr Rogan’s disciplinary process

89. Mr South left the Leeds office for a new role within the respondent based at a different office on 1 November 2019. Mr South’s transfer left Mrs Lowe as the sole manager in the Leeds office at that time.
90. The claimant emailed Mrs Lowe on 19 November 2019, asking about the outcome of his complaint. The claimant said:

“I found myself imagining Neil as my manager/TL in this morning’s meeting and just the thought of it made me uncomfortable so I’m trying to find out whether there is actually a chance of that happening?”

91. Mrs Lowe said that she was unable to disclose the outcome and suggested that the claimant should contact HR. The claimant did not contact HR.

Claimant's projects – December 2019

92. The claimant alleged that in December 2019, Mrs Lowe assigned two projects that he had been working on to develop his skills to Mr Rogan and Mr Clayson. However, in his oral evidence, the claimant stated that the only project that Mrs Lowe allocated to him during December 2019 related to the distribution of sales leads queries to the sales team. We accept Mrs Lowe's evidence that this task should have only taken 10-15 minutes per day. The other projects to which the claimant referred during his evidence were allocated to him prior to December 2019.
93. We accept Mrs Lowe's evidence that she removed the sales leads project from the claimant in January 2020 because he was spending too much time on this task, to the detriment of his core sales role. This was because the claimant spent time dealing with the queries himself, rather than just allocating them to the team. As a result, the claimant was not meeting his own sales target and was receiving less commission than he had previously done. We accept Mrs Lowe's evidence that allocating sales leads was an administrative task and would not have supported the claimant to develop the skills he needed for promotion.

Team Leader appointments

94. The respondent decided to appoint Team Leaders, who would sit between Mrs Lowe and the sales staff in its management structure, rather than replace Mr South. The respondent advertised the Team Leader role internally on or around 9 December 2019, with a closing date of 13 December 2019 for any applications.
95. Seven of the respondent's employees applied for the Team Leader role, including the claimant and Mr Rogan. Mrs Lowe and Mr Rose interviewed the applicants and scored using the respondent's standard questions in December 2019. Mr Rose emailed Mrs Lowe on 19 December 2019, confirming that Mr Rogan, Mr Clayson and Ms Ather received the highest scores (scoring between 15 and 17 out of 24).
96. Mrs Lowe emailed Richard Greenhill on 20 December 2019 and asked him to offer the Team Leader roles to the three successful applicants. Due to delays caused by the Christmas period, the new Team Leaders were announced officially by the respondent on or around 8 January 2020. The sales team were split into three teams, each headed by a Team Leader. The claimant was placed in Mr Clayson's team. Mr Clayson (along with the other Team Leaders) reported into Mrs Lowe.
97. The claimant did not raise any concerns regarding his interview or his score of 11 out of 24. Mrs Lowe suggested during the claimant's appraisal in 2019 that they should prepare a personal development plan, to assist him to develop the skills that he would need for a management role. However, no personal development plan was put in place for the claimant before he went on sick leave on 3 February 2020.

Claimant's grievance

98. The claimant emailed Mr Blakely, copied to Mrs Lowe, on 9 January 2020. In this email he stated that:

"I'm hoping you can assist me with an issue that is distracting me from my daily duties, keeping me awake at night and generally causing me a lot of stress and anxiety.

I reported an incident of racial abuse back in October and was assured by my line and area managers at the time that the incident will be treated seriously and accordingly following the TGP guidelines.

I have tried to chase up the outcome of this a couple of times with my manager and as per below email trail, I was advised that details weren't able to be shared with me and I'd have to approach you directly as you may be able to share more of the detail with me.

I didn't approach you straight away as I know with such sensitive issues it can be quite long and drawn out and I was happy to wait for things to take their natural course.

It was confirmed yesterday afternoon that the colleague in question has been promoted to a more senior position within our sales team which has distressed me enormously. How is it possible that following his actions in October he is rewarded with a promotion?

The only support I have received since this incident has been from some of my colleagues and peers. I've had no support from my manager and at no point since I raised my original concern have I had any contact or support from HR. Due to this, I have requested an independent organisation called ACAS to contact TGP on my behalf to address and hopefully resolve my grievance."

99. The claimant also requested copies of the respondent's policies, which Mr Blakely sent to him on 20 January 2020. The respondent's grievance procedure stated that an employee's line manager should hear their grievance, unless the grievance related to that line manager.
100. The claimant and Mrs Lowe had a separate discussion, following his email on 9 January 2020. Mrs Lowe arranged the meeting to discuss the claimant's comments. She again confirmed to the claimant that she was not able to share Mr Rogan's disciplinary outcome with him because this would be a breach of confidentiality.
101. The claimant then sent a follow up email to Mrs Lowe on 13 January 2020 stating:
"When I stated that I hadn't received any support from my manager, that was not directed at yourself and I'd like to apologise for any unnecessary distress this may have caused you. It was yourself I approached originally and you were and have been really supportive and I was aware that my manager at the time, Darren South, took over the handling of this issue along with Paul Sidebotham."
102. The claimant and Mr Blakely exchanged further emails. Mr Blakely emailed the claimant on 20 January 2020, stating:
"We take complaints such as yours extremely seriously and the moment you raised this with Vikki we immediately started the investigation process. During this investigation process you were asked specifically what you wanted as an outcome and you confirmed that you had processed the situation but understood that TGP needed to investigate and that you were happy for the disciplinary process to run its course. As a result of this statement, and as already explained we considered

that following the conclusion of the disciplinary process the matter was closed. However, we did recognise the need to ensure that staff were trained in the area of diversity and inclusion and as stated in a previous email, are going to introduce training in due course.

I am sorry if you feel that this is unacceptable. As previously asked in my last email, what outcome had you been hoping for as a result of your initial complaint? Also, as previously stated, you do still have the right to raise this under the Company's Grievance procedure, which is available on WAT [the respondent's intranet]."

103. The claimant raised a formal grievance by email on 27 January 2020, addressed to Mrs Lowe. In his email he stated:

"I have checked the TGP grievance procedure and have decided that I would like to raise a formal grievance regarding the racially abusive email I received from Mr Rogan back in October 2019 and also the way this whole situation has been handled.

...

I believe my grievance falls under the broad category of discrimination where there is a perceived breach of Company's Equal Treatment Policy.

1) I am aggrieved by the original communication I received from Neil Rogan with racially abusive content.

2) I am very dissatisfied with the way my thoughts and feelings have been misrepresented during any disciplinary procedure which has enabled Neil to be rewarded with a promotion.

3) I am disgusted by the lack of support and communication I have received throughout this whole process.

4) I am hugely disappointed with the lack of action taken by TGP following the serious nature of this incident."

104. Mrs Lowe spoke with Mr Blakely and Miss Fowler (who was due to take over HR support for the Leeds office from Mr Blakely) to check who should hear the grievance and when the hearing should take place. They advised Mrs Lowe that she should hear the grievance, supported by Miss Fowler.

Claimant's grievance hearing

105. Mrs Lowe wrote to the claimant on 29 January 2020, stating that his grievance hearing would take place on 3 February 2020. The claimant was accompanied to the meeting by Ms Ather.

106. During the hearing, the claimant stated that he believed that the message from Mr Rogan was racist because:

106.1 he viewed the picture as menacing, because Ice-T did not have a friendly demeanour and was holding a weapon (which suggested that he was a 'gangster');

106.2 he had previously had very limited contact with Mr Rogan and did not chat to him on a day to day basis.

107. The claimant accepted that he may have regarded the picture of Ice-T differently if it had been sent by someone else, but that this would depend on the content of the picture.
108. The claimant said that he was unhappy with the way in which his complaint had been handled because:
- 108.1 he thought that should have been advised of the grievance procedure when he originally raised his complaint on 15 October 2019;
 - 108.2 Mr South asked him inappropriate questions on 16 October 2019, such as whether he wanted Mr Rogan 'to be sacked' in a one on one meeting without a witness;
 - 108.3 he was left with the impression that disciplinary action had been taken against Mr Rogan, when this was not the case;
 - 108.4 he felt that no thorough investigation had been carried out and that no fair process had been followed – instead he had been left to 'fight his own corner';
 - 108.5 Mr Rogan had been 'rewarded' by being promoted to the Team Leader role, rather than being subject to disciplinary sanction;
 - 108.6 he found any interactions with Mr Rogan to be uncomfortable and difficult;
 - 108.7 the way in which the respondent handled the situation had affected the way in which he interacted with others on the sales team on a day to day basis; and
 - 108.8 he believed that incidents involving other colleagues had been handled differently.
109. The claimant was absent on sick leave from 3 February 2020. His GP's fit note stated that his absence was due to 'work-related stress'. He did not return to work until 3 August 2020.
110. Miss Fowler emailed Mr South on 7 February 2020, to ask him about his discussion with the claimant on 16 October 2020. Mr South responded by email stating:
- "I directly asked him if he wanted Neil to be dismissed. I remember because Paul Sidebotham directly told me to ask that question and to note down his response."*
111. Mrs Lowe and Miss Fowler discussed the grievance hearing and the documents relating to the claimant's grievance in detail. They decided that no further investigation was required. Miss Fowler then prepared a grievance outcome letter which Mrs Lowe checked and approved without making any amendments.
112. The grievance outcome letter was dated 7 February 2020 and rejected each ground of the claimant's grievance. The outcome letter stated:
- 112.1 The message sent by Mr Rogan was not racially abusive. The outcome letter stated:
"Having reviewed the notes taken at the investigation meeting that took place between you and Darren South following your initial complaint, you had confirmed to Darren that you had already resolved things with Neil. The findings from our investigation were that the message was inappropriate and possibly gave offence because of the appearance of the

subject. However, and given that the identity of the picture subject was of a musician or rap artist, not a gangster, and taking a comparative approach it is difficult to perceive any racist motive when a picture of a white musician or rap artist sent to a white colleague would be unlikely to produce such a response.”

- 112.2 the claimant was not entitled to be informed of the outcome of Mr Rogan’s disciplinary process, because this was confidential. In addition, Mr Rogan was promoted following a fair recruitment process;
 - 112.3 the claimant had access to the respondent’s policies, including the grievance policy, and that support was available through the respondent’s Employee Assistance Programme; and
 - 112.4 the respondent carried out an investigation into the claimant’s complaint of 15 October 2019 and followed its disciplinary procedure.
113. Mrs Lowe and Miss Fowler both gave oral evidence about the reason why they concluded that the image sent was not “racist”. We accept Miss Fowler’s evidence that Mrs Lowe was ultimately responsible for the grievance outcome, but that they discussed the claimant’s complaints in depth. The key grounds for the grievance outcome were:
- 113.1 that Mr Rogan did not intend the image to be racist and responded to the claimant’s question stating that it was intended to be a ‘compliment’;
 - 113.2 that the image was not one of a ‘gangster’, but was one of a well-known actor and musician;
 - 113.3 that the claimant said during the grievance hearing that he may not have regarded the image as racist if it had been sent by a friend.
114. The grievance outcome letter did not refer to Mr South’s note of his meeting with the claimant on 16 October 2019 or to the contents of that note.

Claimant’s first grievance appeal

115. The claimant emailed Mr Rose on 11 February 2020, stating that he wanted to appeal against the grievance outcome. Mr Rose heard the claimant’s first grievance appeal on 21 February 2020. Ms Ather accompanied the claimant to the hearing. Mr Rose upheld the original grievance outcome and confirmed his decision in a letter dated 27 February 2020.
116. We have not made any additional findings about this decision because it does not form part of the List of Issues.
117. The claimant alleged that he told Mr Rose on 11 March 2020 that the Respondent’s managers were all white British and that employees of ethnic minority backgrounds lacked opportunities to progress. However, the claimant stated in his oral evidence that this discussion took place on a different date but he was unable to recall that date.
118. We do not accept that the claimant discussed this matter with Mr Rose because:
- 118.1 the claimant was unable to confirm the date (or approximate date) on which he states he spoke to Mr Rose. Mr Rose denied having any verbal

discussions with the claimant, other than during the grievance appeal hearing which took place on 21 February 2020;

- 118.2 the notes of the grievance appeal hearing do not refer to this allegation. The notes refer to Mr Rogan's promotion to Team Leader role, but do not set out a more wide-ranging allegation about lack of opportunities for progression; and
- 118.3 Mr Rose did investigate the claimant's allegations about two members of staff whom the claimant alleged had been treated differently to Mr Rogan in relation to an incident involving swearing in the office.

Claimant's request for information

- 119. After the grievance appeal outcome, the claimant requested Mr McLeod's email address from Ms Ather because Mr McLeod was the director in charge of his business unit. We accept the respondent's evidence that the claimant could have worked out Mr McLeod's email address for himself because all of the respondent's email addresses were in a standard format.
- 120. We accept that Mrs Lowe told Ms Ather that the claimant should direct his requests to HR because:
 - 120.1 the claimant had called Ms Ather via the general sales number, on which all calls were recorded and could be later listened to by the rest of the sales team;
 - 120.2 the claimant had called Ms Ather when she sat in the sales team office and other team members could overhear the conversation.
- 121. The claimant then emailed Ms Patricia Rae (HR) and later Mr Rose on 5 March 2020, requesting Mr McLeod's email address in order that he could raise a second appeal. Ms Rae responded to the claimant's email of 5 March 2020 and confirmed Mr McLeod's email address.

Claimant's second grievance appeal

- 122. Mr McLeod heard the claimant's second grievance appeal using Teams on 2 April 2020. Mr McLeod upheld the original grievance outcome and confirmed his decision in a letter dated 17 April 2020. We have not made any findings about this decision because it does not form part of the List of Issues.
- 123. The claimant alleged that he told Mr McLeod on 11 March 2020 that the Respondent's managers were all white British and that employees of ethnic minority backgrounds lacked opportunities to progress. However, the claimant stated in his oral evidence that this discussion took place on a different date (which he was unable to confirm).
- 124. We accept Mr McLeod's evidence that this discussion did not take place because:
 - 124.1 the claimant was unable to confirm the date (or approximate date) on which any such discussion took place;
 - 124.2 the note of the second grievance appeal hearing refer to the Team Leader recruitment process, but do not refer a more wide-ranging allegation about lack of opportunities for progression; and
 - 124.3 the notes of the hearing were provided to the claimant, along with the outcome letter, but the claimant did not comment on those notes.

125. The claimant also alleged that during the final Appeal Hearing on 2 April 2020, Mr McLeod told the Claimant that it was fine for him to return to work from sick leave because he did not sit near Mr Rogan, even though Mr Rogan was by this time the Claimant's line manager.
126. We do not accept the claimant's allegation that Mr Rogan was his line manager. We were provided with emails in the hearing file that demonstrate that the claimant was aware that he reported into Mr Clayson (as the claimant's Team Leader), who in turn reported into Mrs Lowe. We accept that Mr Rogan was more senior than the claimant, but we find that Mr Rogan's contact with the claimant was limited and that Mr Rogan had no line management responsibility for the claimant. In addition, we accept the respondent's evidence that Mr Rogan's team did not sit on the same side of the office as the claimant's team.
127. We also accept Mr McLeod's evidence that he spoke to the claimant regarding potential arrangements for the claimant's return to work because the claimant expressed a wish to return to the office.

Further events

128. The claimant remained absent on sick leave following the conclusion of the second grievance appeal.
129. Mr Rogan resigned from his employment with the respondent in June 2020. The claimant returned to work on 3 August 2020.

Mr Rogan's relations with colleagues and managers in the Leeds office

130. Mr Rogan had worked for the respondent as a manager, before leaving the respondent's employment for a few years and returning in February 2019. Mr Rogan returned as a sales executive, rather than a manager, but he made it clear that he intended to apply for a managerial role again when the opportunity arose.
131. We find that it was common knowledge that Mr Rogan not particularly popular within the Leeds office. We accept Mrs Lowe's evidence that Mr Rogan would sometimes tell people to focus on their work, he would send out 'inspirational quotes and memes' to the team and he was keen on what other members of staff saw as 'organised fun' (eg work quizzes).
132. We do not accept the claimant's evidence that he 'neither liked nor disliked' Mr Rogan before Mr Rogan sent him the image on 15 October 2019. It is clear from the Teams messages exchanged by the claimant and his colleagues (referred to in our findings) below that they disliked Mr Rogan's behaviour.
133. By contrast, the claimant was on friendly terms with his colleagues in the office, as evidenced by our findings below relating to the claimant's Team's group. He played football outside of work with colleagues, including Mr South. The claimant was nominated for a team player award in late 2019 by his colleagues, for which he received a gift voucher. The claimant was also on good terms with Mrs Lowe, for example sending her an email on 14 November 2019 stating: "*I just want you to have a paper trail confirming just how super I think you are.*"
134. The claimant has alleged that:
 - 134.1 Mr South and Mrs Lowe were 'close friends' with Mr Rogan. We reject this assertion because there was no evidence that Mr South or Mrs Lowe had any dealings with Mr Rogan, other than in a work context. We accept Mr

South's evidence that he had a closer relationship with the claimant (with whom he played football outside of work), than with Mr Rogan.

- 134.2 Mr South, Mrs Lowe and Mr Sidebotham were trying to 'protect' Mr Rogan because they had 'earmarked' him for a management role. We reject this assertion because there was no evidence that Mr Rogan had been earmarked for a management role at the time of the claimant's complaint in October 2019. We accept that Mr Rogan had previously been a manager with the respondent, that Mr Rogan aspired to become a manager again and that his behaviour reflected his aspirations. However, the respondent carried out a full recruitment process for the Team Leader role in December 2019 and Mr Rogan's application was dealt with in the same way as applications from other candidates.
135. The claimant has also alleged that all of the respondent's managers who were involved in dealing with his complaints and his grievance were trying to 'cover up' Mr Rogan's actions because they were concerned that a finding of race discrimination may impact their own careers and the respondent's business. We reject this allegation because there was no evidence of any attempted 'cover up'. The respondent dealt with the claimant's complaints through its disciplinary process and later through its grievance process. We accept the evidence of Mr Rose and Mr McLeod that if Mr Sidebotham or Mrs Lowe had found that discrimination had taken place, this would have not had any adverse impact on Mr Sidebotham or Mrs Lowe's careers. We also accept Mrs Gregson's evidence regarding the steps that the respondent is taking to seek to increase diversity within the respondent's organisation, including setting up a diversity council.

Claimant's Teams groups

136. The claimant and the respondent did not consider any other Teams messages during Mr Rogan's disciplinary process or during the claimant's grievance process. However, Miss Fowler obtained copies of other Teams message discussions relating to the claimant as part of the respondent's disclosure for these proceedings. The respondent alleges that it was commonplace for the sales team to send each other Teams messages and that the claimant participated in this practice.
137. The respondent's Leeds office was noisy and busy and most communication took place via verbal conversations. However, we accept that the sales team would also send messages via email or Skype to each other.
138. We find that the Respondent switched from using Skype to using Teams in early October 2019 because all of the messages disclosed by the respondent took place on or after 11 October 2019. We accept the claimant's evidence that if you typed a word into Teams, the Teams system would suggest several images and 'gifs' (graphic interchange formats which consist of images or soundless video which loop continuously when a message is opened). The message sender could select one of the images or gifs or could choose to send a text only message.
139. The claimant set up a new Teams group called "Football matters more than work" in late October 2019 and invited four colleagues to join the group. They exchanged images and messages in this group, which included:
- 139.1 the claimant's post on 6 November 2019 of a picture of Lord Voldemort from the Harry Potter books with a comment: *"Which snake looks like*

this?". We do not accept the claimant's evidence that this picture followed on from a conversation that he was having with colleagues about the devil. We find that the claimant was referring to Mr Rogan, because the claimant referred to Mr Rogan in a message on 21 January 2020 as a 'snake';

- 139.2 the claimant's colleague said that Mr Rogan had told off another colleague for using the word 'c***' in one message, to which the claimant responded stating: "maybe because he is one";
- 139.3 the claimant joined in a discussion on 19 November 2019 with his colleagues about Mr Rogan, stating: "*man is getting above his station!*", in response to which a colleague posted a gif of David Brent from The Office television programme. Those messages also contained comments from the claimant and his colleagues stating that they hoped that Mr Rogan had not been given a Team Leader role.
140. We note that all of these messages were exchanged after Mr Rogan sent the image to the claimant on 15 October 2019. We also note that none of these messages were sent directly to Mr Rogan by the claimant or by any of his colleagues.

APPLICATION OF THE LAW TO THE FACTS

141. We applied the law to our findings of facts as set out below.

Direct discrimination (s13 EQA) or harassment related to race (s26 EQA)

Allegation 1: *The respondent accepts that on 15 October 2019 Mr Rogan sent the Claimant a Teams message attaching a photograph of a mixed-race rapper in a menacing pose and holding a machine gun, with the wording: "Gavin Chittick = Ice T".*

142. Legal issues – direct discrimination:

If the respondent did the acts complained of above, was that less favourable treatment? The claimant compares himself to a hypothetical comparator.

- 142.1 Both parties' representatives agreed during submissions that the hypothetical comparator would be a person of a different heritage or skin colour who received an image of a musician or actor frowning and holding a gun, where such musician or actor was of the same racial group as the recipient. For example, the comparator could be (a) a white person who receive an image of a white musician or actor; or (b) an Asian person who received an image of an Asian musician or actor; provided that they had the same facial expression, clothing and were holding a gun as the picture of Ice-T.

If so, was it because of the claimant's race?

- 142.2 In deciding this question, we have applied appropriate weight to the evidence given by the claimant and the documents recording Mr Rogan's response during the disciplinary procedure. We have taken into account the fact that we were unable to test Mr Rogan's evidence in the way that the claimant's evidence was tested during cross-examination.
- 142.3 We have concluded that Mr Rogan did not send the message in Allegation 1 to the claimant because of the claimant's race. The key reasons why we reached this conclusion are:

142.3.1 the claimant's initial reaction was one of confusion. He was not sure why Mr Rogan had sent him the image. The claimant showed the image to his colleagues and they were also confused as to the meaning of the message;

142.3.2 Mr Rogan explained that he sent the message to the claimant because he thought the claimant had a physical likeness to Ice T, having recently changed his appearance to include a goatee. He regarded the message as a 'compliment' to the claimant;

142.3.3 the claimant has not complained that Mr Rogan had committed any other acts of race discrimination towards him.

142.4 We have therefore concluded that the claimant's claim of direct race discrimination fails.

143. Legal issues – harassment:

If the respondent did the acts complained of above, was that unwanted conduct?

143.1 We have concluded that Allegation 1 was unwanted conduct. Mr Rogan sent the message without any prior discussion with the claimant.

If so, did it relate to the claimant's race?

143.2 We have concluded that the message did relate to the claimant's race. Mr Rogan sent the message to the claimant because Mr Rogan believed that the claimant had a physical resemblance to Ice-T.

Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

143.3 We found that Mr Rogan did not intend to violate the claimant's dignity or create the specified environment. Mr Rogan explained to the claimant that the message was intended to be a 'compliment' and offered to apologise to the claimant as part of the disciplinary process.

If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

143.4 We accept that the claimant's perception is that he had been 'racially abused' and we note that Mrs Lowe described him as 'visibly upset' and 'distressed' when they met on 15 October 2019.

143.5 We have considered the other circumstances of the case, including the following findings:

143.5.1 Mr Rogan and the claimant were not 'friendly' at work and Mr Rogan did not send the message to the claimant as part of an ongoing conversation;

143.5.2 the respondent did not provide examples of any Teams or other electronic messages that pre-dated Mr Rogan's message to the claimant on 15 October 2019;

143.5.3 the claimant raised a complaint to the respondent regarding Mr Rogan's message on the same day that it was sent; and

- 143.5.4 we accept the claimant's evidence regarding the negative stereotypes of black men and their perceived association with guns and gang violence.
- 143.6 We have balanced these against our findings that the other circumstances of the case included our findings that:
- 143.6.1 Mr Rogan had previously sent an image of Jimmy Carr (a white comedian) to another colleague, whom he believed resembled Jimmy Carr;
- 143.6.2 Mr Rogan sent the image to the claimant only and did not circulate it more widely. The claimant shared the image with other colleagues because he was confused regarding the meaning of the message and as part of his complaint against Mr Rogan;
- 143.6.3 the claimant was aware that Ice-T was a musician and an actor. He did not conclude immediately that the image was 'racist' but instead stated that he was confused as to why Mr Rogan sent the message and asked him to explain;
- 143.6.4 Mr Rogan responded quickly to the claimant's request for an explanation of the message and said that it was intended as a 'compliment';
- 143.6.5 Mr Rogan offered to apologise to the claimant after his disciplinary investigation meeting, although the offer of an apology was not communicated to the claimant;
- 143.6.6 the claimant did not raise any other complaints regarding Mr Rogan's conduct towards him;
- 143.6.7 the claimant returned to work on 16 October 2019 and continued to work alongside Mr Rogan. The claimant arranged a meeting with Mr Rogan in late October 2019 to 'clear the atmosphere' in the office (arising from other colleagues' knowledge of the claimant's complaint against Mr Rogan), after which they agreed to work together in a professional manner. The claimant's concerns escalated after Mr Rogan was promoted to Team Leader in January 2020;
- 143.6.8 the claimant stated in his oral evidence that the stronger terms used in his witness statement reflects how he feels about Mr Rogan's message and the respondent's handling of the complaint now that he has had over 12 months to consider these matters, rather than his reaction when he received the message on 15 October 2019; and
- 143.6.9 the claimant had sent gifs to colleagues and discussed Mr Rogan in derogatory terms, albeit that these messages took place after 15 October 2019.
- 143.7 We have concluded that Mr Rogan's message did not meet the threshold required for an act of harassment under the Equality Act 2010 because it was not reasonable for Mr Rogan's message to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading,

humiliating or offensive environment for the claimant. In reaching this decision, we took account of the factors set out above. We also took account of the caselaw set out in the section on 'Relevant Law' above, including:

143.7.1 *Dhaliwal*, in which the EAT stated that: “Not every...adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended”; and

143.7.2 *Weeks*, in which the EAT stated that: “...although we would entirely accept that a single act or single passage of actions may be so significant that its effect was to create a proscribed working environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding....An ‘environment’ is a state of affairs. It may be created by an incident, but the effects are of longer duration.”

143.8 In reaching this conclusion, we would like to reiterate that we do not doubt the claimant’s honesty or integrity. The respondent’s disciplinary and grievance processes found Mr Rogan’s message to be ‘inappropriate’ and the managers accepted that the claimant had been offended by the message.

Allegation 2: *On or around 27 January 2020, did Mrs Lowe respond to the Claimant’s complaint about being sent this image by:*

- a) *saying that, if he were white, he would have perceived the image differently;*
- b) *implying that he was being overly sensitive in being offended by the image?*

144. The claimant confirmed during his oral evidence that both allegations related to the wording at the top of the second page of the grievance outcome letter (quoted at paragraph 112.1 of our findings of fact above).

145. We do not accept that the wording of the grievance outcome letter amounted to a statement by Mrs Lowe that either:

145.1 the claimant would have perceived the image differently if he were white;
or

145.2 the claimant was ‘overly sensitive’.

146. The key reasons why we do not accept this are:

146.1 the letter stated: “*the message was inappropriate and possibly gave offence because of the appearance of the subject*”;

146.2 the paragraph in question stated that: “*a picture of a white musician or rap artist sent to a white colleague would be unlikely to produce such a response*”. The wording did not suggest that a white person receiving the image of Ice-T would have perceived that image differently;

146.3 the wording of that paragraph was somewhat clumsy. However, it was attempting to explain why Mrs Lowe reached the decision that she reached in relation to the grievance outcome letter.

147. We have concluded that the facts of Allegation 2 have not been made out. The claimant's complaints of direct discrimination and harassment relating to this Allegation 2 therefore fail.

Victimisation (s27 EQA)

148. The respondent accepts that the claimant's complaints on 15 and 16 October 2019 and on 27 January 2020 amount to protected acts.

Allegation 1 - *Mrs Lowe and Mr South failed to take the Claimant's complaint of 15 October 2019 seriously, by failing to get him to record his complaint in writing or explain how he could make a formal grievance.*

149. We found that Mrs Lowe and Mr South did take the claimant's complaint seriously for the following reasons:

149.1 Mrs Lowe met with the claimant shortly after he emailed her regarding Mr Rogan's message and arranged a further meeting with the claimant and Mr South on 15 October 2019;

149.2 Mr South held a disciplinary investigation meeting with Mr Rogan on the afternoon of 15 October 2019 and referred the matter to Mr Sidebotham for a disciplinary hearing; and

149.3 Mr South asked the claimant to provide a written statement of his complaint, which the claimant provided to Mr South on 16 October 2019.

150. We also found that the claimant was provided with a copy of the respondent's grievance procedure when his employment started and that he could access it on the respondent's intranet.

Allegation 2 - *On an unknown date between 15 October 2019 and 27 January 2020, Mr Sidebotham decided that the image the Claimant had been sent was not racist and no further action should be taken.*

151. We found that Mr Sidebotham decided that the image was not racist on a date between 18 October 2019 (when he held Mr Rogan's disciplinary hearing) and 21 October 2019 (when he issued Mr Rogan's disciplinary outcome letter).

152. We have concluded that Mr Sidebotham's decision regarding Mr Rogan's disciplinary hearing did not amount to a detriment to the claimant because it did not disadvantage the claimant in terms of the circumstances in which he had to work. The claimant was willing to continue working alongside Mr Rogan and did not raise any formal complaint until early January 2020.

153. However, even if Mr Sidebotham's decision could amount to a detriment, we have concluded that his actions did not amount to victimisation. The reason for Mr Sidebotham's decision was that he had followed the respondent's disciplinary process and reached a conclusion on the evidence before him, rather than reaching this decision because the claimant had complained of race discrimination on 15 and 16 October 2019. The claimant has not raised any specific complaints about the way Mr Sidebotham conducted the disciplinary hearing; rather, the claimant disagreed with the outcome of the hearing.

Allegation 3 - *On unknown dates between 15 October 2019 and 27 January 2020, Mr South and Mr Sidebotham reported to management that in conversations they had had with the Claimant he had told them that he was content with the Respondent's position that the image was not racist and no further action would be taken.*

154. We found that there was no evidence that any such conversations took place. The only evidence of conversations between Mr South and other managers related to the note that Mr South made of his meeting with the claimant on 16 October 2019. This was a brief note that summarised their meeting on 16 October 2019. The contents of that note do not reflect Allegation 3. The note states regarding the claimant: *“He is happy for the disciplinary process to run its course”*. At that date, Mr Sidebotham had not heard Mr Rogan’s disciplinary hearing (which took place on 18 October 2019).
155. We note that Mr Sidebotham’s involvement ended when he issued Mr Rogan’s disciplinary outcome letter on 21 October 2019. The claimant did not provide any evidence of any conversations between Mr Sidebotham and the respondent’s other managers after this date.

Allegation 4 - *In the course of the formal grievance process, Mr South produced notes of a conversation he had had with the Claimant that did not reflect the fact that the Claimant had told him that he was not happy with the Respondent’s actions and falsely represented that the Claimant had said he was content with the Respondent’s position that the image was not racist and no further action would be taken.*

156. We found that Mr South did provide a copy of his note as part of the grievance process in January/February 2020.
157. However, the contents of the note do not reflect Allegation 4, for the reasons that we have stated in relation to Allegation 3.

Allegation 5 - *On an unknown date after 27 January 2020, an unknown person appointed Mrs Lowe to oversee the grievance process, even though Mrs Lowe and Mr South are close friends of Mr Rogan.*

158. We found that there was no evidence of a ‘close friendship’ between Mr Rogan and either Mrs Lowe or Mr South. In any event:
- 158.1 the respondent’s grievance process stated that the individual’s line manager should hear the grievance;
 - 158.2 the claimant did not indicate that his grievance related to Mrs Lowe’s conduct and in fact emailed her on 13 January 2020, thanking her for her support;
 - 158.3 the claimant sent his grievance to Mrs Lowe on 27 January 2020 and did not object to Mrs Lowe hearing his grievance;
 - 158.4 Mrs Lowe sought advice from Miss Fowler (who had recently started working for the respondent) and Miss Fowler confirmed that Mrs Lowe would hear the grievance.

Allegation 6 - *In December 2019 Mrs Lowe assigned two projects that the Claimant had been working on to develop his skills to Mr Rogan and Mr Clayson, with the intention that he would be less likely to be able to show he had the skills he needed to be promoted.*

159. We found that Mrs Lowe did not provide the claimant with any additional projects in December 2019 to help him to develop his skills for promotion. The claimant was given the administrative task of distributing sales team queries. However, we accept Mrs Lowe’s evidence that the sales team’s queries task was purely administrative and would not assist the claimant to develop his skills. Mrs Lowe

and Mr Clayson decided in January 2020 to remove the sales team's queries task from the claimant because the claimant was spending too much time on that task, to the detriment of his core sales role.

160. We accepted Mrs Lowe's evidence that she discussed the possibility of putting in place a development plan for the claimant during his appraisal in late 2019, but that no plan was put in place before he went on sick leave on 3 February 2020.

Allegation 7 - *On unknown dates after the grievance hearing on 3 February 2020, Mrs Lowe and someone in the Respondent's HR department told Ms Ather, who was supporting the Claimant in his grievance, not to provide the Claimant with information, including the email contact details of the Managing Director (Mr McLeod) that he needed to pursue his grievance.*

161. We found that the only information requested from the claimant was Mr McLeod's email address. We accepted Mrs Lowe's evidence that she told Ms Ather to refer the claimant to HR due to the lack of confidentiality of any office phone calls as set out in our findings of fact.

162. We have concluded that Mrs Lowe's instruction did not amount to a detriment to the claimant because it did not disadvantage the claimant in terms of the circumstances in which he had to work. The claimant could have obtained Mr McLeod's email address himself because the format of the email address was the same throughout the respondent's organisation. In addition, HR later provided the claimant with Mr McLeod's email address.

163. However, even if Mrs Lowe's instruction could amount to a detriment, we have concluded that her actions did not amount to victimisation. The reason for Mrs Lowe's instruction did not relate to the fact that the claimant had complained of race discrimination on 15 and 16 October 2019 or raised a grievance on 27 January 2020.

Allegation 8 - *On an unknown date after 27 January 2020 Mrs Lowe, Mr South and someone in the Respondent's HR department accepted Mr South's notes (referred to in allegation 4 above) as accurate even though they were not.*

164. We found that Mrs Lowe and Miss Fowler believed that Mr South had asked the claimant if he wanted Mr Rogan to be dismissed. The claimant did not dispute that this question was asked. Mrs Lowe and Miss Fowler did not rely on Mr South's notes as part of the grievance outcome letter.

Allegation 9 - *Mr South, Mrs Lowe and someone in the Respondent's HR department failed to take appropriate disciplinary action against Mr Rogan.*

165. We found that the decision regarding Mr Rogan's disciplinary hearing was taken by Mr Sidebotham and recorded in the disciplinary outcome letter on 21 October 2019. Mr South, Mrs Lowe and Miss Fowler were not involved in that decision.

166. Mrs Lowe and Miss Fowler did not uphold the claimant's grievance and the claimant has not stated on what basis any further disciplinary action should have been considered. Mr South was not involved in the claimant's grievance process.

Allegation 10 - *At the final Appeal Hearing on 2 April 2020, Mr McLeod told the Claimant that it was fine for him to return to work from sick leave because he did not sit near Mr Rogan, even though Mr Rogan was by this time the Claimant's line manager.*

167. We found that Mr Rogan was not the claimant's line manager for the reasons set out in our findings of fact.

Allegation 11 - *Mr Rose and Mr McLeod failed to address the Claimant's concerns, raised on 11 March 2020, that the Respondent's managers were all white British and that employees of ethnic minority backgrounds lacked opportunities to progress.*

168. We found that Mr Rose and Mr McLeod discussed the claimant's concerns about the Team Leader role recruitment process, but that the claimant did not raise any wider concerns about the lack of diversity amongst the respondent's managers and the lack of progression opportunities for employees of ethnic minority backgrounds.

169. We accepted Mrs Gregson's evidence regarding the steps that the respondent is taking to seek to increase diversity within the respondent's organisation.

Conclusions re victimisation complaints

170. We have concluded that the claimant's complaints of victimisation fail for the reasons set out above.

CONCLUSION

171. We have concluded that the claimant's claim for direct race discrimination, harassment related to race and victimisation under sections 13, 26 and 27 of the Equality Act 2010 fail and are dismissed.

Employment Judge Deeley

1 December 2020