EMPLOYMENT TRIBUNALS

Claimant: **Mr L Morton-Buwerimwe**

Respondent: **Plusnet Plc**

Heard at: **Leeds by CVP**
On: **14-18 December 2020 and (deliberations only) 5 February 2021**

Before: **Employment Judge Maidment**
Members: **Mr T Downes**
Mr L Priestley

Representation
Claimant: **Mr P Ward, Counsel**
Respondent: **Mr B Williams, Counsel**

RESERVED JUDGMENT

The claimant's complaints of race discrimination, disability discrimination, harassment and victimisation fail and are dismissed.

REASONS

Issues

1. The claimant's complaints are as set out by Employment Judge Licorish after a preliminary hearing on 19 November 2019. She also then determined that the claimant was at all material times from November 2017 to September 2018 a disabled person by reason of his impairment of depression. The claimant identifies as Black African in terms of ethnicity. As recorded by Employment Judge Licorish:

1.1. "The issues between the parties to be determined by the Tribunal are currently:

Time limits

1.2. According to the date that the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 June 2019 is potentially out of time, so that the Tribunal may not have jurisdiction to deal with it.

1.3. The Tribunal will need to consider whether all of the claimant's complaints were presented within the time limits set out in sections 123 of the Equality Act 2010 (EqA). The claimant will argue that there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; or that time should be extended on a "*just and equitable*" basis.

EqA, section 13: direct discrimination because of race

1.4. Was the claimant subjected to the following treatment according to section 39(2) EqA? The claimant alleges:

1.4.1. On 5 August 2017, following an argument at work Michael Gallagher told the claimant "*he was going to knock his black head off*".

1.4.2. The subsequent investigation into the incident by Liam Holiday (also Michael Gallagher's team leader) was biased as CCTV footage showed Mr Gallagher to be the aggressor but the claimant was also suspended.

1.4.3. Michael Gallagher was suspended for four weeks and the claimant for almost four months.

1.4.4. On his return to work in around November 2017, the claimant told Ryan Millar (another team leader) about Michel Gallagher's comment during their argument, but no action was taken and statements were not taken from the witnesses identified by the claimant.

1.4.5. In around November 2017, the claimant was issued with a "*record of discussion*" regarding the incident with Mr Gallagher for raising non-work-related matters at work.

1.4.6. On 28 April 2018 the claimant and another black colleague, Jemal Cohen, were told that they would be disciplined for arriving late to work. There had been a staff party the night before and a number of employees (including Faris Anwar) were late but were not threatened with conduct proceedings.

1.4.7. The respondent failed to deal adequately or at all with the claimant's written grievance citing race discrimination dated 26 July 2018.

1.4.8. On 27 September 2018, Liam Taplin (the claimant's team leader) said to the claimant in front of his colleagues: "*I can smell weed. Lindley, have you got weed on you?*"

1.5. Did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant describes himself as black and of African origin, and relies on Michael Gallagher (who is white), Faris Anwar (mixed British Asian) and/or hypothetical comparators.

1.6. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Disability

1.7. If the Tribunal determines as a preliminary issue that the claimant was a disabled person according to section 6 EqA at all relevant times because

of the condition of depression, it is agreed that the relevant time runs from November 2017 until September 2018.

EqA, section 15: discrimination arising from disability

1.8. Did the following arise in consequence of the claimant's disability?

1.8.1. The reduction in the claimant's hours from full time to part time from around November 2017. The claimant says that the permanent reduction in his hours from January 2018 was for mixed reasons, but was mainly to improve his health (including the fact that he wanted to spend more time with his children as it made him feel better).

1.8.2. His sickness absence from April to July 2018.

1.9. Did the respondent treat the claimant unfavourably? The claimant alleges:

1.9.1. He was excluded from three House Move and TV training sessions between February and May 2018.

1.9.2. The respondent failed to deal adequately or at all with the claimant's written grievance citing disability discrimination (to do with his sickness absence) dated 26 July 2018.

1.9.3. During his sickness absence, Liam Taplin constantly telephoned him and sent him a number of letters stating that he was not following the respondent's sickness absence policy.

1.9.4. In around September 2018 Sam Baxter refused the claimant's request to increase his hours, and offered no support to enable him to do so.

1.10. Did the respondent treat the claimant unfavourably in any of those ways because he was on reduced hours or because of his sickness absence? The claimant specifically maintains that in around March 2018 Liam Taplin told him that had not been included in the training sessions because he worked reduced hours.

1.11. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? *The respondent is specify the grounds for any defence of justification in its amended response.*

1.12. If the claimant is found to have been a disabled person, the respondent accepts that it knew, or could reasonably have been expected to know, that the claimant was a disabled person at the relevant time.

Reasonable adjustments: EqA, sections 20 and 21

1.13. A "PCP" is a provision, criterion or practice. Did the respondent apply the PCP that only advisers on full-time hours can attend House Move and TV training sessions?

1.14. If so, did that PCP put the claimant at a substantial disadvantage compared to persons who are not disabled? The claimant says that disabled advisers are more likely to work reduced hours and his exclusion from the training affected his ability to earn as much as other advisers on his team.

1.15. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

1.16. If so, did the respondent take such steps as were reasonable to have to take to avoid any such disadvantage? The claimant alleges that the respondent should have included him in the training sessions.

EqA, section 26: harassment related to race

1.17. In the alternative. did the respondent engage in the conduct as set out at paragraphs 8.3.1 to 8.3.6 [1.4.1 to 1.4.6] above?

1.18. If so, was that conduct unwanted?

1.19. If so, did it relate to the protected characteristic of race?

1.20. Did the conduct have the purpose or was it reasonable for that conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EqA, section 26: harassment related to disability

1.21. Did the respondent engage in the conduct described at paragraph 8.8.3 [1.9.3] above?

1.22. If so, was that conduct unwanted?

1.23. If so, did it relate to the protected characteristic of disability?

1.24. Did the conduct have the purpose or was it reasonable for that conduct to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?"

2. At a further preliminary hearing on 3 March 2020, Employment Judge Smith allowed the claimant to amend his claim to add the following complaints.

2.1. On 19 October 2019 the respondents line manager Sarah Simpson replaced the claimant's computer screensaver with an image of the rap singer Afroman. The claimant contends that this was an act of direct race discrimination given the connotation of the image of "Afroman". The claimant relies upon a hypothetical comparator.

2.2. On or about 30 November 2019 the claimant became aware his sickness record had been falsely inflated on the respondent's management system. The claimant contends that this was an act of direct race discrimination. By increasing his apparent absence record it made him more susceptible to disciplinary action. The claimant relies upon a hypothetical comparator.

2.3. On or about 28 October 2019 the claimant was granted overtime but was not permitted to take a break after four hours continuous work. Claimant contends this was an act of victimisation. The claimant's protected act was the issuing of tribunal proceedings on 23 October 2018 under case reference 1810867.

3. The tribunal clarified with the parties and it was indeed confirmed that these constituted the entirety of the claimant's complaints.

Evidence

4. The tribunal had before it an agreed bundle numbering in excess of 421 pages. The tribunal heard firstly from Ms Sobia Rafiq called on behalf of the claimant pursuant to a witness order. The claimant then gave evidence on his own behalf. Mr Jemal Cohen was then called by the claimant to give evidence and a written statement of Natalie Milner was submitted and accepted as evidence, but where only reduced weight could be given to it in circumstances where Ms Milner was not present to be cross-examined. Ms Rafiq, Mr Cohen and Ms Milner had all worked with the claimant as sales and retention advisers.

5. On behalf of the respondent, the tribunal then heard from Mr Liam Taplin, sales and retention team leader, Mrs Sarah Simpson, also a sales and retention team leader, Mr Simon Smith, Business Manager, Ms Clare Smith, Head of Planning in the Customer Operations team, but no longer employed by the respondent, and Mr Naveed Hussain, Business Manager in sales and retentions.

6. Having considered all of the relevant evidence the tribunal makes the following findings of fact.

Facts

7. The claimant was employed by the respondent internet service provider as a sales and retention adviser from 30 May 2016. This was a call centre role where the claimant was involved with new sales and the retention of existing customers. Initially, his line manager was Sarah Simpson, Sales and Retentions Team Leader.

8. On 29 June 2017 the claimant expressed an interest in being trained to deal with customer house moves. The claimant's evidence was that he was told by Mrs Simpson that, if courses became available, he would be put forward.

9. On 5 August 2017 an argument arose between the claimant and a colleague, Michael Gallagher. Mr Gallagher had been living in a property owned by the claimant and, it appears, acted aggressively when the claimant raised that he was unhappy about the state of the property.

10. Mrs Simpson was not at work that day and another team leader, Liam Holliday, undertook an informal fact find. As part of that, he spoke to the claimant at 10:30am on 5 August. The claimant explained how he raised the issue of the house with Mr Gallagher. The claimant explained that Mr Gallagher had stood up and was trying to be intimidating. The claimant said that he went back to his seat, but that Mr Gallagher came over to him again.

11. Mr Holliday reconvened the meeting at 12:36pm. He said that, having discussed the matter with other people and having looked at the CCTV footage,

he would be taking the matter to a formal meeting regarding both the claimant and Mr Gallagher. They were both being suspended. He said that he felt it was best for both if they were not in the building "to protect you". The claimant said that he had done nothing wrong and had not been aggressive. The claimant asked if this might lead to dismissal was told that this was a potential outcome, however he would have the chance to state his case. The claimant repeated that he hadn't sworn and felt hard done by. Mr Holliday said that he was not saying the claimant was guilty of misconduct. The claimant asked if Mr Holliday had spoken to Shaun, a reference to Shaun Snowden, one of his colleagues. The claimant told the tribunal that Mr Snowden had escorted Mr Gallagher away from the claimant after the second occasion he had sought to confront the claimant - he described Mr Gallagher as "acting like a football hooligan". Mr Holliday replied that he was it wasn't appropriate for him to tell the claimant who he had spoken to. The claimant said that he felt he was being punished. It is noted that Mr Snowden left the respondent's employment in September 2017.

12. The claimant's case is that Mr Gallagher used threatening and racist language about the claimant to Mr Snowden, which Mr Snowden reported to the claimant (in the presence of another colleague, Natalie Milner) in the period in the adjournment of these 2 fact-finding meetings with him. Before the tribunal, the claimant said that he did not raise this with Mr Holliday at the second meeting as he had been told not to discuss the matter with anyone else and to keep it confidential. The notes of the first meeting record that the claimant was simply told, at the end of the meeting, to stay away from Mr Gallagher. The instruction given to the claimant was in the second half of the second meeting. The claimant said that if there had been a fair investigation, Mr Snowden would have been questioned.

13. Mr Gallagher was interviewed by Mr Holliday at 10:40am and again at 12:20pm when he also was suspended from work.

14. The claimant said that, shortly after his suspension, he obtained the assistance of his union representative, Mr Rehman, whom he told about the incident of racism.

15. By letter of 14 September 2017, the claimant was invited to a disciplinary meeting on 19 September by Mr Ryan Miller, Customer Solutions Team Leader. This was to discuss the allegations of threatening behaviour, bullying, harassment or insulting behaviour. Possible outcomes were said to range from no action to a dismissal. The meeting, however, had to be rearranged and Mr Miller contacted the claimant seeking to find a convenient date in circumstances where Mr Miller was due to be off work the following week. An email of 20 September from Mr Miller recorded him as having tried to call the claimant without success and having left a voice message.

16. The claimant was sent a further invitation letter on 10 October for a meeting on 18 October. The claimant responded on 18 October saying that his union

representative had just returned from holiday and was not able to attend a meeting that day. He asked if the meeting could be rescheduled. Arrangements were then made involving the claimant's union for the meeting to take place on 26 October. 25 October had initially been put forward, but Mr Miller was not available then and an alternative date, put forward by the union, of 26 October then agreed.

17. The CCTV footage of the incident was viewed at the meeting. Mr Rehman said that it was clear that Mr Gallagher had instigated the incident and questioned why the claimant had been suspended. Mr Miller said that they needed to hear both sides of the story. Mr Rehman said that he understood that Mr Gallagher had by now returned to work. Indeed, Mr Gallagher had already by then attended a disciplinary hearing and had received a written warning which was to remain live for a period of 12 months. There was a discussion of the incident itself. The claimant explained that the situation had been affecting his mental health. The meeting was briefly adjourned after which the claimant said he felt uncomfortable about seeing Mr Gallagher again. He said that when Shaun Snowden walked Mr Gallagher away into the canteen area, Mr Gallagher had made a racist remark about him – that he was going to "knock my black head off". He referred to Natalie and another colleague, Raj, hearing Mr Snowden report this.

18. The claimant sought to rely before the tribunal on a written witness statement of a former colleague, Natalie Milner. In this she said that Mr Snowden had come over to the claimant and told them that Mr Michael Gallagher had threatened to "knock Lindley's black head off".

19. Mr Miller emailed the claimant on 8 November to inform him of the outcome, which was that the claimant was being issued with a "Record of Discussion". The claimant's suspension was lifted. Whilst he didn't feel that the claimant's behaviour was threatening, the situation could have been handled "a bit better from your end". He considered the claimant ought not to have brought a discussion about private matters into the workplace and did not want that situation to be repeated. He said that he would like the claimant to return to work on 13 November. Mr Miller continued that there had also been mention of Mr Gallagher's alleged racist comment. He said that he had reviewed the initial fact-finding documents and other statements and that this allegation had never been raised before. He said therefore that "anything around this should be raised on your return to the workplace, where it will be fully investigated." Mr Miller referred to the claimant coming into work on 9 November for a catch up, before he returned to work the following week.

20. The claimant met with Mr Miller again on 9 November, following which Mr Miller emailed the claimant outlining their conversation. This referred to the claimant's agreement to take part in a mediation with Mr Gallagher. He also recorded that the claimant had expressed a wish to raise a grievance regarding the initial handling of issues and that Mr Miller had explained how he could do that and that he might wish to try to resolve this informally firstly by raised it with his

team leader. The claimant had said that he would rather pursue a formal process and Mr Miller confirmed that he would email the claimant a copy of the grievance policy for the claimant to review and take the right action in order to raise the grievance formally. The policy was indeed attached to this email.

21. The claimant was to return to work on a phased basis, working reduced hours in line with the advice of the claimant's GP. The claimant, it was noted, also asked about reducing his hours on a more permanent basis and the claimant was told about how to make a request for flexible working.

22. The claimant did not disagree that this was an accurate summary. He received and read the grievance policy. When put to him that, therefore, it was clear that it was for him to put his grievance in writing, he said that he believed that Mr Miller was dealing with this matter, that he had said he would and said that he had had further conversations with Mr Miller. He alleged that he had asked Mr Miller for updates on the grievance and had been told that he was dealing with it. The claimant accepted that he put nothing in writing chasing Mr Miller for any form of response. The tribunal does not accept that he did any chasing up. On further cross examination about why he had not put a grievance in, the claimant said he was worried about the consequences and did not want to be victimised by the respondent. He felt that he already had been by his earlier suspension. He did not respond that he had in fact raised a grievance.

23. The claimant's team leader, Mrs Simpson conducted a return to work meeting with the claimant on 17 November 2017. The claimant confirmed that whilst he accepted that the information produced from that meeting was accurate, it was inaccurate in the sense that he had not been absent due to sickness such as to require a return to work meeting. It was recorded that the claimant had been suspended on 5 August, that in total this was for 3.5 months and that he had gone into "a bad mental state". Mrs Simpson understood that there had been a period of suspension, but then sickness before his return to work. Mr Miller's aforementioned email of 8 November referred to suspension being lifted at that point. The claimant had already notified the respondent on 26 September that he was unwell. It was recorded that the claimant had submitted a flexible working request to reduce his hours due to his stress levels. The claimant agreed with this record. A meeting was then held with Mrs Simpson and Sam Baxter, a Business Manager who took the lead on issues of flexible working, to discuss making alterations to the claimant's shifts through the respondent's flexible working policy. The claimant agreed that part of his reason for seeking an adjustment was to do with childcare arrangements. Also, his ability to spend time with his children would improve his mental health.

24. Ms Baxter wrote to the claimant on 16 December 2017 confirming that from 8 January 2018 the claimant was to reduce from 37.5 to 25 hours each week, working 4 hours, Tuesday – Friday and 9 hours on Saturdays. This was subject to a 3 month trial period. There was in fact no review until September 2018.

25. The claimant's evidence was that he had a conversation with Mr Taplin, who had taken over as his team leader on Mrs Simpson's absence on maternity leave, in the period from February to April 2018 about the possibility of him being put on a training module for house moves and also for TV services. His evidence was that he was told that Mr Taplin could not put him forward because he was working on reduced hours. Mr Taplin denies ever making such a comment. The claimant thought working on such work streams to be lucrative. The evidence does not suggest that people engaged in such work earnt significantly more, in circumstances where more commission was available for, in particular, house moves but that work tended to involve longer calls and more paperwork than the ordinary retention calls. It appears that the next opportunity for house moves training arose in May when the claimant was absent due to sickness, as described below. Mr Taplin said that names were simply passed to scheduling, who decided who was to be trained and informed the relevant team leader. He had no choice in the matter. The tribunal accepts that.

26. The respondent held a 21st corporate birthday party for itself in Sheffield in April 2018. The claimant drove there with a colleague, Mr Jemal Cohen, and stayed overnight. They both accepted that they drank too much and that the claimant was unable to drive the following morning. They were due in at work at 9:30am but arrived only at around 2:00pm. The claimant telephoned Mr Taplin in the morning. He told the claimant to get into work when he could. The claimant thought that 2 other employees, Angelina (on his team) and Farris (from a different team), had also arrived late at work albeit he was unaware how late, just that it was not as late as him. Mr Cohen gave evidence that Angelina and Farris were also late (he said that he had asked them if they had been late, which he said they confirmed) but were not disciplined. He did not ask how late they had been. There is no evidence of their lateness.

27. The claimant was then absent from work for several days from 1-5 May. Mr Taplin conducted a return to work meeting with him on 9 May. The claimant attributed the soreness of his throat to vomiting after the party, but said that he was also experiencing stress due to an employment tribunal claim he had taken against a previous employer which was coming up to hearing. The claimant referred to an ongoing prescription for antidepressants and was asked if there was anything the respondent could do to support him through this time.

28. Mr Cohen attended an informal fact finding meeting with Mr Taplin on 12 May regarding lateness in attending work. There had also been a further occasion of Mr Cohen's lateness on 8 May, also the result of drinking too much the day before. He was issued with a Record of Discussion rather than a disciplinary warning. Mr Cohen is black.

29. The claimant maintained that he had also been threatened with some form of conduct hearing on his own return to work. The claimant said that whilst it was omitted from the notes of the return to work meeting, he was told at the end of that meeting that he would be put into a formal conduct disciplinary for his lateness after the party. He said that Mr Taplin said that he had been told to do

this by his own manager, Andrew Gallagher. The claimant was absent from work due to sickness again immediately after the meeting on 9 May until he returned on 21 July 2018.

30. Mr Taplin said that race played no part in his decision making regarding the claimant at any stage. He assumed that Angelina would identify as being white, but didn't recall that she had been late. He said that he was himself in an interracial relationship.

31. It was the claimant's case that Mr Taplin constantly telephoned him during his period of sickness. He said that he had lost count of how many calls had been made. He agreed that some calls he did not answer. When he did answer, he said that he could not recall what was discussed. Mr Taplin wrote to the claimant on 27 June saying that they had been unable to contact the claimant, having tried on several occasions. He referred to the policy that employees maintain regular contact during any periods of absence and enclosed the sickness absence policy. The claimant was asked to contact Mr Taplin on receipt of this letter. He was also directed to a telephone number for the respondent's employee assistance programme. The claimant said that he did respond to this communication and said that his absence was covered by a sick note. The claimant denied that he was ignoring calls, but said that, if he had more than one call, he would consider that harassment. He should not need to speak to the respondent every day.

32. The claimant raised a grievance with the respondent on 20 July 2018.

33. Mr Taplin conducted a return to work meeting with the claimant on 24 July 2018. The claimant asked if it was possible to increase his hours of work during the school holidays. Mr Taplin said that this was unlikely, but he could ask the question in his flexible working review with Ms Baxter. At the same time, the claimant was reporting stress and anxiety which had added to his condition of depression. He attributed his condition to the employment tribunal claim against his previous employer and also referred to work-related stress and his recently raised grievance. As part of a phased return, the claimant was going to be kept away from customer facing duties until 29 July. Mr Taplin referred to struggles in keeping in touch with the claimant during his absence. The claimant advised that he was unaware that he had to maintain contact and said he did not listen to the voice messages Mr Taplin had left. The claimant was upset at receiving a letter regarding lack of contact and perceived he was being pushed out of the respondent. Mr Taplin clarified that this wasn't the intention. The claimant agreed before the tribunal that this was a supportive meeting, "to some extent". He said that his complaint of harassment (about contact during sickness) might have been raised over the telephone to Mr Taplin rather than at this meeting.

34. The claimant attended a review meeting on 4 September 2018 with Mr Taplin and Ms Baxter to discuss his flexible working arrangement. The claimant said that the current arrangement was working for him, but asked if he could make

an amendment. He was told that if the respondent did so, that would be the only one allowed for a period of 12 months. The claimant raised that his Saturday shift was a long one, but was good for the money. He was considering dropping his Tuesday shift to avoid childcare costs. The claimant agreed that his consideration of reducing hours had nothing to do with his health. When asked if he was sure that he didn't wish to look at changing the Saturday hours (the claimant had raised the possibility of additional breaks, but was told that this would mean a later finish time) he said to leave it as it was as he'd prefer the Tuesday off. The claimant referred to him looking forward to house moves training and said that he would be flexible to ensure that the training could be undertaken as it would not necessarily align with his shifts. Towards the end of the meeting, the claimant said that it might be best for him to stay on his existing hours.

35. At his grievance investigatory meeting with Lisa Brandwood, Business Manager, on 2 October the claimant said that he had been told by Mr Taplin that he was going to go to a conduct meeting. He went on, however, that he didn't think Mr Taplin was going to take any action. He was being pushed by his own manager, Andrew Gallagher. He said that Mr Taplin had told him that he did not have a problem but that Mr Gallagher was on his back. The claimant described Mr Andrew Gallagher as "the one with the problem" and said that he was "a racist".

36. A separate allegation of the claimant is that on 27 September, Mr Taplin suggested to the claimant that he had been smoking weed and questioned him about this. This was not, however, raised by the claimant with Ms Brandwood at their meeting 5 days later. The claimant said that was because they were discussing the other matters set out in his grievance and that it slipped his mind. He said that he had, however, seen Gemma Johnson who was the notetaker at the investigation meeting on the floor prior to the meeting and told her that there was more information he needed to add. There was no reference to this conversation in the claimant's witness statement. The claimant said that he had also told his union representative, Mr Rehman, about the incident in advance of the investigation meeting. Towards the end of the meeting, Ms Brandwood asked the claimant if he had any other examples of incidents where he felt his race had played a part. He said the incident had bothered him and he wanted to mention it, but just forgot at the time. The claimant accepted before the tribunal that he had taken Mr Taplin's smoking weed comment at the time to be an example of racial stereotyping. The claimant agreed that his evidence was that, when Mr Taplin had made this comment, he had told him that he was going to raise a grievance.

37. In questions from the tribunal, the claimant said that he had spoken to Gemma Johnson, after rather than before the grievance meeting and that she said the matter would be picked up at the next meeting. Also, he then said that he had had a conversation with Lisa Brandwood in the canteen, where he said that there was an incident he needed to add, but without going into any details about the nature of the allegation. His evidence, was that she said that Mr Smith was

going to pick it up. The investigation into the claimant's grievance was relinquished by Ms Brandwood, due to the claimant's grievance now being against the level of management above Mr Taplin i.e. Mr Andrew Gallagher, another Business Manager. Mr Simon Smith, at the time a Senior Business Manager, was contacted by HR and asked to take over the grievance.

38. Mr Taplin, before the tribunal, denied that the smoking weed incident had occurred. He said that he would not be able to identify one person from a smell in the air. There had been cases where drug use was suspected within the respondent which had led to formal fact-finding meetings. He wouldn't have ever taken someone into a room on his own, not least due to concerns about his own safety. He had never accused the claimant of smelling of drugs and would never have done so openly on the floor. People who said otherwise were making it up. There were 2 distinct factions within the team.

39. Ms Baxter wrote to the claimant on 5 October 2018 with the outcome to his flexible working request. He was given the options of staying as he was, dropping the Tuesday or increasing his hours. Workable shift patterns were provided to the claimant in respect of the new options. The claimant confirmed to the tribunal that he decided to stay on his existing hours.

40. The claimant has alleged that the respondent refused to increase his hours and it was pointed out to him that the third option would have provided for that. The claimant's issue was, however, that the hours he was offered involved him working late into the evening on some shifts, whereas he had hoped to increase hours during daytime. He said he didn't complain about the outcome, because one of the options was to stay as he was which she said would involve less stress rather than putting complaints in.

41. On 12 October Mr Taplin emailed his Business Manager, Mr Naveed Hussain, about what he described as concerning behaviour from the claimant, where he said that the claimant had threatened him with a grievance for purposely not putting him forward for training on home moves and TV. He said that he had agreed that the claimant could be upskilled on TV, but would require training on house moves. He said that the claimant had said that Mr Taplin had told him he had less priority because of his flexible working and that he was being victimised. Mr Taplin said that this had no effect on priority when training individuals and it was usually the scheduling team that booked people onto training. Before the tribunal, the claimant recalled this conversation. The claimant accepted that, whilst still working on a part-time basis, he undertook the house moves training in April 2019.

42. Mr Taplin said that members of the team had ganged up on him and that relationships had broken down whilst he managed what was described as a loud and difficult team during Mrs Simpson's maternity leave and before she returned in October 2018.

43. Mr Smith received from Ms Brandwood the original grievance, notes from her initial meeting and various email correspondence with the claimant. Mr Smith then went on to hold grievance meetings with the claimant on 30 November 2018 and then on 4, 14 and 25 January 2019. He said that the reason for this number of meetings was that the claimant kept bringing matters up which hadn't been raised previously, causing the need for Mr Smith to carry out further investigation.

44. Mr Smith wrote to the claimant 29 October, introduced himself as the person now handling the grievance and invited him to a meeting. There was a delay initially due to the claimant's union representative being on holiday and then due to the claimant not being able to attend. In the meantime, Mr Smith had sought to investigate the grievance and had spoken to HR to enquire as to what information was still available given the passage of time in respect of some of the allegations. He had also interviewed Mr Andrew Gallagher on 14 November, who denied treating the claimant differently from anyone else.

45. When the claimant met with Mr Smith on 30 November there was discussion as to why Mr Miller had not taken any steps to investigate the allegation of race discrimination against Mr Michael Gallagher. Mr Smith said that he was unaware of this and it was explained that the matter had been raised with Mr Miller at a meeting in October. The claimant said that he had raised the issue with Ms Brandwood. After a brief adjournment, the claimant explained that Mr Michael Gallagher said that he was going to knock the claimant's "black head off. That wasn't addressed. It is very stressful." Mr Rehman then asked for a further adjournment. When they reconvened, the claimant said: "On 27th September was pulled into a meeting room by Liam Taplin and was asked if I had been smoking cannabis and if I had any on my personal possession…. No notes taken. Nobody else was taken in about this. Mentioned it when I came out of the room, all of my team heard me. They would be witnesses and all are still in the business. No reason to lie about it." Mr Smith recognised that this was new information and said it would be something he would look into.

46. It was put to the claimant that this account of the incident was at odds with how he now described it – where Mr Taplin had come over to the claimant's workstation and made the comment about weed in front of colleagues, before then taking the claimant off on his own to an office to repeat the allegation. The claimant said that what was recorded in the notes of the 30 November meeting was not word for word and not his words. The claimant agreed that he had seen the notes of this meeting subsequently, he thought around January 2019. He agreed he had never pointed to the notes being inaccurate.

47. There was then discussion regarding the claimant's suspension arising out of the incident with Mr Michael Gallagher. Mr Smith informed the claimant that the CCTV footage was no longer available.

48. After adjourning the meeting, Mr Smith subsequently asked Mr Naveed Hussain to investigate the smoking weed allegation against Mr Taplin. On 11 December he requested CCTV footage from 27 September, but was advised that it was no longer available.

49. On 12 December he interviewed Mr Taplin. He denied the allegation saying that he hadn't spoken to the claimant about drugs and that, if he was going to do so, he wouldn't have had that sort of conversation without a witness. Mr Taplin subsequently raised the issues he had had with the claimant regarding house moves training. Mr Hussain then proceeded to interview 9 of the claimant's colleagues.

50. On 21 December he interviewed Mr Assad Hussain. He said that he remembered that day. They were all sat in a row, the claimant called Mr Taplin over and Mr Taplin said he could smell weed. The claimant said it was not him and he said that the claimant was then taken into a room by Mr Taplin. He, however, subsequently spoke to Mr Naveed Hussain where it was noted that he then said that the claimant wasn't taken into a room. The incident happened on the floor.

51. Jordan Holdsworth said that he heard about the incident, but wasn't there himself. He said that everyone said there was a smell of weed and Mr Taplin went straight up to the claimant and said he could smell it and then took him into a meeting.

52. Mr Oliver Sidda said that he had heard bits but nothing specific he could think of. He then emailed Mr Naveed Hussain on 13 December saying that he honestly couldn't remember anything going on. Mr Raja Haidari said that he could not remember any incident. A colleague, Reece, said that he wasn't there and that the claimant had told him about incident out of work. His recollection was that the claimant told him that Mr Taplin had taken him into a room and said that he smelt of weed.

53. Sobia Rafiq said an incident definitely took place where she thought something was said about smelling of drugs. When asked if she had been there, she said she was trying to remember, but did know that it was said. She said that she didn't think it was fair for the manager to approach and single out an individual over allegedly smelling of weed, but then said it was hard to remember what she had heard and which memory was what. When asked if the claimant had spoken to her about it, she said that he would have - that was how she knew he was upset.

54. Tashan Benjamin said that he had not been in on the date in question. On 10 January Mr Naveed Hussain interviewed Angelina and explained the alleged incident on 27 September. She wasn't sure she had been at work on that day and had not heard any gossip about it. She said that this would have required a private conversation not one on the floor and said that, as a rule, Mr Taplin

was professional. Aqeel Hussain was then interviewed. When asked if the claimant had been approached at any point regarding the use of drugs in front of the team he said that he was aware of it. He said that to the best of his memory Mr Taplin came up to him and said something smells like weed. He couldn't remember if something was said about taking the claimant into a meeting. He didn't know if the claimant had then gone into a meeting with Mr Taplin.

55. Mr Cohen was not interviewed as part of the investigation (Mr Naveed said that there was no particular reason why not) but told the tribunal that Mr Taplin walked over to speak to the claimant, sniffed the air and asked him if he had been smoking weed and if he had any on him. Mr Cohen was on a call at the time. He said that Mr Taplin then asked the claimant to go to a meeting room. He said that the claimant returned from the meeting looking upset. Mr Cohen said that he had not thought to tell Mr Naveed Hussain what he had witnessed.

56. Mr Naveed Hussain's view was that each person described a different experience and version of events. He appreciated that he was asking them to recall a specific incident nearly 3 months ago but, even allowing for the passage of time, was concerned that there were clear discrepancies and this meant it was difficult to be clear on what had happened. He re-interviewed Mr Taplin again on or shortly before 9 January who repeated his denial that the incident had taken place. Mr Taplin emailed Mr Hussain on 9 January saying that he was starting to feel that he had been set up and that this was a malicious attempt from certain individuals within the team.

57. Mr Hussain was not able to understand why the claimant did not raise the issue earlier, including with himself as his second line manager or human resources.

58. Prior to the production of Mr Hussain's report, Mr Smith held a second grievance meeting with the claimant on 4 January. The claimant was told that he would be updated regarding the smoking weed allegation against Mr Taplin. Mr Smith hadn't been able to find any records of an allegation of racist abuse by Mr Michael Gallagher being escalated. Mr Rehman also raised the issue of Mr Taplin telling the claimant he could not do house moves training. Mr Smith said that he would look into this. The claimant also complained that Mr Taplin had unfairly singled him and Mr Cohen out over their lateness to work following the company celebration in April 2018.

59. A further grievance meeting took place on 14 January 2019. Mr Naveed Hussain's investigation was still ongoing. The claimant queried why the smoking weed incident had not been investigated before December. Mr Smith explained that it hadn't been raised by the claimant until 30 November. The claimant said that he did try to raise this with Ms Brandwood and that she said that Mr Smith would pick it up. Mr Smith had however obtained information from HR about another issue raised - the claimant's payment during his period of suspension.

60. Mr Hussain wrote to Mr Smith on 15 January with a report of his investigation. His conclusion was that it was not clear what the discussion had consisted of and that there was no evidence of the claimant being taken into a meeting room about the incident. He felt it was clear that some additional coaching/training was needed on the kind of conversations which could and could not take place on the open floor. The case had also highlighted the need to raise issues quicker, so that they could be addressed close to the time.

61. A final grievance meeting was then held on 25 January. Mr Smith again referred to no allegations having been raised about the smoking weed incident until 30 November 2018, 2 months after the event. The claimant said that he had mentioned it to Gemma Johnson on the sales floor who had told him to bring it up with Ms Brandwood. Mr Smith asked the claimant why he had not raised it then at the grievance meeting on 2 October 2019 or why he had not told his own Business Manager, Mr Hussain. He also explained that the witness accounts didn't match the claimant's accusations. Mr Smith also asked why he had previously waited until July 2018 to formally raise the issue of Mr Michael Gallagher's behaviour when he had first told Mr Miller about this in October 2017. The claimant repeated that he thought that Mr Miller had been dealing with it. Mr Smith adjourned the meeting to consider his decision on the grievance.

62. Mr Smith obtained on 25 January from Sam Baxter emails and correspondence regarding the claimant's move to flexible working hours.

63. He wrote to the claimant on 25 February 2018 listing 10 different points of grievance which had been raised in the original grievance and during subsequent grievance meetings.

64. A number of these related to the Michael Gallagher incident and in particular the claimant being disciplined, suspended for around 3 months whilst Mr Gallagher returned to work and a failure to investigate the allegation of racial harassment by Mr Gallagher. Mr Smith went through the Michael Gallagher incident and said that the claimant had accepted that his conversation with Mr Gallagher had escalated and become heated between them. The CCTV footage was obviously no longer available, but, on the basis of the information which did exist, there were two contrasting versions of the same event. He felt it was clear that there was a case for the claimant to answer, with the claimant himself admitting to approaching Mr Gallagher and then having a heated conversation about non-work related matters. He noted that the claimant was not issued with a formal warning. He could see why a disciplinary warning would have been inappropriate. This contrasted with the 12 month written warning received by Mr Gallagher which was more severe. The claimant had not appealed this decision.

65. Mr Smith appreciated that the claimant's suspension was fairly lengthy but, as there was no documentation on his file explaining this, he was unable to reach a conclusion. He accepted that Mr Gallagher had returned to work before the claimant but had no information as to why this was the case. There were two entirely separate disciplinary processes in respect of each of them. There was nothing which suggested that the suspension or its duration had anything to do with the claimant's race.

66. As regards the allegation of racial harassment, the first mention he could find of this allegation was during the disciplinary hearing with Mr Miller on 2 October 2017. Mr Miller had commented that the claimant hadn't raised this with Mr Holliday during the investigation into the incident. Mr Smith found that to be surprising. Nevertheless, he could not find any evidence that the matter had been investigated by the respondent once it was raised. Unfortunately, it had not been escalated to HR by Mr Miller. He did not know to whom, if anyone, Mr Miller had spoken. He agreed that the allegation had been mismanaged. He noted that Mr Gallagher and Mr Snowden were no longer with the respondent. He noted that he had apologised that this process had fallen down and could not be concluded for the claimant.

67. As regards the claimant being overlooked for or denied TV and house moves training, he said that this was demand driven and not always available. He could see that the claimant had been on a flexible working pattern since January 2018, but could see no evidence that the claimant had been overlooked because of this. He sought to clarify that there was no expectation that an adviser would earn more from doing this sort of work. House move calls would be longer and involve more paperwork. The commission therefore balanced out when compared to ordinary retention work. If the claimant wanted to undertake the training, this would be considered, subject to business and customer demand.

68. As regards the treatment of the claimant following his late arrival at work after the company celebration, the claimant admitted that he had been late to work because he had drunk too much. Mr Smith struggled therefore to understand how the claimant felt he had been unfairly treated. The business would be justified in taking at least some action against an adviser who was late for work without good reason.

69. Whilst he could not share this with the claimant for reasons of confidentiality, he had looked at Mr Cohen's records and saw that he had had 3 instances of lateness and had therefore triggered action under the respondent's disciplinary policy. Mr Smith was clear that the action against Mr Cohen had nothing to do with his race. He had seen no evidence of any action actually been taken against the claimant as a result of his lateness. This had been discussed at the return to work meeting on 9 May 2018. but this appeared to be a supportive meeting. Neither Angelina nor Farris had been logged as late on the day in question. Nor had they hit any triggers for disciplinary action.

70. As regards the smelling of weed incident, most of the people spoken to could not remember anything happening clearly or at all. Some witnesses had suggested that Mr Taplin did make a comment about weed but thought that it was not aimed at anyone specifically. Most of the statements said that they had heard this had happened rather than being first-hand witnesses. One had said that he had heard this from the claimant himself outside of work. He did not think that any statement said that the claimant had been taken into a room on his own. The claimant had not raised this as a complaint until well after the event. He did not raise it when he met as part of his grievance with Ms Brandwood on 2 October 2018. He found this surprising since it was just a few days after the incident. The claimant had said that he had spoken to Gemma Johnson (without specifics) who had advised the claimant to raise it at the grievance meeting which he failed to do so. He had been unable to get a clear enough picture of what happened on 27 September for any firm conclusion. He had no evidence that Mr Taplin had acted inappropriately because of the claimant's race. The complaint was not upheld.

71. On 11 March 2019 the claimant appealed the grievance decision. Mrs Clare Smith was asked to hear this and received all relevant documentation. The appeal meeting took place on 5 April 2019 and she went through his points of appeal which covered the Michael Gallagher incident and aftermath, flexible working, being overlooked for house moves and TV training, unfair treatment in relation to the lateness following the celebration party and the allegation against Mr Taplin arising out of the smoking weed incident. The claimant was sent a copy of the hearing notes on 11 April and made some comments. Due to holiday absence Mrs Smith was unable to properly focus on further investigation she needed to make until the start of May 2019. She kept the claimant updated on her progress and why this was taking longer than he might normally expect. Mrs Smith explained that due to the historical nature of some of the incidents raised she struggled to get hold of relevant documentation. She was told that CCTV footage was only stored for 90 days and it was not available for the 27 September 2018 smoking weed incident. The claimant had previously left it too late to request a copy of the footage from the earlier Michael Gallagher incident. As regards the length of suspension, she reviewed the documentation and interviewed Mr Ryan Miller. He confirmed that he had tried several times to arrange a disciplinary hearing and to do a home visit. However, the claimant had been ill during this time and wanted to wait until he was better before attending a disciplinary hearing. In contrast Mr Gallagher had been able to attend a hearing sooner and therefore to return to work before the claimant. She was satisfied that the claimant's illness after the incident and the delays caused to the disciplinary process was the reason why he had been off work for so long.

72. In terms of the incident itself, she was limited by the effects of the lapse of time. The allegation of racist language by Mr Gallagher had not been raised until the disciplinary hearing on 26 October 2017. She noted that the claimant had initially said that Shaun Snowden had advised him that Michael Gallagher had made the remark to him in the canteen area. However, he had later said that

Natalie Milner and Raja Haidiri would be witnesses as the racist remark was reported to him personally at his pod. Mrs Smith was only able to speak to Raja Haidiri who firstly said that he could not remember and subsequently came back to her to confirm that he had not witnessed the racist remark. Mr Miller said that he had spoken to witnesses at the time, but there was no evidence to support the allegation. No documentary confirmation was however available of any discussions. Mrs Smith concluded therefore that Mr Simon Smith's original findings were correct i.e. that there was no evidence to support the allegation.

73. She reviewed the claimant's request for flexible working which had been granted. She did not understand that this was related to allegations of racism or the handling of the claimant's case.

74. Mrs Smith had some knowledge of scheduling and, as regards the house moves and TV training, obtained confirmation that less than 19% of the Leeds workforce was in fact multiskilled. This is because the demand in these areas was small and it was better for advisers to focus on a smaller number of key areas. It was therefore absolutely common practice for everyone not to be skilled in those areas. She also saw that there was no real difference between the proportion of part-time staff who were multiskilled when compared to the number of full-time staff. She concluded that the claimant missing out on training was not because of him being on a flexible working arrangement.

75. She found that there had been 3 home moves training days in May 2018 but the claimant had been absent due to sickness at this time. There had been subsequent training in October 2018 when the claimant had been at work. She could not say for certain why the claimant hadn't been put on this October training, but could see no evidence that he had been deliberately excluded. It was explained to her by scheduling that people were selected for the training programme based on their performance and the coverage that they could provide in terms of their shift patterns when compared to where there was customer demand. It didn't matter if the adviser was part-time or full-time, provided that they covered the gaps that the business was looking to. She disagreed with the claimant's view that there was a financial benefit in being trained on these additional areas.

76. As regards the lateness following the celebration party, she found the claimant's position to be difficult to understand and contradictory. There was no evidence to suggest that the claimant had been threatened with a formal conduct process and, in fact, the documentation backed up what the claimant had said about his original phone call to Mr Taplin i.e. that Mr Taplin had been supportive. In her view, Mr Taplin had been lenient because the claimant's actions were unprofessional and could reasonably have been dealt with as a conduct issue. There was certainly no evidence that the claimant been singled out or treated unfairly due to his race.

77. She considered that the first time the claimant had raised the smoking weed incident was 2 months after the incident at the grievance meeting on 30 November 2018. There was no evidence that he had raised this beforehand with Gemma Johnson. He had not raised it when he could have at the initial grievance meeting with Ms Brandwood on 2 October. Given the proximity in time to the incident, she didn't understand why it had not been brought up at that time.

78. She looked at Mr Hussain's investigation report. She was satisfied that there had been a thorough investigation. Looking at the statements, she felt that many of the witnesses had simply heard gossip about what had happened or had been told by the claimant what had happened, but had not been there. None of the witnesses confirmed seeing the claimant being taken into a room by Mr Taplin. Two witnesses confirmed that Mr Taplin had stated he could smell weed on the claimant. The accounts were extremely muddled however. Mr Assad Hussain started by saying that the claimant was taken into a room and then corrected this to say that he hadn't been taken into a room. Ms Rafiq started by saying that she knew it had been said, but by the end of the meeting couldn't remember if she had been there or not. The claimant said that his scheduling would prove that he had been taken into a room by Mr Taplin but, on checking, there was no such corroboration. Against all this, Mr Taplin was adamant that the incident hadn't happened and viewed this as his reputation being tarnished because he had fallen out with various members of the team. Mrs Smith couldn't say for certain what had happened and could not uphold this part of the claimant's grievance. On 21 June 2019 she emailed the claimant her decision letter and rationale.

79. On 19 October 2019 the claimant said that he went out to pick up a lunch delivery for him and his colleagues. When he returned to his desk he found that his screensaver had been changed to a picture of Afroman who he described as an African – American music artist who was famous for a song: "because I got high". At first the claimant thought that his colleague, Jordan Holdsworth, who sat next to him, had done this. He confronted him. Mr Holdsworth denied doing it and explained that he had witnessed Sarah Simpson putting the screensaver on. The claimant said that she was aware that in his previous employment a manager had passed this image around as a derogatory reference about the claimant and related to his race. He believed that the image had been selected by Mrs Simpson to remind him of this and to cause him offence. Rather than raise a grievance, the claimant, who was absent due to sickness from 30 November 2019, raised this matter for the first time by amending his existing employment tribunal complaint.

80. Mrs Simpson's evidence to the tribunal was that the claimant's suggestion that she had been responsible for the screensaver was a lie. When she had left the claimant's desk it was not there. When asked if someone else could have done it, she said that was not possible because she "100% remembered" locking the screen. No one else could have locked it then as they would have had to have known the claimant's password. She did not know it. She recalled the claimant returning to his desk and that there was no reaction from him. Whilst accepting

that it was possible that she did not see any reaction, she said she was sat only around 10 metres away. She said that her team were loud and she would have been close enough to hear any conversation about such a matter. She said that the claimant had never referred to Afroman in the context of issues he had had in his previous employment. She didn't know who Afroman was. She had overheard conversations and laughing within the team, when the claimant had worn a baseball cap and the team used to say that he had hair like Afroman. The claimant had joined in on this laughter. When interviewed by Mr Hussain, Mrs Simpson recalled such conversations about Afroman. She was shown the claimant's picture of the screensaver and his account of the incident. On the day after the interview, Mrs Simpson said that she had become visibly upset (due to the allegation being made) towards the end of her shift. The claimant had been a friend and she could not understand why, in her eyes, he had turned against her. She was aware that the claimant had brought a tribunal claim against the respondent – he told her on her return from maternity leave. She only knew that it related to Mr Taplin's dealing with the claimant's lateness issue.

81. The screensaver allegation was picked up by Mr Hussain as well as the claimant's additional complaints about his sickness absence record and being refused breaks during overtime. He was charged with carrying out an investigation.

82. He met with Sarah Simpson on 16 January 2020. She was adamant in her denial of changing the claimant's screensaver. She said that she sometimes would sit with advisers at their desks, but only when doing a web chat coaching or escalation. The claimant had requested CCTV footage but this was again no longer available. Mr Hussain confirmed this in an email to the claimant of 30 January. Mr Hussain had written to the claimant on 21 January seeking to arrange a grievance meeting. This was originally scheduled for 30 January but the claimant informed him on the morning that he was unable to attend due to ill-health. The meeting was arranged for 11 February, but the claimant did not attend. Mr Husain emailed the claimant on 13 February to ask when the claimant would be able to attend, but received no reply. On 4 March 2020 the claimant did make contact regarding a welfare meeting which Sarah Simpson was seeking to arrange and saying that he was hoping to see another team leader due to the breakdown in his working relationship with Mrs Simpson. Mr Hussain replied confirming that he had assigned Tom Horner to oversee the claimant's absence.

83. Mr Hussain on 12 March 2020 emailed Ms Simpson to ask for comments on allegations which had been further particularised as part of the employment tribunal process. She replied to say that she had been sat at the claimant's desk and continued to do a chat with a customer on his computer whilst he had gone downstairs to collect food for the team. However, she insisted that once the chat had finished she had closed it and locked the claimant's screen. She had not changed the screensaver.

84. Before the tribunal the claimant suggested that Ms Rafiq had witnessed Mrs Simpson change the screensaver. Ms Rafiq was called to the tribunal by the claimant under a witness order. She had no recollection of ever seeing that. She said that if she believed that the claimant had been racially harassed, she would speak out. If someone "was trying to make a quick buck" she would speak out. She referred to the claimant as someone of questionable character. It was put to the claimant that he had waited to raise this allegation, knowing that there would then be no CCTV footage available. He denied that he had had this in mind in terms of timing. He said that he had not called Mr Holdsworth to give evidence as he was now supporting Mrs Simpson.

85. Mr Hussain emailed the claimant again on 16 March regarding a meeting but the claimant responded on 17 March to confirm that Mr Hussain should feel free to continue in his absence. Mr Hussain responded to say that he would therefore review the grievance without a meeting. He gave the claimant an opportunity to make any written submissions. The claimant did not reply.

86. The claimant had also alleged that he had been denied breaks when working overtime. There was no reference to this allegation in his witness statement evidence. In particulars provided to the employment tribunal he had, however, stated that on or around 29 October 2019 he had requested to work overtime. The overtime request was approved, but he was not scheduled a break. This was the case for all 3 shifts he was to work as overtime, albeit he said that he did not work the final shift. The claimant's concerns were investigated by Mr Naveed Hussain who emailed a number of questions to Mrs Simpson who then responded with her explanation on 12 March 2020. According to that, the claimant finished his normal hours of work at 12:00pm. After a compulsory shift gap of half an hour, the overtime was therefore to run from 12:30 until 6:00pm. The claimant was paid for 5 hours with the other half hour in the period as a break. Mrs Simpson pasted into her email the claimant's overtime sheet for the relevant dates.

87. The claimant's case was that this schedule had been fabricated after he had raised the allegation. He said that on one day he worked straight through from 12:00pm and did not take the shift break. He said he was not told he was entitled to one. He was not given any further break and said that he had asked Mrs Simpson on his next shift why he had not had a break. Mrs Simpson accepted that he had raised this and that she messaged scheduling that day, but that they did not get back to her. When put to the claimant that he knew he worked for 5 ½ hours but was only paid for 5 and that, therefore, why did he not just take a break, he said that it was because it had not been explained to him. He saw others taking breaks but none had been scheduled for him.

88. It was accepted ultimately that the day in question was 15 October 2019. On the following day the claimant said that he was allowed to leave early at 3:00pm. He said that, at the time, rather than complain about being victimised to Mrs Simpson, he was focused on his health and the pressure he was under. He did not work the third overtime shift because he was "shattered".

89. The claimant also alleged that on or around 30 November 2019 he became aware that his sickness record had, in his eyes, been falsely inflated on the management system. The claimant's view was that this had been done on purpose by Mr Taplin. This, he said, made him more susceptible to disciplinary action. Again, Mr Hussain raised this with Mrs Simpson on 12 March and she responded that the claimant had brought this to her attention. After looking at his record she considered that time off had been added in wrongly. In January 2018 he had had a formal flexible working agreement and was put on 25 hours. From March 2019 his sickness absence had been added in wrongly as representing his previous 37.5 hours. She said that she rectified this, the records were sent to payroll and the claimant received a payment of arrears of wages in January 2020 in the sum of £284.40.

90. Mr Hussain reviewed all of the evidence and confirmed his decision on 26 March 2020. He rejected the allegations, including regarding the screensaver. The only evidence to support this was a screenshot which the claimant had copied to the respondent's legal team on 13 January 2020. This showed that the screensaver was on a computer screen, but not what had happened. There was no corroborating evidence. A witness the claimant had identified at the time, Aqeel, was no longer in the business and the claimant had also waited nearly 3 months to raise the allegation. He was therefore very limited in the information available to him. Mrs Simpson strongly denied the allegations and, whilst there were some learnings from a compliance point of view in terms of her working on advisers' computers when they were not present, he felt she had been honest and consistent in her version of events.

91. On 30 March 2020 he received an email from the claimant stating that he had never raised a grievance and that the outcome letter had come as a surprise to him.

92. At one point in cross examination the claimant was asked to clarify which individuals within the respondent's employment he believed had been racially discriminating against him. He listed them as being Michael Gallagher, Liam Holliday, Ryan Miller, Sarah Simpson, Liam Taplin, Andrew Gallagher, Lisa Brandwood, Mr Simon Smith and Mr Naveed Hussain. At the end of his cross examination he said that he wished to add to that list Mr Stephen Hall, the respondent's solicitor in these tribunal proceedings. When put to him that, if he disagreed with someone, he was very willing to label the cause as being his race, the claimant said that he "felt like it is because I am black".

93. A number of questions were raised regarding the accuracy of the respondent's notes, particularly of the grievance meetings conducted by Mr Smith. At the start of the final day of hearing there was further disclosure of a number of emails which showed that the notes of the grievance meetings had been sent to the claimant, relatively shortly after the meetings take place.

Applicable law

94. The Claimant complains of direct race discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(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."* In terms of a relevant comparator for the purpose of Section 13, *"there must be no material difference between the circumstances relating to each case".*

95. The Act deals with the burden of proof at Section 136(2) as follows:-

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes 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 provisions".*

96. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

97. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At the second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

98. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. The Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

99. The complaint of harassment is brought pursuant to Section 26 of the Equality Act 2010 which provides that:

> *"(1) A person (A) harasses another (B) if -*
> *A engages in unwanted conduct related to a relevant protected characteristic, and*
> *the conduct has the purpose or effect of—*
> *violating B's dignity, or*
> *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—*
> *the perception of B;*
> *the other circumstances of the case;*
> *whether it is reasonable for the conduct to have that effect."*

100. Harassment will be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

101. A claim based on "purpose" requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what the true motive or intent actually was. The person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift from accuser to accused.

102. Where the Claimant simply relies on the "effect" of the conduct in question, the perpetrator's motive or intention – which could be entirely innocent – is irrelevant. The test in this regard has, however, both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that requisite effect. The fact that the claimant is peculiarly sensitive to the treatment accorded him does not necessarily mean that harassment will be shown to exist.

103. Harassment and direct discrimination complaints are mutually exclusive. A claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct – 'detriment' does not include harassment (Section 212(1) of the 2010 Act).

104. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-

> *"(1) A person (A) discriminates against a disabled person (B) if –*
> *A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

105. The duty to make reasonable adjustments arises under Section 20 of the 2010 Act which provides as follows (with a "relevant matter" including a disabled person's employment and A being the party subject to the duty):-

> *"(3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

106. The tribunal must identify the provision, criterion or practice applied, the non-disabled comparators and the nature and extent of the substantial disadvantage suffered by the claimant. 'Substantial' in this context means more than minor or trivial.

107. The case of **Wilcox –v- Birmingham Cab Services Ltd EAT/0293/10/DM** clarifies that for an employer to be under a duty to make reasonable adjustments he must know (actually or constructively) both firstly that the employee is disabled and secondly that he or she is disadvantaged by the disability in the way anticipated by the statutory provisions.

108. Otherwise in terms of reasonable adjustments there are a significant number of factors to which regard must be had which as well as the employer's size and resources will include the extent to which the taking the step would prevent the effect in relation to which the duty is imposed. It is unlikely to be reasonable for an employer to have to make an adjustment involving little benefit to a disabled person.

109. If the duty arises it is to take such steps as is reasonable in all the circumstances of the case for the respondent to have to take in order to prevent the PCP creating the substantial disadvantage for the claimant. This is an objective test where the tribunal can indeed substitute its own view of reasonableness for that of the employer. It is also possible for an employer to fulfil its duty without even realising that it is subject to it or that the steps it is taking are the application of a reasonable adjustment at all.

110. Pursuant to section 27 of the Equality Act 2010:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*

B does a protected act; ….

111. Sub-paragraph (2) of this section provides:

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

(a) bringing proceedings under this Act;

112. In this case there is no dispute that the claimant indeed did a protected act by his bringing of these Employment Tribunal proceedings where, amongst other things, it was alleged that he had been unlawfully discriminated against for reasons relating to race.

113. To succeed in a complaint of victimisation, the detriment must be "because" of the protected act. There is an initial burden on the claimant to prove facts from which the tribunal could conclude, in the absence of any other explanation, that the respondent has contravened Section 27. The burden then passes to the respondent to prove that discrimination did not occur. If the respondent is unable to do so, the tribunal is obliged to uphold the discrimination claim.

114. It is clear from the authorities that a person claiming victimisation need not show that the detrimental treatment was meted out solely by reason of the protected act. If protected acts have a "significant influence" (more than trivial) on the employer's decision making, discrimination would be made out.

Additional factual findings and conclusions

115. The tribunal deals firstly with the claimant's complaints of race discrimination. These are brought mainly, in the alternative, as complaints of harassment and/or direct discrimination.

116. The claimant firstly, complains of Mr Michael Gallagher stating on 5 August 2017 that "he was going to knock his black head off". The tribunal has not heard from Mr Gallagher. Nor was it the claimant's case that he had heard the comment himself. His case is that the comment was made to Mr Snowden, from whom the tribunal has again not heard. The tribunal has considered a written statement of Ms Milner corroborating Mr Snowden having informed the claimant of the comment, but that evidence can be given little weight, given the nature of the factual dispute and that she was not present before the tribunal to be cross-examined on her evidence.

117. There are significant issues in this case which go adversely to the claimant's credibility overall. There is a theme of the claimant raising allegations a significant time after the events complained of and then expecting the respondent to investigate these without the claimant providing information which might have assisted it to do so. Regularly the claimant has made

baseless assumptions as to what the respondent might be doing in respect of concerns raised. A pattern of delay is evident where time has expired resulting in the deletion of any potentially corroborative CCTV evidence. The claimant has not brought allegations forward despite having the opportunity and the benefit of trade union representation in circumstances where the claimant maintains that his union representative was well aware of the allegations. The claimant has not always given consistent accounts of events. Some of these factors are clearly present in this particular allegation of the comment made by Mr Michael Gallagher.

118. The claimant did not raise this allegation until a number of months after the alleged incident. He had an obvious opportunity to raise it on the day of the incident at the second fact-finding meeting. The claimant maintains that he was told by Mr Holliday not to discuss the incident with anyone else. The tribunal does not accept that the claimant did or could reasonably have taken that to be a discouragement regarding raising Mr Gallagher's alleged comment. The instruction by Mr Holliday was not made until the latter part of the second fact-finding meeting, when it would have been expected that the claimant would raise such a serious allegation at an early stage. Further, the claimant was saying that the allegation had been brought to him, not that he had initiated a conversation about it with anyone. The claimant says that he then informed his union representative - the tribunal does not accept that, if he had, his representative would not have ensured that this was raised at the earliest opportunity. In fact, the matter was only communicated after a further adjournment in the disciplinary hearing which took place over 3 months later on 26 October 2017.

119. The tribunal cannot in all the circumstances and on the evidence available make a finding that Mr Gallagher made the comment alleged such that the claimant's allegation of race discrimination/harassment in this regard can go no further.

120. The claimant complains that Mr Holliday's investigation was biased as CCTV footage showed that Mr Gallagher was the aggressor, but that the claimant was also suspended. The key complaint is indeed that the claimant was suspended at all. However, this was a genuine suspension in circumstances where there were two conflicting accounts and the need to investigate. The tribunal accepts that both the claimant and Mr Gallagher were suspended, as Mr Holliday explained at the time, for their own good. Whilst the CCTV footage may have shown that Mr Gallagher was the significant aggressor, there was a need to understand the claimant's initial approach to Mr Gallagher and what might have provoked the altercation. Suspension in the circumstances would not have been a neutral act unless both were indeed subject to suspension. Of course, no one within the respondent was aware of any allegation of racist language at the time of the suspension. The treatment of the claimant cannot be said to be less favourable and, in any event, there are no facts from which the tribunal could reasonably conclude that the claimant's suspension was in any way whatsoever related to his race. Indeed,

the tribunal accepts the respondent's explanation that there were issues in respect of both Mr Gallagher and the claimant to investigate and that it was appropriate that they both be suspended from work until an investigation was concluded.

121. It is accepted that the claimant was suspended for a lengthy period and longer than Mr Gallagher. The claimant next alleges that this difference in treatment was an act of race discrimination. The incident occurred on 5 August 2017 and the claimant was invited on 14 September to a disciplinary hearing, scheduled to take place initially on 19 September. The tribunal has no evidence that matters up to that stage progressed any more quickly in respect of Mr Michael Gallagher. Mr Gallagher attended a disciplinary hearing and was given a disciplinary warning. He then returned to work. His suspension ended because his disciplinary case had been dealt with. Again, there was no issue at this stage, that the respondent was aware of, to raise with him as regards racist language.

122. Whilst it is not clear why the claimant's disciplinary hearing did not go ahead on the date originally arranged, Mr Miller made immediate attempts to rearrange it anticipating that unless this could be done quickly there might be a longer delay because he was about to depart on a period of holiday. There is evidence of Mr Miller seeking to call the claimant and leaving messages, but receiving no response. The balance of evidence is that after Mr Miller's return to work there was further timely communication to seek to arrange the meeting, but that a delay was caused due to the claimant and his union representative requiring additional time. There was effectively a delay of around 6 weeks before the claimant's disciplinary case could be heard. The claimant made no complaint at the time as to how long this was taking. There are no facts from which the tribunal could reasonably conclude that the difference in lengths of suspension was because of or related to race. The tribunal accepts the respondent's explanation as untainted by discrimination.

123. The claimant says that, when he told Mr Miller about Mr Michael Gallagher's comment, no action was taken and no statements gathered as part of any investigation into this complaint of race discrimination. Whilst it is unclear if Mr Gallagher was still employed within the business at this point, the tribunal would ordinarily expect an accusation of racist language to be investigated. It would note again, however, that this allegation was made a significant time after the event, when the claimant had had ample opportunity to raise it at an earlier stage.

124. The allegation was raised for the first time on 26 October 2017. Mr Miller sent to the claimant the outcome of the disciplinary case against him on 8 November. He also emailed him on that date referring to the new allegation, informing the claimant that it should be raised on his return to the workplace when it would be fully investigated. The claimant in fact met with Mr Miller on 9 November 2017 before his full return to work. This was followed by further email from Mr Miller noting that the claimant wished to make the complaint formal. To

assist the claimant in doing so, the respondent's grievance policy was provided to the claimant which the claimant says he read. The claimant did not in fact raise any formal grievance until the matter was raised in a grievance covering this and a number of other issues on 20 July 2018.

125. The claimant cannot credibly say that he was in this interim period expecting anything to happen. He did not ever chase Mr Miller as to progress. He did not say that he had in his witness statement evidence. His assertion that he had queried the progress of any investigation with Mrs Simpson appeared as an embellishment and was not a point on which Mrs Simpson was challenged in cross examination.

126. Again, there are no primary facts from which the tribunal could reasonably conclude that Mr Miller's failure to investigate the matter was because of the claimant's race or at all related to his race or colour. It has been explained to the tribunal's satisfaction that the ball was thought to be firmly in the claimant's court as to whether he wished to raise this late complaint and that the reason why there was no investigation was because the claimant did in fact not chose to raise it for a significant period thereafter. Had the claimant thought the position to be any different, it is not credible that he would have let matters rest as, on the facts, he did, until July 2018.

127. The claimant maintains that he was discriminated against by Mr Miller on 8 November 2018 issuing him with a record of discussion, regarding the Michael Gallagher incident, for the claimant raising non-work related matters with him. This was an informal sanction at the lowest level possible in circumstances where Mr Gallagher received a written disciplinary warning. The claimant's conduct was not comparable with that of Mr Gallagher's and hence the claimant indeed received a lesser sanction. There was, however, a genuine basis for the respondent issuing him with a record of discussion in circumstances where the altercation had started by the claimant approaching Mr Gallagher on the floor of the workplace to raise his complaints regarding Mr Gallagher's treatment of the claimant's property. There are no facts from which the tribunal could reasonably conclude that the claimant's treatment was because of or in any way related to his race. In any event, the tribunal is satisfied with the explanation that the claimant received a sanction which was genuinely felt appropriate in the light of his conduct in bringing private issues into the workplace.

128. The claimant next complains that he and a black colleague, Mr Cohen, were told they would be disciplined for arriving late on 28 April 2018 after a staff party in contrast to a number of others who were late and who were not threatened with disciplinary action - Angelina who is white and Farris who was said to be British Asian in terms of national/ethnic origin.

129. Fundamentally, the tribunal has not concluded that the claimant was threatened with a conduct meeting. The issue of his lateness was discussed at

a return to work meeting, but in a supportive manner without any reference to potential disciplinary action. It is perhaps surprising that the claimant was not disciplined given the degree of lateness and lack of legitimate excuse. Few employees are likely to be dealt with sympathetically who are late to work due to being too drunk to get into work on time and where they seek to attribute blame to the availability of free alcohol at the employer's event. The claimant was around four and a half hours late. There is no evidence that Angelina and Farris were late or, if so, how many minutes late they might have been. Mr Taplin's evidence, rejecting any considerations of claimant's and Mr Cohen's race, was convincing. Mr Taplin would not have been responsible for Farris in any event and did not recall that Angelina had been late. Mr Cohen was dealt with by way of a record of discussion, but in circumstances where he had been late on a number of occasions, including a further occasion after the celebration party where he had been late having drunk too much at a family event.

130. With a lack of finding of any detrimental treatment, this complaint is unfounded, but in any event the tribunal is satisfied with the respondent's explanations for the way in which the lateness issue was dealt with which was, again, not because of or related to the claimant's race.

131. The claimant complains that the respondent did not deal adequately or at all with his grievance of race discrimination submitted dated 20 July 2018. This is brought as a complaint of direct discrimination only. It also overlaps with the separate allegations regarding the smoking weed and screensaver allegations. The tribunal deals with those separately below. Indeed, the tribunal considers that the claimant's real complaint is that these allegations were not in fact found in his favour. Otherwise, the tribunal considers that the claimant's grievances were dealt with thoroughly and patiently in circumstances where additional complaints were added as the grievance progressed. The respondent was willing to recognise failings in terms of Mr Miller not taking the allegation of racist language forward, despite the claimant's lack of raising a formal grievance. Mr Smith commissioned Mr Hussain to undertake an investigation regarding the smoking weed allegation which again was conducted thoroughly. Mr Hussain interviewed a significant number of colleagues and, whilst they did not include Mr Cohen, Mr Hussain had no indication that he would be able to provide any particular information. The number of people he spoke to, the tribunal agrees, is not suggestive of him seeking to limit his enquiry in any way. Mr Hussain genuinely concluded that he could not make a finding that the smoking weed incident had occurred. The length of time taken to conclude the grievance process is explained by the range of issues raised and the seriousness with which they were taken. Whilst the claimant may not have welcomed the conclusions reached by Mr Hussain and Mr Smith's effective acceptance on his review of them, no basis has been suggested upon which the tribunal could conclude that the decision-making was because of the claimant's race. Indeed, the tribunal can make a positive conclusion that the respondent came to genuine conclusions on the basis of a thorough consideration of the evidence before it.

132. The claimant separately complains that the smoking weed comment attributed to Mr Taplin was an act of direct race discrimination. Again, the claimant's credibility is significantly called into question by his failure to report this matter immediately or shortly after it had occurred. The claimant had raised a grievance and was awaiting a hearing when the alleged incident occurred. He met with Ms Brandwood only 5 days after the incident, but said nothing about it. Again, the claimant maintains he told his union representative about what had happened. The claimant was disingenuous in suggesting that he had made hints to Ms Brandwood and Ms Johnson about something further to investigate and that he assumed that they would unearth this allegation. The allegation, when made on 30 November, came out of nowhere.

133. It did, however, come out of a background of the claimant being upset with Mr Taplin about training opportunities. Had this incident occurred on 27 September, the tribunal believes, on the balance of probabilities, that it would have been raised by the claimant at or before his 5 October grievance meeting. The claimant had by this stage made allegations of race discrimination and there is no suggestion that he was holding back out of concern for raising this type of matter with the respondent. Ms Brandwood even asked the claimant if he had any other examples where he felt race had played a part in his treatment.

134. The tribunal accepts that the witness accounts gathered of the incident are confused. Some support for the claimant's allegation is contained within them, but there are other accounts where individuals' memories are clearly impaired and/or where they are seeking to recount a secondhand understanding of what had occurred or issues which the claimant had raised with them out of the workplace. The tribunal considers it significant that, when the claimant did raise the matter for the first time at the grievance meeting on 30 November 2018, he described Mr Taplin taking him into a meeting room and accusing him of smelling of weed. The tribunal considers this to be an accurate note, uncontradicted by the claimant at the time. This was the extent of the original allegation. The allegation has become one of Mr Taplin approaching the claimant at his workstation to accuse him of smelling of weed in front of his colleagues. The claimant is unlikely to have left this out when describing the allegation, if this was what he actually believed had occurred. In all the circumstances, the appearance of Mr Cohen before the tribunal to give an account of the incident identical to the one the claimant now gives is not decisive. He had never sought to give this account at the time when there was no impediment to him coming forward. His evidence can simply not be taken at face value.

135. The claimant's complaint is rejected in circumstances where it cannot be found to have any factual basis.

136. The tribunal similarly does not conclude that Mrs Simpson altered the claimant's screensaver to display an image of Afroman. The claimant's evidence comes down to Mr Holdsworth, from whom the tribunal have not

heard, telling the claimant that Mrs Simpson did this. Mrs Simpson denied having done so. She did however, which goes significantly to her own credibility, rule out the possibility, which had been raised with the claimant, that Mr Holdsworth might himself have changed the screensaver and sought to blame Mrs Simpson when he saw the claimant's upset. Mrs Simpson was clear that she was the only person who could have changed the screensaver, having left the claimant's desk with the computer locked and with no one else having access to the claimant's password. Again, the allegation is characterised by significant delay on the claimant's part in raising it and again with such delay that no CCTV evidence was available. The claimant chose to raise the allegation initially within his ongoing employment tribunal proceedings rather than to the respondent in an effort to have the matter resolved internally. When the respondent did treat this as a grievance and gave an outcome, the claimant expressed surprise as he was not expecting Mr Hussain to investigate it. The claimant had called Ms Rafiq to give evidence in support of his allegation, but her evidence discredited his own truthfulness and motivations.

137. The claimant complains that suffered victimisation from Mrs Simpson in response to him submitting his original employment tribunal complaint in him being granted overtime but with no breaks. Whilst Mrs Simpson confirmed that she was aware of the tribunal complaint, albeit of little detail with in it, none of the complaints related to her own conduct as the claimant's manager. The evidence is supportive of the respondent's schedulers having responsibility for scheduling breaks within an overtime shift, not that it would fall to Mrs Simpson to address this at all. The tribunal found it to be lacking in credibility that the claimant simply worked the entire period of his first overtime shift without a break knowing that one ought to have been scheduled for him and seeing his colleagues go off on breaks at various times. The claimant is simply not an individual who would have carried on working quietly without raising this as an issue with someone. When the claimant did raise the matter with Mrs Simpson the following day, she contacted the schedulers but in any event allowed the claimant to leave early that day. The claimant did not work the further third overtime shift he had initially agreed to. It is noted then that in other respects Mrs Simpson had been helpful to the claimant, which is not indicative of a person seeking to victimise him.

138. The tribunal has no facts before it from which it could reasonably conclude that any lack of breaks the claimant received in first overtime shift was because of him having done a protected act.

139. The claimant's final allegation of direct race discrimination is that his sickness record was inflated. He suggests that this was done deliberately by Mr Taplin. When he was cross-examined, Mr Taplin said that it was not his role to input absence data. The evidence is that when the claimant raised this, it was looked into by Mrs Simpson who then received confirmation from payroll that a mistake had been made. The claimant's record was amended. Indeed, the tribunal does consider this explanation to be the most likely circumstances where claimant's absence had continued for a period to be recorded as if he

was working full-time, when in fact he had reduced his hours of work. That is a not uncommon workplace mistake. The tribunal accepts this as the most likely explanation for the error. In any event there is no evidence before the tribunal from which it could reasonably conclude that the claimant was less favourably treated because of his race.

140. The claimant next brings complaints of disability discrimination. When it came to submissions it was evident that Mr Ward, on the claimant's behalf, had little to say about these allegations, unsurprisingly given the difficulties he faced in pursuing them with any of the respondent's witnesses. Having taken instructions at this stage, it was however confirmed on the claimant's behalf that he continued to pursue these complaints. Mr Ward thereafter pointed to the failure to provide training as being the claimant's strongest disability complaint.

141. The claimant firstly complained of unfavourable treatment arising out of a reduction from full-time to part-time hours in November 2017. It is accepted that the claimant reduced his hours due to his health and his wish to spend more time with his children. He agreed to the variation of hours and worked on them until his sickness absence from April 2018 onwards. That sickness absence had nothing to do with the hours he had worked, but resulted from the claimant's excessive alcohol consumption at the respondent's celebration event and then a period of absence, in circumstances where the claimant said that he thought that he might face accusations of misconduct regarding his lateness. Whilst the tribunal has found it not to be credible that he was threatened with formal conduct proceedings, if he had been, this would have arisen out of his lateness on 28 April 2018. In the circumstances, the allegations of unfavourable treatment arising out of his change to part-time hours and period of absence from April – July 2018 cannot be understood.

142. The claimant maintains as an act of unfavourable treatment that he was excluded from house moves training because of his reduced hours. The period this complaint covers is from February – May 2018. The tribunal's findings reject Mr Taplin telling the claimant that he would not have the benefit of training because of his part-time hours. The claimant was eligible to receive such training but opportunities were determined and allocated by the respondent's schedulers. The claimant missed an opportunity to undergo the training in May 2018, but he was absent due to ill-health at that time (he could not have attended training then). There was further training in October 2018 where the claimant was not selected, but he did in fact receive the house moves training in April 2019.

143. The claimant at the end of the fourth day of hearing withdrew any disability discrimination complaint arising out of an alleged failure by the respondent to deal with his grievance. No such potential basis or motivation had ever been put to the respondent's witnesses.

144. He did however continue to maintain, as a complaint of unfavourable treatment/disability harassment, the constant telephone calls from Mr Taplin during his period of sickness. The claimant's complaint is not borne out by the tribunal's factual findings. The evidence is that the claimant did not maintain regular and sufficient contact with the respondent during his period of absence as was required under the respondent's sickness absence policy. The claimant did not answer calls made to him, listen to voice messages or respond to missed calls. Mr Taplin wrote to the claimant (one letter) because of difficulties contacting him, but the representation of near constant harassment during a period of sickness simply did not occur. The return to work meeting is supportive with no concerns being expressed by the claimant.

145. The claimant complained that in September 2018 Sam Baxter refused his request to increase his hours and provided him with no support to enable him to do so. In fact, an increase in his hours was one of the options he was given by Ms Baxter and the claimant chose to remain on his current working arrangements. The reality was that the claimant wanted to work more daytime hours but not to work the additional hours into the evening.

146. Finally, the claimant things a reasonable adjustment complaint which is reliant on the respondent's practice that only advisers working full time hours could attend house moves and TV training sessions. Again, the tribunal's factual findings are that no such practice was applied and such claim must therefore fail. In any event the evidence was that a similar proportion of part-time and full-time employees had undertaken this type of training.

147. On the basis of the tribunal's findings it was unnecessary to determine any jurisdictional issue as to applicable time limits.

Employment Judge Maidment

Date 11 February 2021