EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Bati	**v**	Cojean Limited (1) Mr S Takhamt (2)

Heard at: Central London Employment Tribunal (V) **On: 9-11 November 2020**
(and in Chambers on 23 November 2020)

Before: Employment Judge Norris **Members: Ms H Bond**
Mr B Furlong

Appearances
For the Claimant: Mr C Jones, Solicitor
For the Respondent: Mr S Hoyle, Consultant (Croner)

RESERVED JUDGMENT

The Tribunal's unanimous decision is as follows:

1. The Claimant's complaints of direct sex discrimination and harassment related to sex are not well-founded and are dismissed;
2. The Claimant's complaints of direct race discrimination and harassment related to race are not well-founded and are dismissed;
3. The Remedy Hearing listed for 25 January 2021 is vacated.

WRITTEN REASONS

1 Background

1.1 The Claimant describes himself as a heterosexual man of Congolese ancestry, born in France. He was employed by the First Respondent (a vegetarian/vegan restaurant chain in London whose parent company is French) from 16 April 2018, as an "Assistant and Administrative Accountant" in the First Respondent's Ludgate Hill premises, where it appears he was known as Modeste (his middle name). His starting salary was £22,000 per annum. The Second Respondent worked as the First Respondent's Chief Executive Officer from 14 June 2018.

1.2 It is alleged that the First Respondent's UK accounting systems and controls were weak and inadequate and the Claimant (and the Paris-based Executive Team) quickly realised that the demands of the role merited a higher salary. The Claimant says it was agreed by his line manager Mr Neve (the Chief Financial Officer, based in Paris and a member of the Executive Team) that his rent (of £1,243 per month) would be paid by the First Respondent by way of pay rise. However, the Claimant contends that the Second Respondent refused to confirm this pay increase in

August/September 2018 because of sex/race. The Claimant compares himself to several female and/or white colleagues in this regard. He was the only black person in the London office.

1.3 Between 20 and 26 December 2018, the Claimant paid himself three sums of money which together totalled £1,495. He asserts that this was an advance on his January 2019 salary and that he was authorised to make himself such an advance. The Respondents say that he was not, and that this was considered by them as theft.

1.4 The Claimant further claims that the Second Respondent harassed him because of sex and/or race from June 2018 onwards. He did not raise a formal grievance. However, he claims to have raised the harassment issue with Mr Vincent Colin, Operations Manager, on 21 January 2019. He claims that Mr Colin dismissed his concerns. The Claimant was signed off sick by his GP on 24 January 2019. He did not return to work thereafter. On 20 February 2019, he sent an email in which he purported to give three months' notice but indicated that he would continue to send in fit notes throughout that period.

1.5 On 5 March 2019, the Second Respondent reported the Claimant to the City of London police for the alleged theft of the money referred to in paragraph 1.3 above. The police subsequently indicated that they were taking no further action in the matter. On 2 May 2019, the Respondents completed disciplinary proceedings against the Claimant and informed him of his summary dismissal. He did not appeal the decision.

2 Conduct of the case

2.1 The Claimant entered Early Conciliation ("EC") in February 2019 and his first EC certificate was issued on 27 February 2019. The claim form was presented on 26 March 2019. The Claimant subsequently obtained a second EC certificate on 4 April 2019 and his claim was treated as received on 11 June 2019. On 1 July 2019, the Claimant confirmed to the Tribunal that he wished to bring the claim against both Respondents.

2.2 The Claimant's complaint of unfair dismissal was dismissed on withdrawal by Employment Judge Snelson on 11 November 2019 (although the Claimant continues to assert that he was constructively dismissed because of sex and/or race discrimination and/or harassment) and the Claimant served, at EJ Snelson's direction, a schedule of loss and a schedule of discrimination at the end of that month. From that date, Mr Jones was on record for the Claimant and has remained so ever since.

2.3 On 3 March 2020, a Preliminary Hearing (Case Management) ("PHCM") took place before EJ Palca. She listed the hearing for three days starting on 9 November 2020. A list of issues was agreed and set out in her Case Management Summary. It transpired that the claim form had not been served on the Second Respondent. This was done and Croner (who were and have since remained on record for both Respondents) submitted an ET3 response form with attached rider on behalf of the Respondents on 28 May 2020, denying all accusations.

3 Issues

The issues for the Tribunal to decide were in the bundle and follow these reasons as Appendix One. It was confirmed that all complaints set out in that list were pursued by the Claimant and that there was no complaint relating to pay before us. It was also confirmed during the Hearing that the complaints of discrimination are in relation to race and sex (i.e. not to sexual orientation).

4 The Hearing

4.1 Although there were cancellations and postponements for many cases as a result of COVID-19 between March and July 2020 in particular, this Hearing remained listed and by November 2020, full panel in-person hearings were once more taking place at Victory House in London. However, in this case, some of the Respondent's nine witnesses were abroad and unable to return to London for the Hearing. It was therefore agreed that the Hearing would commence in person and the panel decided that if the evidence from the witnesses present at the Tribunal could be completed in the first two days, we would hear from the remaining witnesses via CVP on day three. In the event, we had not finished hearing from the in-person witnesses; and we had to return to Victory House on day three anyway because the Claimant's representative and one of the Respondent's witnesses did not have technology suitable for a fully remote CVP hearing; but we heard from three of the Respondent's witnesses who were based abroad by that means using a combination of laptops and phones.

4.2 At the start of day one, which was delayed until 10.30 to allow the participants to travel outside the rush hour, the panel was told that the parties wanted to make applications. The Claimant was seeking to adduce a piece of evidence, namely a short video clip, that he said he had discovered by accident while looking for something else on a disused mobile phone the previous Thursday (5 November 2020) dating back to 5 October 2018. We did not see the clip. We were told that it was a recording of a conversation in French which the Claimant had translated in a particular way. The recording and the Claimant's transcript of the conversation translated into English had been served on the Respondents on 6 November 2020, i.e. the working day before the Hearing. The Respondents disputed the translation and objected to the clip being adduced in evidence.

4.3 It was the parties' joint application that an interpreter should be engaged by HMCTS to resolve the dispute over the translation. However, following discussion, we determined not to allow the evidence to be admitted at all. Firstly, this would require an interpreter to be found at very short notice. Secondly, we were given to understand that the clip was not probative of any of the issues in the case and therefore would also require an amendment to the list of issues to add a further complaint of discrimination that would have been out of time even on the date the claim form was first submitted. The Claimant had not previously recalled the incident even when he was invited to (and did) serve a schedule of discrimination. Finally, even if an interpreter could be found, their function is not to assist the Tribunal to determine disputes of translation; that is the job of an expert witness. A court-appointed interpreter is there to interpret the evidence given by witnesses who are unable or do not wish to give their evidence in English. The application was therefore denied and we did not consider the Claimant's third witness statement or associated evidence at all.

4.4 The panel spent the rest of the first morning reading in to the case, so that we were able to start hearing evidence at 12.30. Throughout the first afternoon, save for lunch and a comfort break, we heard from the Claimant, who was cross-examined by Mr Hoyle. We adjourned at 16.30.

4.5 On the morning of day two, we continued with the Claimant's cross-examination until 11.50, when we took a comfort break. Following questions from the panel and re-examination, he was released at 12.24. We then heard evidence from the Second Respondent who was cross-examined from 12.30 until just after 13.00 and then again after lunch between 13.55 and 15.12. After a short break, there were panel questions and brief re-examination. We then heard from Mr F Picciau, the First Respondent's former Recruitment Manager/Head of Recruitment, who was cross-examined until 16.26. There were no panel questions and limited re-examination.

4.6 On day three we heard from Mr V Colin, the First Respondent's Operations Manager. After some supplemental questions from Mr Hoyle, he was cross-examined between 10.40 and 12.17, including a short break. There were no panel questions or re-examination. We heard evidence via CVP from Mr B Kedidi, a former colleague of the Second Respondent, who was brought in to cover for the Claimant while he was off sick/serving his notice until a permanent replacement could be engaged, Ms F Thomas, Head of Purchasing for the First Respondent and Ms B Galeano, another former colleague of the Second Respondent. We took a late lunch from 13.45 to 15.00 to allow time for the parties to prepare oral submissions, which we then heard. The decision was reserved and those submissions were considered in detail, though we do not replicate their content here. It was agreed that the Chambers day would take place on 23 November 2020 by CVP. A provisional Remedy day for 25 January 2021 was also diarised.

4.7 The other witnesses (who had served witness statements but from whom we did not hear) were: Ms M Garbul, formerly an Assistant/General Manager of the First Respondent, Ms E Armanz, General Manager and Ms C Benhamou, who left the Respondent in August 2019. We have not taken their evidence into account in reaching our decision.

5 Law

Burden & standard of proof

5.1 The provisions of section 136 Equality Act 2010 ("EqA/Act") apply to complaints of discrimination. They state that if there are facts from which the court could decide, in the absence of any other explanation that a person contravened the provision concerned, the court must hold that the contravention occurred, save where the person can show that they did not contravene the provision. This is commonly referred to as the shifting, or reversing, burden of proof: the Claimant has to show facts from which we could decide that the Respondents (or either of them) breached the Act, and if he does so, the burden moves to the Respondents to show that they did not do so.

5.2 Authorities, some pre-dating the coming into force of the Act (e.g. *Igen v Wong*[1], *Laing v Manchester City Council*[2], *Villalba v Merril Lynch*[3], *Madarassy v Nomura International PLC*[4]) and others that post-date it (e.g. *Hewage v Grampian Health Board*[5]) deal with the reversal of the burden of proof. In *Hewage*, Lord Hope observed that tribunals can exaggerate the importance of these provisions and that if the Employment Tribunal is in a position to make positive findings, the provisions may even have "nothing to offer". In a case such as this, where the allegations are largely one person's word against another, almost entirely unsupported by contemporaneous or other evidence, we remind ourselves of section 136's straightforward wording; all relevant material has been considered. However, absent any other explanation, if the Claimant shows facts that are capable of supporting an inference of unlawful discrimination, it falls to the Respondents to disprove it.

5.3 In each case, the standard of proof applicable is the balance of probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not. We have borne in mind the fact that the fact that a witness has lied about one matter does not necessarily mean that he or she has lied about another; and that when considering the credibility of a witness, it may be essential to test their veracity by reference to the facts proved independently of their testimony, in particular by reference to the documents in the case and by having regard to their motives and the overall probabilities.[6]

Direct sex/race discrimination

5.4 By virtue of section 13 EqA, direct discrimination occurs when an employer treats an employee less favourably than they treat or would treat others because of a protected characteristic (in this case, sex or race).

5.5 Direct discrimination requires a comparator who does not share the protected characteristic but who otherwise is in not materially different circumstances.

5.6 It should be noted that section 14 EqA, which refers to discrimination because of a combination of two relevant protected characteristics (including race and sex) has never come into force.

Harassment

5.7 Section 26 EqA provides that harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic, and that conduct has the purpose or effect of violating their dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Sex and race are relevant protected characteristics for these purposes.

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[1] [2005] IRLR 258 CA
[2] [2006] IRLR 748 EAT
[3] [2006] IRLR 437 EAT
[4] [2007] 246 CA
[5] [2012] IRLR 870 SC
[6] See for instance Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1*; Gorgeous Beauty Limited v Liu* [2014] EWHC 2952

5.8 In deciding whether conduct has the effect complained of, the Tribunal must have regard to the employee's perception and the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

Time limits

5.9 The Act requires complaints to be lodged with the Tribunal (in reality, for a prospective complainant to enter EC) within three months of the act complained of or, where there has been continuing discriminatory conduct, within three months of that conduct ceasing. In this case, any proven conduct preceding 28 November 2018 would be out of time and the Tribunal would not have jurisdiction to deal with it, unless the Claimant can show that it is part of an act continuing after that date or the Tribunal exercises its discretion on a "just and equitable" basis to extend time.

6 Findings of fact

We make the following findings of fact (references in brackets are to the complaints in the list of issues):

6.1 We observe first of all that the Claimant appears correct to a degree in his assertions about the First Respondent's accounting systems and controls, or lack thereof. By way of example, in relation to salary advances, the process for obtaining approval was not set out in writing and appears to have been somewhat haphazard. Mr Colin said in his witness statement, for instance, that advances had to be authorised by the direct line manager, who "in the Claimant's case would be Mr Takhamt" although in the email to the police, Mr Neve said he would have been the one to authorise any advance to the Claimant. Mr Picciau says in his statement that Mr Neve never authorised any advance for the Claimant. It is clear from payslips in which advances were recouped however that the Claimant **had** received advances before the one in December for which he was subsequently disciplined, but although there was no evidence in the bundle that Mr Neve (or anyone else) had approved those earlier advances in writing, nor was the Claimant disciplined or, it appears, even reproached in this regard.

6.2 It is also apparent that there may well have been issues that pre-dated the commencement of the Claimant's employment (e.g. in relation to pensions) and must have arisen during a period when the management team in Paris were dealing with UK finances. The extent to which issues arose because the French team were unfamiliar with UK rules around matters such as auto-enrolment, or because subsequently the Claimant was being line-managed by Mr Neve in France but working closely with the management team in the UK, is unclear.

6.3 There was also a certain lack of clarity in roles and responsibilities and nor was there a process for a written performance improvement plan, on the evidence before us, when it was perceived that there was underperformance. For instance, notwithstanding a number of alleged shortcomings on the Claimant's part, the evidence shows that by November 2018, the First Respondent had agreed with the Paris management team that the Claimant would be known as Finance Manager with effect from 1 April 2019 and that he would receive a pay rise. It appears that the Claimant was never given formal written guidance and warnings on areas in which it has been asserted he had to improve, such as timekeeping.

6.4 We consider that the role the Claimant was taken on to perform was one which it appears would have been better suited to somebody with a higher level of skill and experience. The Claimant describes himself in his witness statement as "the only accountant in an office of eight employees". However, the Claimant was not in fact a qualified accountant but was working towards his ACCA qualifications. There may have been a mismatch between the Claimant's skills and the First Respondent's expectations and needs from the outset. Whether he "oversold" himself on recruitment is unclear, but in any event, he was ratified in post following his probation period by the Second Respondent, who gave evidence that he wanted to develop the Claimant and not to deter him from improvement.

6.5 We note these points because it was agreed with the parties at the Hearing that it was not part of our function to analyse whether the disciplinary proceedings that ultimately led to the Claimant's dismissal were justified, rather that we have only to consider whether they were motivated by discrimination on the part of the Second Respondent. That is the basis for the Claimant's case. Nonetheless, it is against this background that we have considered the complaints.

6.6 (Complaint 3.2) So far as the question of a pay rise is concerned, we note that the Claimant said in his witness statement that he was asked by the Paris Executive team, after he started work but on an unspecified date, if he "wanted" more salary. At the top of the email from the Claimant to Mr Neve and Mr Robillard in France dated 21 June 2018 somebody (we infer the Claimant) has handwritten the words: "Approved pay rise request by executive team from France". Then the English translation of the Claimant's email says, "Regarding my needs I have no real need. However, a salary compensation before or at the end of my trial period would not be refused."

6.7 We do not consider it likely that the French Executive Team had offered the Claimant a pay rise. We find it inherently improbable that they would have asked the Claimant if he "wanted" additional salary as he says in his statement, rather than just giving him a pay rise. Further, the Claimant does not appear to be responding to any offer in his email of 21 June. We find that it is more probable the French Executive Team had asked him if there was anything else he needed (in training or administrative terms), given that he was at the mid-point of his probation period at this stage, and his response was to moot a pay rise to which they apparently did not respond, far less agree.

6.8 In August 2018 (at the end of his probation period) there was then an email from the Claimant to Mr Neve in which the Claimant suggested that the First Respondent might give him an indirect pay rise by paying his rent in the sum of £1,243 per month. He continued, "Otherwise I am open to any proposal from you". There is again no response in the bundle from Mr Neve, whether agreeing to pay the Claimant's rent or putting forward a different option. The Claimant said in re-examination that this was agreed over the phone but did not say on what date. There is no confirmation in writing, as might be expected, of the date any pay rise was to come into effect, nor of the amount agreed. In an email dated 25 August 2018 from the Claimant to the Second Respondent, the Claimant confirms that his salary is "£22,000.00 annual + pension" and gives a brief job description for his role. He makes no reference to an agreed increase in pay or benefits.

6.9 We have considered whether to draw an inference from the failure to call Mr Neve as a witness. He would have been able to answer questions on this point – and some others - precisely. The difficulty is that either side could have called him to support their case but neither side did. Therefore, we consider that no inference can be drawn. However, we find it inherently improbable as an agreed outcome that Mr Neve did agree to pay the Claimant's rent, because it would have meant that the Claimant's salary would have been almost doubled when grossed up. The Claimant also acknowledged that this would have led to the Respondent "avoiding" paying tax, something which he must have known would have been unlawful. By contrast, the Respondent was permitted to - and did - pay Mr Colin's rent as part of his remuneration package, because he had had to relocate from France to the UK on the Respondent's business.

6.10 We note that in November 2018, the Second Respondent was in communication with the finance team in Paris about pay reviews for the London Head Office staff. There is an email in the bundle that shows on 27 November 2018, there had clearly been a discussion about salaries, following which a spreadsheet was drawn up whereby five members of the London team, including the Claimant, would receive an increase with effect from April 2019.

6.11 This spreadsheet states there will be no increase if somebody is in their probation period, which further supports our conclusion that it would have been unlikely for the Claimant to have been given an increase in June 2018, just two months in to his employment. The spreadsheet shows that the Claimant's proposed increase was the equivalent of just short of 14% of his existing salary; he was to receive a flat increase whereas his colleagues were to receive pay rises of just 3%.

6.12 Far from the Second Respondent objecting to or suppressing a pay rise for the Claimant, or treating him less favourably than his white or female counterparts, it appears therefore that he had agreed the Claimant should have an increase at the same time as everyone else, more than four times what they were to receive in percentage terms. Further, the "current salary" amount that is given in the spreadsheet is the amount payable to the Claimant from his start date: £22,000. There is no higher amount indicated by Mr Neve or anyone else in Paris that would support the Claimant's assertions that a previous pay rise had been agreed between them.

6.13 It is also important to note that in the bundle there is an email from the Second Respondent to two members of the Paris team (one was Mr Chevry who we heard was, with Mr Lecuyer, Head of Finance), dated February 2019 and confirming that the Claimant had resigned in October 2018 ("Modeste resigned however the decision made was to keep him in the business"). The Second Respondent's evidence before us was that he had found out the Claimant had resigned while he was in France on a business trip; he then spoke to the Claimant about his pay for the first time. He told us that the Claimant said he had made numerous requests to Paris about his pay but had been ignored, so he, the Second Respondent, said to the Claimant that they would work together and set targets so that the Claimant would have something to aim at and would be ready for a pay rise when the time came. This is plausible in light of the agreement the following month between the Second Respondent and the Paris Executive Team that the Claimant would receive a significant percentage increase in April 2019. It is also plausible that the Claimant would have indicated to the Second Respondent in October that he had

made requests to Paris for a pay rise but had been ignored. That is what the evidence in the bundle suggests.

6.14 In oral evidence the Claimant denied having resigned, but the Second Respondent's email of 14 February 2019 does not appear to have been contradicted or queried by the recipients. They do not question what he is talking about, for instance, as we consider they would have done if this had been untrue. Mr Picciau's evidence in his witness statement was also to the effect that the Claimant had been, in terms, fixated about money. He described an incident in August 2018 when he and the Claimant walked to a friendly football match that Mr Picciau organised; he said the Claimant "was talking about money over and over" and that all the Claimant cared about was money, wanting to make £100,000 per annum because that was what his friends earned. Ms Thomas's witness statement similarly said that the Claimant was always interested in a "huge salary". We accept their evidence.

6.15 We then turn to the specific complaints about sex and/or race discrimination and sex- and race-related harassment.

Complaint 5.1.1 is that the Second Respondent said repeatedly to the Claimant between June and September 2018: "Hey Modeste, I will fire you this Friday".

i) We considered the Claimant's evidence initially to be credible. However, when the Second Respondent gave evidence, he was similarly credible in denying this allegation. He was demonstrably very unhappy with the assertion that he did or would have said these words. His speech increased in tempo and emotion when he was asked about it. He denied that he uses the word "fire" when speaking about dismissal, because he said he has watched the programme "The Apprentice"; it was clear he did not have a high opinion of Lord Sugar's management technique and that he dislikes "You're fired" as a catchphrase. The Second Respondent's evidence therefore also had the ring of truth.

ii) We have concluded that the Second Respondent did not say these words to the Claimant. There were no witnesses to him saying it, even though it is said to have happened on multiple occasions and even though the two men shared an open plan office with Mr Colin, Mr Riopedre, Ms Thomas and Mr Picciau, all of whom gave evidence before us. Since the Second Respondent no longer works for the First Respondent, it did not appear to us that any of those four would feel under any compulsion or have any motivation untruthfully to support the Second Respondent's version of events.

Complaint 5.1.2 is that the Second Respondent asked the Claimant "Are you fucking for a pay rise?" on 16 October 2018.

iii) Firstly, we observe that this comment does not make sense in English, although those purport to be the words used by the Second Respondent.

iv) We accept the Second Respondent's evidence that it was nearly always French that was spoken in the London office until mid-November 2018 because most of those working with the Claimant and the Second Respondent were French speakers, frequently dealing by phone with the Paris parent company or French suppliers. In particular, we heard that Mr Neve does not speak English and it was

not surprising that conversations would continue in French once employees had finished speaking with or emailing him.

v) However, we heard that Mr Riopedre and Mr Picciau did not speak French and so there came a time when their colleagues were asked to speak in English. We note that in the WhatsApp chat, on 19 November 2018, the Second Respondent said, "Good morning everyone. Hope all is going well and you had a good weekend. Please can we make sure we do speak English as I had a lot of feedback last week from shops and office. I am guilty too on this will work on that".

vi) We were given no context to the words allegedly used on 16 October. It is implausible that the Second Respondent would suddenly use a phrase that does not make sense or that he would do so in English when he and the Claimant were used to speaking French in the office at that time. Again, nobody else in the office heard him say what is alleged.

vii) Although we were told the Claimant was not keeping a diary, he said in the schedule of discrimination that this took place on "a Friday around 16 October 2018" but in the PHCM summary it has been stipulated as taking place "on" 16 October. It appears however that the Second Respondent was out of the country on 16 October 2018 (which was actually a Tuesday), or at least travelling and therefore off site. There is a message in the chat from 16 October, timed at 07.24 on that date, saying "Morning. Let us know when the Hot langer arrive please as none of us will be here" [sic]. Mr Colin responded with a "thumbs up" emoji. There was then an exchange between the Second Respondent, Ms Thomas and Ms Tzidikman in which it is clear that the three of them are travelling ("I'm one stop from you… I'll look for you… will be with you shortly… I am 100 stops from you… should I take the tickets? Take only 2 as I will take mine is a special one…"). It has not been suggested that the conversation took place remotely, e.g. by phone.

viii) We find the Claimant has not shown on balance of probabilities that the Second Respondent said these words.

Complaint 5.1.3 is that at the beginning of November 2018 the Second Respondent made reference to the Congo being "the first country in the world to classify dick size" but saying as the Claimant was born in France it was different before saying "I have not any problem. I could show you".

ix) Once again, this was not heard by anyone in the office and was denied by the Second Respondent. We look at the general tenor of the conversation in the WhatsApp chat at the time and we note that the topics are mainly work-related or concern the team apparently socialising together after hours. On 3 November 2018, for instance, it appears the Claimant is joining his colleagues just after 23.00, addressing them as "the dream team" and on 7 November laughing at a video that the Second Respondent has put in the chat, saying "Hahaa BOOOOWWSSSSS!!!"

x) This way of describing the Second Respondent as "boss" is frequently repeated, for instance on 17 October 2018, around the time the Claimant contends he was being subjected to repeated sexual and racial harassment, he emails the Second Respondent with the subject "Fouuurth!!!!" and the content "BOOOOOOOWSSSSS !!! MasterMind on negociation" [sic] and on the afternoon

of 16 November he emails the Second Respondent regarding the October P&L figures with the single word "BOOOOOOOOOWWWSSSSS!!!!!!!!".

xi) It is unclear exactly what is being discussed on 8 November 2018, but Mr Colin says in response to it, "Morning, that's good news!" and the Second Respondent replies "Not to our lovely Modeste", who responds "Good morning guys!! Loool! I'll die by depression anyway if I wake up everyday at 5" followed by six emojis "😂" indicating that the sender is laughing a great deal. As we find below, the Second Respondent then left for Paris and was not back in the London office until nearly the end of November.

xii) In short, we find that the general tenor of the communications between the Claimant and the Second Respondent is one of light-hearted geniality and not of crass sexualised comment or innuendo of the nature alleged by the Claimant. We find the Claimant has not shown on balance of probabilities that the Second Respondent said the words alleged.

Complaints 5.1.4 and 5.1.5 concern allegations that on 16 November 2018 at around 8 pm and before a company event in Chancery Lane, the Second Respondent asked the Claimant "What title do you want for the next position? Finance Manager? Are you able to make love for a pay rise Modeste?" and drew the Claimant's attention to a picture on the Second Respondent's desk allegedly showing a man on his knees with his face close to the Second Respondent's genital area, with a caption saying "This is how to get a pay rise". It is alleged that the Second Respondent also said to the Claimant something like, "This is how you get a pay rise".

xiii) The date and time of these allegations were given specifically in the Claimant's schedule of discrimination ("Scott Schedule") and these incidents were said to have been witnessed by Mr Colin, with other colleagues also having seen the photograph on the Second Respondent's desk.

xiv) We accept the Second Respondent's evidence that he was not in London between 8 and 20 November and hence these incidents could not have taken place as alleged. His boarding passes, of which there are copies in the bundle, show that the Second Respondent left London on 8 November from St Pancras at 05.40 and arrived in Paris at 09.17; he returned on 20 November taking the train from Paris at 18.13 and arriving in London shortly before 20.00. There apparently was an event that night (16 November) because in the chat, Mr Picciau says "Champagne tonight", but it is clear that the Second Respondent is unaware of it taking place because he responds "What?" and Mr Picciau says "Party at 7.30 pm in Chancery Lane".

xv) Further, on 19 November, the Second Respondent was clearly still in Paris because he refers to having found someone "very famous" there, of whom the Second Respondent says, "he is everywhere". Accordingly, while it would be conceivable that the Second Respondent could have made a homeward journey and then returned to Paris between the two dates for which we have the boarding passes, we find on balance that he did not and accordingly that the event could not have taken place as the Claimant describes. On that morning, the Claimant had emailed the Second Respondent at 10.28 with another friendly message, this time about the budget, "Hello, I hope this will be perfectly accurate BOOOOOWWWWSSSSSSS!!".

xvi) We find it highly unlikely that the Claimant would have continued to behave in such a fashion if the Second Respondent had created an environment of the type envisaged in section 27 Equality Act 2010, i.e. one where the Claimant's dignity was violated or he was finding the environment humiliating, degrading etc, even though we do accept that not all victims of harassment will raise their distress with the perpetrator or report such conduct formally.

xvii) So far as the Claimant's title is concerned, it is clear that he was to be referred to as Finance Manager in any case. The spreadsheet to which we refer above regarding the proposed April 2019 pay rises has this as his job title. Additionally, the Claimant referred to himself as Finance Manager in his email sign off on 28 September 2018 to a potential supplier (Fourth), and indeed introduced himself in that email as "the finance manager for Cojean". We do not find it credible that the Second Respondent would be having a discussion about this in the terms alleged nearly two months later. The Claimant repeats this title in other emails (e.g. email of 28 December 2018 to a Chris Hudson, described as a Chartered Insurance Broker – the Claimant says he is "the Finance Manager of Cojean Limited (UK)" and has replaced Harriet Green, and an email of the same date to an Amy Brewer, described as Credit Controller for Sovereign Partners Limited, copied to the Second Respondent).

xviii) Turning to the question of the picture on the Second Respondent's desk, we were unable to see the original, which we gather had four images as a montage, with captions beneath, in a frame. The evidence from Ms Galeano was that the original had been left in an office that has since been closed down. A copy was however in the bundle, but it was extremely indistinct both as to the images and the captions beneath them. In any event, this bundle copy was said to be a still picture taken from video footage recorded on a mobile phone by the Claimant. The footage had not been disclosed and indeed it only emerged during the Claimant's cross-examination by Mr Hoyle that this was the provenance of the item in the bundle.

xix) We are therefore compelled to make findings based, not on the picture itself, which could have been conclusive, but on balance of probabilities based on the evidence of the witnesses. We were told by the Second Respondent that it related to teambuilding and we accept that evidence. Ms Galeano, who also impressed us as being credible, explained that the photographs she used to create the item had been taken at a corporate event by a professional photographer when the Second Respondent worked at Prêt à Manger, and that possibly the one in question showed the Second Respondent with an area manager from Prêt.

xx) Ms Galeano was clear that there was no sexual content; the originals had, she said, been posted on the Prêt intranet. When the Second Respondent left Prêt, she used this picture and others to compile a "mock-up" of a magazine cover or similar to remind him of the "great experiences" they had had working together. She said it was meant in "fun". Specifically, in answer to the question "Did that picture say, "This is how to get a pay rise"? she replied, in the CVP chat bar, "No. Teh picture only remind moments in events before" [sic]. She said that the nature of the comments was "We will miss you, thank you for everything." She did not remember there being anything about a pay rise in a caption under any of them. She said that the Second Respondent had been their boss for over seven years and this had been intended as a pleasant gesture to thank him for that.

xxi) All the witnesses save for the Claimant agreed that the picture, which was displayed on the Second Respondent's desk, visible to anyone entering the room (including senior executives visiting from Paris) had no captions such as the one of which the Claimant complains. Ms Thomas, who as we have noted, joined by CVP and had therefore not been in the room listening when the other witnesses gave their evidence, also said that it related to team building.

xxii) In addition, this again does not sit well with the overall communications, and in particular those emanating from the Second Respondent, between the team members. We note indeed that it was the Claimant who used an offensive word in the WhatsApp chat on more than one occasion (as to which we return below) and when he did so, not only did his colleagues not reply in kind but Ms Thomas questioned whether he was drunk. Nobody said anything with particularly sexual or racist overtones, other than the Claimant. We find on balance of probabilities that the Claimant has not shown the incidents on 16 November of which he complains took place and we find that the picture on the Second Respondent's desk was not offensive as claimed.

Complaint 6.1.1 is that the Second Respondent said repeatedly to the Claimant between June and September 2018: "Hey Modeste, I will fire you this Friday".

xxiii) Our findings on this point are the same as those in relation to complaint 5.1.1 (see paragraphs i) to ii) above).

Complaint 6.1.2 is that the Second Respondent said to the Claimant "I am Arabic but you are Congolese. You are a thief" in around July 2018.

xxiv) We find in relation to the events of summer 2018 that it appears to be common ground the First Respondent was the victim of a scam so that a large sum of money was paid into the wrong bank account. We can see no reason why the Claimant would have been blamed for this or why the Second Respondent would have said such a thing. However, more pertinently, we accept that the Second Respondent does not describe himself as Arabic or an Arab. He explained, with conviction, that he is North African, specifically Berber (an ethnic group indigenous to North West Africa). He said that he speaks Arabic but that does not make him Arabic. We accept that evidence. We consider that it is the Claimant's perception that the Second Respondent is Arabic, but that the Second Respondent would not and did not say that he is.

Complaint 6.1.3 is that the Second Respondent asked the Claimant "Are you fucking for a pay rise?" on 16 October 2018.

xxv) Our findings on this point are the same as those in relation to complaint 5.1.2 (see paragraphs iii) to viii) above).

Complaint 6.1.4 is that at the beginning of November 2018 the Second Respondent made reference to the Congo being "the first country in the world to classify dick size" but saying as the Claimant was born in France it was different before saying "I have not any problem. I could show you".

xxvi) Our findings on this point are the same as those in relation to complaint 5.1.3 (see paragraphs ix) to xii) above).

Complaints 6.1.5 and 6.1.6 concern allegations that on 16 November 2018 at around 8 pm and before a company event in Chancery Lane, the Second Respondent asked the Claimant "What title do you want for the next position? Finance Manager? Are you able to make love for a pay rise Modeste?" and drew the Claimant's attention to a picture on the Second Respondent's desk allegedly showing a man on his knees with his face close to the Second Respondent's genital area, with a caption saying "This is how to get a pay rise". It is alleged that the Second Respondent also said to the Claimant something like, "This is how you get a pay rise".

xxvii) Our findings on this point are the same as those in relation to complaint 5.1.4 and 5.1.5 (see paragraphs xiii) to xxii) above).

Complaint 6.1.7 is that the Second Respondent forced the Claimant to work on a Sunday twice – on 18 and 25 November 2018.

xxviii) Firstly, the Claimant's witness statement says this happened once, while the list of issues says it was twice that he was forced to work on Sunday. There is evidence as noted above (paragraph xv) that on Sunday 18 November 2018 the Claimant sent the Second Respondent a document related to the 2019 budget, as an attachment to a jocular email. The Second Respondent replied just over an hour later thanking him. It appears therefore that the Claimant did work on at least one Sunday in November 2018. As we have found, however, the Second Respondent was not in the UK on that date (18 November) and there is no evidence that he had forced the Claimant to work, whether from home or in the office, on that day or the following Sunday.

xxix) Rather, there is a jocular exchange in the WhatsApp chat between the Claimant and the Second Respondent where the Second Respondent said (on 9 November 2018), "Hi All, I would like to organise the Xmas get together dinner with everyone so the team in this what's app plus the GMs and Marita. Let me know what day suits you the best in December." The Claimant replied, "Any days for you booooowssss" to which the Second Respondent responded within a few seconds, "Sunday at 4.30 a.m.". The Claimant asked, "Which one?" and the Second Respondent said "Next one", to which the Claimant said "I'll be there" and, a minute later, "🤓". Again, we find that this was a light-hearted exchange between the two men and was not intended (nor was it taken) as discrimination or harassment, whether related to sex, race or otherwise. This is further borne out by a subsequent message, just a few minutes later, from the Claimant in response to something asked by Mr Picciau ("What Sunday are we talking about?"): "Next one but I don't think so. I don't know who's got the idea for this group but I like it."

xxx) There is however evidence in the bundle of the Claimant voluntarily going in on a Sunday the following month. He sent an email to the Second Respondent on 28 December saying that he had lost his cell phone in Paris the previous week and would be in the office on Sunday to "take advantage on my tasks before restart". He concludes "If you need anything, feel free to let me know. I'm working actually from home. Have a good day".

xxxi) Even if the Second Respondent had required the Claimant to work on a Sunday to complete the budget, we accept that the Claimant's contract of employment said he had no normal hours of work and could be required to work between 7 am and 10 pm, Monday to Sunday, up to 40 hours with additional (unpaid) work as

necessary to fulfil the responsibilities of the role. We consider he may well have had to work at the weekend during November to complete tasks because of his position and the fact that it was the time of year for setting budgets.

xxxii) There is little evidence of any activity for the First Respondent by the Claimant on 25 November 2018. The WhatsApp chat has only a link sent by the Second Respondent to which the Claimant sends another link, which the Second Respondent says does not work. The Claimant replies, "I have seen it, it was a joke doesn't matter. I hope everyone are well and have had a good weekend. 🤓" He makes no mention of having attended work, whether under instruction or otherwise.

Complaint 6.1.8 is that the Second Respondent said to the Claimant in around December 2018 "You clean your ass with a leaf or an elephant's tail in Congo".

xxxiii) This allegation is one in which only the Second Respondent is said to have been involved and was not allegedly overheard by any colleagues; it is one party's word against another's. Again, we have had to make a finding based on the balance of probabilities. In the first place, Mr Hoyle rightly points out that the Claimant said the words were "elephant's tail" in the Scott Schedule and "elephant's trunk" in the witness statement, and that these are opposite ends of the elephant. This inconsistency makes the Claimant's evidence less reliable.

xxxiv) Further, the Second Respondent said in evidence that the First Respondent purchased much of its supplies from France, even where this was unnecessary and similar products were available in the UK. He gave an example of Coca Cola, which was imported from France, but also of toilet paper. He said that the Claimant complained when there had been a change in the toilet paper used in the London office. It was not that there was a problem with the toilets, as the Claimant asserts in his witness statement. Given the context, if the words were said at all, it would be more likely that they would have been said when the toilet paper was changed (i.e. according to the Second Respondent's evidence) than if the toilets were broken (i.e. the Claimant's version) but we find on balance of probabilities that they were not said.

xxxv) We find this because we note, as we have indicated above, that the only person who makes racial references in the chat is the Claimant himself, twice using the word "nigga" [sic]. Ms Thomas said that she found this quite shocking, and she thought her colleagues did too, but none of her other colleagues made offensive comments or comments that shocked her. We found her evidence credible.

Complaint 6.1.9 is that the Second Respondent threatened to replace the Claimant with his friend, Mr Kedidi, and said "the only Africans in the Claimant will be white, which is better".

xxxvi) As with the reference to the Second Respondent's own ethnicity, we consider that this is the Claimant's perception but is not the reality. Mr Kedidi is not white and he and the Second Respondent do not describe him as such. Mr Kedidi told us, and we accept, that he describes himself as African/Arab mixed race on monitoring forms. The Second Respondent was asked in re-examination if Mr Kedidi is white and he replied, "not at all, not white European, not at all". Mr Colin said the same.

xxxvii) We find that the Second Respondent did arrange for Mr Kedidi to come in once the Claimant went off sick in 2019 and did not return. The Second Respondent knew Mr Kedidi and had worked with him before, although Mr Kedidi already had another job and at first was reluctant to move to the First Respondent. We accept the Second Respondent's evidence that things had reached a desperate state. The Claimant describes himself as a management accountant and assistant accountant in his CV, but as we have noted above, he did not hold commensurate qualifications while he worked for the Respondents and those are not the functions he was fulfilling. Mr Kedidi discovered a backlog of things not done correctly and/or in a timely manner when he covered for the Claimant while the First Respondent hired a permanent replacement.

We do not find it credible that the Second Respondent threatened to replace the Claimant because of race, nor that he would have used the words alleged.

Complaint 6.1.10 is that Mr Colin dismissed the Claimant's concerns about the relationship with the Second Respondent on 21 January 2019, saying "I think that you are crazy".

xxxviii) We consider it very unlikely that this occurred, but if it did it was not apparently because of or related to race. We accept Mr Colin's evidence that on or around that date, the Claimant came to him and said he thought there was a problem with the Second Respondent and that he wanted the Claimant "out". Mr Colin offered to speak to the Second Respondent the following week and sought to reassure the Claimant that nobody wanted him out of the Company. The discussion came as a surprise to Mr Colin but he was mindful of the First Respondent's motto of "nourrir, aimer, donner" (nourish, love, give) and believes that the human capital in the Company is its most important element; he has never said "you are crazy" to anyone. We have no reason to disbelieve this evidence.

Complaint 6.1.11 is that in March 2019, the Second Respondent and Mr Colin falsely alleged that the Claimant had stolen money following his being paid an advance on salary.

xxxix) The first point to note here is that the Claimant had not just "been paid" an advance; he had paid himself the whole of his salary for January 2019 in three tranches over the Christmas 2018 period without prior written authorisation. The Claimant says that he had had previous advances, which as we have found above, it appears were then deducted from subsequent payslips. We have no way of knowing whether they had been approved or not, and if they had, by whom. What we can see is that on this occasion, it appears it was Mr Neve himself who asked in February about the advance. We can see no reason why he should have done so if he had approved it.

xl) We do not accept the Claimant's assertion that the emails in the bundle show that Mr Neve agreed he did not require prior approval. Rather, it was the case that once approved by Mr Neve (or, in the case of a colleague, their own line manager), it would have been the Claimant who would have then made the advance payments. We find it thoroughly implausible that an accounting professional would not appreciate the inference of serious misconduct where the person responsible for making salary advances has taken it upon himself to pay his entire salary a month early and has neither sought advance permission from his own line manager nor left any obvious record of the same. It is the case that the Claimant's

salary in January was paid in full, although we understand there was confusion around the correct bank account. At any rate, the Claimant had arranged no facility to repay the money.

xli) While the Respondent's financial situation was apparently not as bad as the running bank totals might have suggested (because there was venture capital funding available from Paris when requested by London), it is clear that the London head office needed to be clear what its outgoings were so that it could secure such adequate funding, and further, as the Second Respondent's evidence indicated, that it could plan well in advance. We note for instance that the Second Respondent suggested to the Claimant that he set up direct debits so that regular payments could be budgeted for. While we have been critical to an extent of the systems in place (or absent) from the First Respondent, and have noted that the advance salary payments policy was one that existed only orally if at all, we consider that the Claimant would have been naïve at best if he failed to appreciate the significance of his actions, followed as it was by his continuing absence and lack of substantive response to the Respondents' correspondence chasing an explanation.

Complaint 6.1.12 is that the Second Respondent brought vexatious disciplinary proceedings against the Claimant on 24 April 2019.

xlii) As we have found above, the Respondents reported the Claimant to the police in relation to the salary advance issue, which was only one of the matters of significant concern. We accept that the Respondents (and the rest of the senior team in London) believed that the Claimant had simply disappeared and we consider that this may well have been a reasonable belief.

xliii) Similarly, while it might be "harassing" in the lay sense to be receiving multiple invitations requiring him to attend a disciplinary hearing, there is no relation to race that we can find. We do not accept the Claimant's hypothesis that the Second Respondent might have brought the proceedings as some kind of smoke screen to lead the Paris team away from his own misconduct, not least because, as we have found, there is no evidence to show the Second Respondent had committed any misconduct. Nor indeed was the Second Respondent acting alone in bringing the disciplinary proceedings. This was a decision following what appears to be the direct involvement and approval of the Paris management team.

xliv) Since the Claimant declined to attend the hearings to which he was invited, we cannot know (and indeed it is not necessary for us to know) whether the explanations he might have given would have satisfied those conducting them. For that reason, we sought to dissuade lengthy cross-examination as to whether the Claimant had been derelict in discharging his duties or whether there was a reasonable explanation for his alleged shortcomings. The fact that the police declined to prosecute the Claimant does not suggest to us that there was no evidence so that the internal proceedings were vexatious, merely that the City of London police may have more pressing demands on their time.

7 Conclusions

7.1 <u>Direct sex discrimination/sex-related harassment</u>

We conclude that in relation to the pay rise issue, there is insufficient evidence to show that the Paris Head Office had approved a pay rise for the Claimant with

effect from 1 September 2018. On the contrary the evidence shows that they approved one that was due to come into effect from 1 April 2019 and that the Second Respondent did nothing to oppose it.

7.2 Accordingly, we do not need to go on to consider whether each of the comparators received the second instalment of a pay rise during September 2018 although there is evidence in the bundle that when it was planned to give Mr Riopedre a pay rise, the Second Respondent objected on the basis that he had not approved it. He was told that this had been agreed by the Paris executives at the end of 2017, before he had joined the company, and apologies were made for the oversight in failing to inform him, but the second instalment went through nonetheless. However, the email concludes, "It was quite clear that performance reviews and wages pass and/or are decided by the boss of UK".

The Claimant has not made out the complaint on the facts and therefore it fails.

7.3 Similarly, we have found on balance of probabilities and based on the evidence before us that the Second Respondent did not say any of the words of which he is accused. In light of that finding, there is no need for us to deal with the issue that all the complaints of sex discrimination/sex-related harassment are out of time and whether time should be extended.

7.4 <u>Direct race discrimination/race-related harassment</u>
In a similar vein, we have found that a) there had been no agreement with the Paris head office on or before 1 September 2018 that the Claimant would receive a pay rise and b) on balance of probabilities and based on the evidence before us, the words the Second Respondent (and Mr Colin) are alleged to have used in allegations 6.1.1 to 6.1.12 were not said. Whether or not the allegation was "false" as to the salary advance (in that the Respondents might not reasonably have believed that the Claimant had actually stolen the money) is not for us to determine, but we are not persuaded that the reason for the allegation was race.

7.5 It follows that as we have found no race-related harassment or discrimination because of race, the complaint at 4.2.2 (that the Claimant was forced to resign as a result of his treatment by the Respondents) must fail.

7.6 The Claimant has not shown facts from which we could conclude that there has been a breach of the Equality Act by the Respondents (or either of them) and the burden of proof does not shift to the Respondents. The Claimant's claims are not well-founded and are accordingly dismissed in their entirety. The Remedy Hearing fixed for 25 January 2021 is no longer required and is vacated.

_____

Employment Judge Norris
9 December 2020
Sent to the parties on:

10/12/2020

For the Tribunal:

APPENDIX ONE – LIST OF ISSUES

(taken from EJ Palca's Case Management Summary and Orders

3 March 2020)

The issues

2. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

***3. Direct discrimination on grounds of sex* (Section 13 Equality Act 2010)**

3.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely any of the treatment not found to have been harassment.

3.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators in relation to pay issues:

3.2.1. Flore Thomas (white, female)
3.2.2. Marina Garbul (white female)
3.2.3. Marianne Tzidikman (white female)

and/or for other issues on hypothetical comparators.

3.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

3.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

***4. Direct discrimination on grounds of race* (Section 13 Equality Act 2010)**

4.1. The claimant is a black African from the Congo.

4.2. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:

4.2.1. On 1 September 2018, the second respondent failing to pay the claimant a payrise approved by the Paris head office, while other members of staff received a payrise.

4.2.2. On 21 February 2019, the claimant being forced to resign as a result of his treatment by the respondents;

4.2.3. Any of the treatment not found to have been harassment.

4.3. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators:

4.3.1. Flore Thomas (white, female)
4.3.2. Filippo Picciau (white male)
4.3.3. Marina Garbul (white female)
4.3.4. Marianne Tzidikman (white female)
4.3.5. Brahim Kedid (white African male)

4.3.6. and/or hypothetical comparators.

4.4. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.5. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

5. Harassment on grounds of sex (Section 26 Equality Act 2010)

5.1. Did the respondent engage in unwanted conduct as follows:

5.1.1. On about 25 June 2018 and subsequently about twice a month until September 2018, the second respondent saying to the claimant "Hey Modeste, I will fire you this Friday";
5.1.2. On 16 October 2018 the second respondent saying to the claimant "Are you fucking for a payrise?"
5.1.3. At the beginning of November 2018, the second respondent saying to the claimant that he had read that the Congo was the first country in the world to classify dick size, but as the claimant was born in France, it was difference, saying "For me, I have not any problem. I could even show you".
5.1.4. On 16 November 2018, the second respondent saying to the claimant "What title do you want for the next position? Finance Manager? Are you able to make love for a pay rise Modeste?"
5.1.5. On 16 November 2018 the second respondent showing the claimant a picture in a frame on his desk of a man on his knees in front of him with his face close to the second respondent's genital area, who was standing, with a caption which said "This is how to get a pay rise", saying something like "This is how you get a pay rise

5.2. Was the conduct related to the claimant's protected characteristic?

5.3. 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?

5.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5. In considering whether the conduct had 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.

6. Harassment on grounds of race (Section 26 Equality Act 2010)

6.1. Did the respondent engage in unwantedc conduct as follows:

6.1.1. On about 25 June 2018 and subsequently about twice a month until September 2018, the second respondent saying to the claimant "Hey Modeste, I will fire you this Friday";

6.1.2. In around July 2018, the seond respondent saying to the claimant "I am Arabic, but you are Congolese. You are a thief".

6.1.3. On 16 October 2018 the second respondent saying to the claimant "Are you fucking for a payrise?"

6.1.4. At the beginning of November 2018, the second respondent saying to the claimant that he had read that the Congo was the first country in the world to classify dick size, but as the claimant was born in France, it was difference, saying "For me, I have not any problem. I could even show you".

6.1.5. On 16 November 2018, the second respondent saying to the claimant "What title do you want for the next position? Finance Manager? Are you able to make love for a pay rise Modeste?"

6.1.6. On 16 November 2018 the second respondent showing the claimant a picture in a frame on his desk of a man on his knees in front of him with his face close to the second respondent's genital area, who was standing, with a caption which said "This is how to get a pay rise", saying something like "This is how you get a pay rise".

6.1.7. On 18 and 25 November 2018, the second respondent forcing the claimant to work on a Sunday on budgets;

6.1.8. Around December 2018, the second respondent saying to the claimant "You clean your ass with a leaf or an elephant's tail in Congo"

6.1.9. On 15 January 2019 the second respondent telling the claimant "If you do not agree about what I am doing about your pay rise, you could leave. I have a friend from Pret a Manger, Brahim Kedid. I will hire him at what you are asking and the only Africans in the company will be white, which is better".

6.1.10. On 21 January 2019, Mr V Colin dismissing the claimant's concerns about his relationship with the second respondent saying "I think that you are crazy"

6.1.11. In March 2019, the second respondent and Mr V Colin falsely alleging that the claimant had stolen money following his being paid an advance on salary;

6.1.12. On 24 April 2019, the second respondent bringing vexatious disciplinary proceedings against the claimant;

6.2. Was the conduct related to the claimant's protected characteristic?

6.3. 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?

6.4. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

6.5. In considering whether the conduct had 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.

7. Time/limitation issues – just and equitable

7.1. The claim form was presented on 26 March 2019. ACAS received early conciliation notification on 4 April 2019. The Early Conciliation Certificate was issued by ACAS on 4 April 2019. Accordingly, some or all of the complaints are potentially out of time, so that the tribunal may not have jurisdiction to hear them.

7.2. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

7.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?