EMPLOYMENT TRIBUNALS

Claimant: **Kieran Sidhu**

Respondents:

1. **Exertis (UK) Ltd**
2. **Glynn Smith**
3. **Stuart Smith**
4. **John Cleary**
5. **Doug Spendlove**

Heard at: **Southampton**

On:9, 10, 11, 12, 13, 16, 17,18, 19, 20, 23, 24, 25, 26, 27, 30 September and 1, 2, 3 October 2019

Before: **Employment Judge Dawson, Mr Sleeth, Mr Spry-Shute**

Representation

Claimant:	Ms N Cunningham, counsel
1st Respondent:	Mr J Mitchell, counsel
2nd to 5th Respondents:	Mr T Hunt, solicitor

RESERVED JUDGMENT

The unanimous decision of the tribunal is:

1. The claimant's claim of direct discrimination because of race succeeds against the 1st respondent.
2. The claimant's claim of harassment related to race succeeds against the 1st, 2nd, 3rd and 4th respondents.
3. The claimant's claim against the 1st respondent of being subjected to a detriment on the ground that he made a protected disclosure is well-founded.
4. The claimant's claim of unfair dismissal against the 1st respondent is well-founded.
5. The claimant's claim of breach of contract in respect of non-payment notice pay against the 1st respondent is well-founded.
6. The claimants claims of discrimination on the grounds of religion, sexual orientation, gender reassignment and disability against the respondents are dismissed on withdrawal by the claimant.
7. The tribunal lacks jurisdiction to determine the claimant's claims against the 5th respondent on the basis that they were presented after the end of the period of 3 months starting with the date of the act to which the complaints relate or such other period as the tribunal thinks just and equitable.
8. All other claims are dismissed**.**

CASE MANAGEMENT ORDERS

There will be a preliminary hearing to be conducted by telephone at 12:00 on 29 November 2019 in order for directions to be given for the determination of remedy. It has been given a time allocation of 1 hour. To take part you

should you should telephone 0333 300 1440 on time and enter the access code 687204# when prompted

REASONS FOR DECISION ON LIABILITY

1. In this case Mr Sidhu originally brought claims of constructive unfair dismissal, race discrimination, discrimination on the grounds of religion, discrimination on the grounds of disability, discrimination on the grounds of sexual orientation and gender reassignment discrimination. He also brought claims of victimisation and of being subjected to a detriment due to having made a protected interest disclosure as well as unfair dismissal because he made a protected disclosure. He also brought claims for unauthorised deduction from wages, non-payment of holiday pay and breach of contract.

2. The case was listed for 19 days. The 1st day and a half was spent by the tribunal reading the papers. On the afternoon of the 2nd day (when the parties first attended) the claimant made an application to amend the Particulars of Claim. We gave permission in a separate judgment which is appended hereto at appendix 3. The general effect of the amendment was primarily to include as allegations of race discrimination against the first respondent, allegations which had, hitherto, been pursued under other heads of discrimination or allegations of repudiatory breach of contract. Other amendments included;

    a. the date of December 2016 in paragraph 17.9 was amended to August 2016;

    b. paragraphs 17.12-17.5 were deleted;

    c. paragraphs 32.7 to 32.9 were deleted;

3. At the outset of her closing submissions, Ms Cunningham, for Mr Sidhu, withdrew the claims of discrimination on the grounds of disability and religion, discrimination on the grounds of sexual orientation and gender reassignment as well as the claims for unauthorised deduction from wages and non-payment of holiday pay. As a consequence, certain allegations were no longer pursued at all whereas others were only pursued as claims of race discrimination.

4. Given the number of witnesses which the tribunal was to hear from, we agreed a timetable with the parties to ensure that the evidence would be heard in accordance with the outline timetable set down by Employment Judge Livesey on the 6 September 2018. The parties stuck to that timetable without needing to ask for additional time and we are grateful to them for their cooperation. It was, however, necessary for Mr Rumsey to give evidence on Monday and Friday of the second week in order for the claimant to be able to call Sue Stratton. That meant that, in respect of his evidence, the timetable was particularly tight but again Ms Cunningham was able to complete her cross examination in the time estimate that she had given.

Issues

5. The issues had been agreed in a slightly unusual way, in that at page 61 of the bundle was a list of legal issues which, we were told, was agreed and separately, the parties had agreed a Schedule of Claims and Issues (the

Schedule) which cross-referenced the factual issues to witness statements. We refer, generally, to the factual issues set out within the Schedule as "allegations". We were told that, together, those 2 documents formed the agreed issues for the tribunal to consider and cross examination of all witnesses was structured around the Schedule. As will be seen below, we have given judgment by reference to those lists of issues, we have made our findings of fact by reference to the Schedule and then given our conclusions by reference to the List of Issues at page 61 of the bundle and the Schedule. We have appended the Schedule[1] to these reasons at Appendix 1 and the List of Issues at Appendix 2.

6. At the outset of the hearing the first respondent confirmed that it was not seeking to advance any potentially fair reason for any dismissal that was found to have taken place nor was it seeking to take any *Polkey* type points in respect of whether the claimant would have been dismissed in any event or there was a shelf life to the employment. Mr Hunt for the other respondents adopted the same position.

7. We heard from a number of witnesses being the claimant Sue Stratton, Jordan Hussein, Matthew Rumsey, Lee Smith, Steven Ridge, Edan Penny, Karen Harper, Nicholas Foster, Michael Buley, Glynn Smith, Stuart Smith, John Cleary and Douglas Spendlove.

Approach to the Evidence

8. In *Gestmin SGPS SA v Credit Suisse (UK) Ltd*, Leggatt J gave the following helpful guidance

> *Evidence Based On Recollection*
>
> **[15]** An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> **[16]** While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.
>
> **[17]** Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid

[1] As set out in paragraph 39, we have used initials in respect of individuals working for companies other than the respondent where allegations have been made against them.

and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called “flashbulb” memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description “flashbulb” memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

[18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

[19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

[20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been “refreshed” by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

> **[21]** It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> **[22]** In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

9. We have approached the evidence in that way although we have reminded ourselves that this is not a commercial case and there will be less documentary evidence than would be expected in such a case.

10. We also note, as stated in *King v Great Britain-China Centre* [1992] ICR 516, that “It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases, the discrimination will not be ill-intentioned but merely based on an assumption that 'he or she would not have fitted in'…The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal"

11. We have taken account of the claimant’s diary We consider that it is largely manufactured in the matters that it records. We do not consider that it was created for the purposes of bringing proceedings and we do not think it records things dishonestly. We accept the submission of Ms Cunningham that there are some entries which suggest that the claimant was recording things that happened to him even when he did not know what was being referred to. For instance on 12 December 2016 he records “John said I’m like comedian from shooting star? Orange bag?”. That appears to be a reference to the TV series Shooting Stars but the way in which the claimant has written the diary suggests that he was not aware of the show or who the comedian was or the relevance of the orange bag. We accept that the

impression given by the diary is accurate and that the claimant did not understand those matters but was, nevertheless, recording them.

12. The diary does not record all of the events that the claimant says took place, but does record some of them. We are conscious of the fact that that may mean that the unrecorded events did not take place, however, it is also not unusual for people who are not legally qualified to fail to record in meticulous detail what has happened to them. In this case, we believe the claimant when he says that not every incident that has happened has been recorded in his diary. For instance:

    a. The entry for 28 October 2016 records the statement "gigolo card and McD' advert on big screen now where I can't reach" (p1018F). The claimant's evidence was that the card had been on his screen the previous day. That is consistent with the reference to "on big screen now" (emphasis added) but, in fact, there is no entry in the diary to that effect either for 27 October 2016 or before then.

    b. On 1 December 2016 John Cleary sent an email to a number of people with the subject matter "Tonight!" Which stated "sex on the beach for me all night long!! [a reference to cocktail orders] If not sex in the NCP?? Kieran?" There is, however, no reference in the claimant's diary to that email.

13. Thus, on the balance of probabilities, we accept that the claimant's diary entries do not record everything that happened to him but are largely accurate when they do record matters.

14. We note, also, that the claimant made use of his telephone to covertly record conversations with his manager after 3 February 2017 and was also able to take photographs in the workplace. The respondents make the point that on all of the claimant's recordings he has not secured any recording of the offensive names which he says he was called. He explained that on the basis that he did not think to start making recordings until his manager told him to "fuck off" in the meeting on 3 February 2017 but we have, as we have made our findings of fact, taken account the fact that the claimant did sometimes have the opportunity to use the camera on his phone as well as make covert recordings.

15. In the judgment below, except where stated, references to page numbers are to the bundle of documents.

General Findings of Fact

16. The claimant is a British national of mixed Scottish and Indian descent. He is heterosexual and a Sikh and a Christian. We accept that he has been his father's primary carer since 2011.

17. Prior to working for the respondent, the claimant worked for Vodafone. Towards the end of his time with Vodafone he raised a grievance. A grievance meeting took place on 25 May 2012. Part of his evidence in the grievance meeting was that he was being bullied, one of the witnesses in relation to that bullying was said, by him, to be Jordan Hussain, who is also a witness in these proceedings (p1641).

18. On 11 June 2012 he wrote to Mr Hinde at Vodafone stating that "with regards to your question on why I didn't raise it sooner. I brought it up numerous times… I spent hours with the citizens advice…" He went on to state that he had spent £1000 on solicitor's fees and referred to the Vodafone policies (p1645). Thus he had some knowledge of available sources of legal advice.

19. The claimant raised a claim with Vodafone in respect of expenses and entered into a settlement agreement with Vodafone in the sum of around £2000 in respect of his expenses.

20. The claimant joined the respondent on 16 July 2012 initially as a Plantronics Brand Manager.

21. The respondent is a company providing technology distribution and is a specialist service provider. It sells producer's products to resellers such as online or high street stores that sell onto the public.

22. In respect of the Plantronics Brand Manager role, Plantronics paid the first respondent to employ the claimant to encourage growth of Plantronics' sales within the respondent. The claimant's responsibilities were, therefore, to promote products internally with account managers and drive the business forward.

23. In November 2015, the claimant sought to move into an Etail role. Matthew Rumsey was head of the team into which the claimant was to move. There is an email dated 27 November 2015 from him stating "Kieran presented to Mike and I yesterday as part of his 2nd interview for the Etail role. Mike has left it with me to make the decision which I want to think over the weekend. If we offer Kieran the role it will be based on a smaller portfolio with a view for him to develop and grow into the role." (Page 692).

24. Later, on the same day, Mr Rumsey sent a 2nd email stating "conclusions are he is more process and UC product driven… and would need a lot of coaching and support taking on a role in Etail. I was pleased with his ambition, enthusiasm and a real want for this role which really came across in both interviews." (p692)

25. On 1 December 2015, Mr Rumsey wrote to various people, including human resources officers stating, "I will be taking Kieran on to replace Jamie… I will let him know the good news this afternoon… Kieran will manage the Accessories business for Amazon and all UC business for Amazon and Etail with the exception of Dabs. This will deliver a portfolio of approximately £325k… He will be placed on a 4% Ms 6% Hit commission structure and his basic salary of £25K will remain the same. This will give him an OTE of £39k to£46k." (Page 694).

26. On the same day, Mr Rumsey communicated the decision to the claimant and stated, "well done on getting the job and I will look forward to working with you next year." (Page 695). We find that if Mr Rumsey had been consciously racist it is unlikely that he would have written the email in such friendly terms and probably would not have offered the claimant the job at all.

27. Once he joined the new team the claimant sat on a long table/desk with his colleagues. To his immediate right was Mr Rumsey and to his immediate left, John Cleary. Then, working down the table from Mr Cleary was Glynn Smith, Karen Harper and Angela Rapley. Opposite Mr Rumsey sat Doug Spendlove (who was replaced by Lee Smith), next to Mr Spendlove was Steve Ridge, next to him was Edan Penny and then Stuart Smith. Mr Rumsey and Mr Spendlove were next to a wall/window. Beyond Stuart Smith and Ms Rapley were other members of the sales Administration team.

28. There was a total of 16 people who sat at the table/desk on which the claimant was situated in an open plan office. Immediately behind the claimant was another table/desk of 16 people and the plan at page 1718 shows a total of 19 similar table/desks (including the claimant's).

29. Early on in his cross examination the claimant accepted that there was a degree of background noise and it was put to him that it would be possible for things to be misheard, and he agreed. Later in his evidence he seemed to retreat somewhat from that position saying, in answer to the suggestion that the office was loud and busy, that it did not seem that loud when he was working there. He made the point that most people did not make anywhere near 25 phone calls per day (which was his target at one point).

30. We find that in an office of that size, particularly one engaging in sales, it is likely that they would be background noise which would, at times, be considerable and it would be possible for the claimant to mis-hear things.

31. We have seen videos produced by an employee of the respondent who was situated on the floor below the claimant's. We have also looked at various photographs within the bundle, some social media entries and various emails, some of which we will refer to below. We find that a culture existed in the claimant's workplace where crude sexual innuendo and express sexual reference was considered entertaining and, in order to fit in to the culture, it was necessary to enter into jokes and discussions of that nature. We have seen;

    a. Photographs and video of a person simulating intercourse with a blow-up doll (page 1703)[2],

    b. photographs and video of a person simulating taking drugs (p1612)[3],

    c. a photograph of a straw hat with a large label around the brim stating, "I LOVE DICK" (page 856).

    d. a photograph of Vaseline being sent by email with the caption "ouch! – Time to man up" (page 815),

    e. a photograph of a man (John Cleary, whilst clothed) trying on ladies' underwear in the office (page 766)

    f. a mock business card created for Mr Rumsey headed "Manwhore2door" and stating "Have cock will travel…No fatties, No

[2] This is not very persuasive evidence in that the person did not work on the claimant's floor and appeared to us to have produced a high quality video which may have been more to entertain his social media followers than show the real atmosphere in the office.
[3] ditto

Gingers Threesomes welcome…all holes filled or your money back (page 803)

g. an email with a link to a picture of a woman in a bikini (we were not shown the photograph of the woman) who was suggested to be the claimant's replacement (page 738).

32. We have also noted the statement by Edan Penny, to Ms Stratton, when he was being interviewed about the claimant's allegations that "it's a male orientated environment. There is banter, on the limit, over the limit. If you are of a more sensitive disposition you may struggle." (Page 1287)

33. We also find that emails were sent about the claimant by his colleagues, which may or may not have been intended by them to be humorous, but which could have been upsetting to him. Some are likely to be more offensive than others.

a. On 10th of March 2016, the claimant had erroneously thought the dress code for an event was black-tie. He had only been invited to the event at the last minute - on the afternoon of the event. He told us that his colleagues had all nodded when he had suggested that the event might be black tie. He then indicated to members of his team that he would go out and buy a tuxedo and did so. We will deal below with our findings as to what actually happened, but for now it is sufficient to say that, when he returned, Mr Ridge sent an email to him, Edan Penny and Glynn Smith which stated "Kieran, spot the fatal dress code error…" and with that email forwarded an email about the event which stated "dress code: Smart (not black-tie)". The quote that we have cited from the forwarded email was enlarged and highlighted.

b. On 23rd of June 2016 Glynn Smith sent the email that we have referred to above with a link to a woman in a bikini with the subject matter "Kieran's replacement" (page 738).

c. On 28th of July 2016 Karen Harper had sent an email to the claimant's team asking if there was any objection to him taking a day's leave the next day (page 756). By reply email to the whole team Mr Ridge stated "fine by me, he doesn't do anything when he is here!!" (Page 754)

d. On 19 October 2016, Stuart Smith sent an email to various colleagues with the subject "let's all support Kieran siduko ltd this month" showing a picture of National Sausage Month (page 783). Ashley Vine replied stating "that's just the holding company's name, the trading name is Sidhu's SSSSSSSSSSSSSSSausages! (Page 783). There is clearly a deliberate misspelling of the claimant's surname of Sidhu as siduko.

e. On 25th of October 2016, Stuart Smith sent an email containing the line "Siduko - 6 sausages a day does NOT Keep the Doctor Away" (page 796; we note that there were also remarks probably intended to be humorous towards "Doug" and "Glynn")

f. On 1 December 2016, John Cleary sent an email to the claimant's team and others, as set out above, which stated "sex on the beach for me all night long!! [A reference to cocktail orders] if not sex in the NCP?? Kieran?" (Page 892). We note the evidence of Mr Cleary that whilst the email was intended to be light-hearted it was "possibly yes" intended to humiliate the claimant.

34. We heard evidence from Mr Glynn Smith that he would change the claimant's surname to siduko, but stated that everyone's surnames were changed and he gave the instance that he became "smithy". We accept that evidence. Mr Cleary told us that unprofessional and infantile banter was directed at the claimant although he said that was alongside everyone else in the team.

35. The claimant was managed by Matthew Rumsey. His evidence was, in large part, that he either denied the allegations that the claimant made or stated that he was unaware of them. He vehemently denied that there was a puerile culture loaded with sexual innuendo when that was put to him by Ms Cunningham. We do not accept that denial. Having heard him, we have concluded that Mr Rumsey's primary focus was as to whether his team was meeting its sales targets, his concerns about the well-being of his team largely extended to whether any issues would affect the sales. In this respect we note his evidence that "I believe I managed the team effectively, it is results driven against targets, that's what we were there to do and we did it well. There was a good atmosphere on the team"

36. In particular, we find that the claimant did, at least towards the end of his time with the respondent, make express complaints to Mr Rumsey about the way he felt he was being treated but Mr Rumsey showed little interest in dealing with them. We find that it is likely that Mr Rumsey was aware of the behaviour towards the claimant which we have found proved below (or at least most of it) but did not consider it important enough to deal with beyond, perhaps, one ineffective conversation with the team. We have, in particular, relied upon the following evidence in reaching that conclusion.

    a. On 5 July 2016, the claimant wrote to Mr Rumsey by email complaining about accounts/commission which had not been transferred to him. In the body of that email he stated "I let [Glynn Smith] know out of politeness and in the interest of being transparent team player. He decides to take the offence. "If you do this next month I will fuck you up", you are not having RS orders I did last month I don't care what Qlikview says" (page 741). Not only did Mr Rumsey do nothing with that email but when he was asked about the email when the claimant's grievance was being investigated, he responded "I'm not aware of this happening" (page 1177).

    b. Mr Rumsey also stated that if he had been aware of a comment such as Mr Cleary's at page 892 (the sex in the NCP email) he would have reprimanded Mr Cleary. In fact he was copied in on that email but did nothing about it. We accept the claimant's submission that the fact that Mr Cleary felt able to copy Mr Rumsey in, suggests that Mr Rumsey was not taking those sorts of matters very seriously. The same point can be made in respect of the fact that Stuart Smith copied Mr Rumsey in on the email about Vaseline (p815, in this respect we find that, despite the denials of all of the respondent's

employees, the Vaseline email was a reference to sex in the context of targets being sent and would have been seen as such. We deal in more detail with this finding below.). There is no evidence that Mr Rumsey did anything about stopping such emails being sent.

c. The claimant covertly recorded 3 meetings between him and Mr Rumsey. In the meeting on 7th of February 2017 at 12:26 the claimant recounted an alleged conversation with Mr Spendlove as follows "but Doug was like say "fuck your mum" and I'll go, "she's dead" and then he goes, "oh she's cold"". He gave some more information and Mr Rumsey replied "look, Doug is gone. Move on". He did not express any surprise or concern at the comment which had been made. Mr Rumsey sought to explain that response on the basis that the meeting was about giving the claimant a performance improvement programme and he perceived that the claimant was avoiding the point. Whilst there may be some truth in that, the cavalier way in which he disregarded the statement suggests that it did not strike him as something concerning (page 1090).

d. Earlier in the meeting, the claimant had spoken of the situation now that he had moved desks. He stated "since I'm sitting down this side of the desk… I'm not getting called a bloody shoe bomber, deep – throating bananas next to me and…" Mr Rumsey's response was "so your weekly outlook needs improving as I said…" (Page 1079 – 1080). Again, Mr Rumsey displayed no surprise or concern at the statements made by the claimant.

e. Shortly after that, the claimant said "when John's deep – throating bananas and they're googling my name going "You live in a terrorist area" and all this nonsense, that's like… that's draining time… So for me mentally, that's where I'm thinking, where have I gone wrong? Where I'm not involved in that and they're going, you know, "Kieran, you're Syrian temperament" erm it's and when he's deep throating bananas, I'll give you an example. This… once is a joke, twice is a joke. When this happens like, there hasn't been once in 3 days where that hasn't happened…" To that, Mr Rumsey replied "yeah, but you shouldn't be getting any grief from the team now" (p1084). He made a similar comment later in the meeting - "and at the end of the day, all of the banter is stopping. That's happened you should have seen the improvement yesterday…" (Page 1093). When asked about these replies, Mr Rumsey stated that he had spoken to the team about being more supportive of Kieran and in respect of them clapping him when he was late (which, he accepted, happened). He denied he had spoken to team about anything other than that. We note the statement by Mr Rumsey when asked by Mark Reynolds in the meeting on 24 March 2017 that he had never reprimanded a member of the team for the alleged bullying behaviour (page 1242).

f. It is clear, from the recorded conversation, that Mr Rumsey was not taking the claimant's complaints seriously. He did not pick up on most of what the claimant was saying, we find, because he was aware of what he complained about but was unconcerned. We find that the allegations made by Mr Sidhu did not come as a surprise to Mr Rumsey in the conversation because he was aware of, at least, the general position that the claimant was saying that he found himself

in. We reject his evidence, given to us in his cross examination, that he had not heard the claimant say those things because it was lost in the waffle of the claimant's conversation and the evidence within his witness statement that " I didn't stop and ref the "deep throat banana or Syrian temperament" or all of the other things he referenced as frankly he was waffling and was trying to blame and discredit other members of the team, I was trying to stay on point". Having listened to the recording we consider the allegations being made by the claimant were perfectly clear.

g. For the purposes of clarity, we are not, on the basis of this conversation alone concluding that all of the allegations made by the claimant in that conversation were true, we are, however, finding that Mr Rumsey was not surprised by the claimant's allegations because they were reflective of the way he knew the claimant was being treated by his colleagues. He also had done little or nothing to address that treatment.

37. It is, to some extent, unhelpful to decide in a sweeping or broad-brush fashion whether particular witnesses were honest or not; a witness can be honest in certain things but not others. We have, therefore, endeavoured to make specific findings of fact in relation to each allegation. In respect of the claimant's evidence, however, it is perhaps helpful to record at this stage that generally we considered his evidence was given honestly but, as we set out below[4], in various respects his evidence was not completely consistent with his diary or things he had said earlier. For that reason, we do not simply accept everything that the claimant has said, notwithstanding that we do find that he was honest in his evidence.

38. We also record, at this stage, our rejection of the statements by Mr Cleary, Mr Penny and Mrs Harper that they did not see the claimant as black (or non-white) or white. They all made suspiciously similar comments about the fact that the claimant was "Kieran" and they did not see him as black (or non-white) or white. We do not accept that evidence. We consider it would have been obvious to anyone that the claimant was not white and we do not think that those witnesses were so "colour-blind" that they did not see the claimant as anything other than himself.

39. Against those initial findings we set out our findings in respect of the particular allegations. We largely set out our findings in the order that they are set out in the Schedule. However, we return to allegations numbered 1 and 2 at the end of this section given their generality. We have copied and pasted the particular allegation/issue from the Schedule into the judgment below and then set out our findings in respect of it. Where allegations have been made against individuals who were not working for the respondent and who have not had the opportunity to defend themselves against those allegations, we have taken the view that it is not necessary for them to be named in order for our judgement be properly given. In those circumstances we have used their initials.

40. In some respects, many of the factual allegations overlap and many of the findings we make in respect of some allegations can be made in respect of others. We have not repeated all of the factual findings (for instance as to

[4] Including in relation to allegations numbered, 10, 17, 37, 47, 56 and 57 of the Schedule

the credibility of a witness) and, where appropriate, findings should be read across the allegations.

Findings in accordance with the Schedule of Claims and Issues

3	Jan 2016 on	"Truffle pig"	Ross Holt calling the Claimant a "*truffle pig*" amongst other degrading terms.

41. This allegation was withdrawn in the claimant's closing submissions.

4	Feb 16	Handover	Edan Penny said to Claimant "*you can f*ck right off if you think I am just going to hand them over to a c*nt like you*". Matthew Rumsey shrugged his shoulders.

42. When the claimant was offered his role in December 2016, his offer letter, at page 695, stated that he would manage "all Accessories business across Amazon and all UC business across Etail excluding Dabs".

43. The claimant's complaint arises from the fact that, he says, that Mr Penny would not hand over to him 2 of the accounts which the claimant should have been managing, namely the CPC account and the Logitech UC account.

44. Mr Penny says in his statement that "I had no discussion either with Kieran or Matt about the handover of those two accounts. Kieran never dealt with them, and as far as I know, was never told that he would deal with them and they are still to this day my accounts" (paragraph 18).

45. It is, therefore apparent from Mr Penny's statement, that he accepts that the CPC account and the Logitech UC account were not handed over to the claimant notwithstanding the offer letter.

46. Mr Rumsey's witness statement gives no insight into the matter simply denying the whole allegation.

47. The claimant has provided a diary entry which shows, for 6 June 2016 an entry "Ask Matt to push Edan on remaining UC accounts not handed over" (page 1018A).

48. Having heard Mr Penny give evidence and having considered the various Facebook and social media posts which he has made in the past we consider that he is likely to have been motivated by the fact that he did not want to lose accounts which made him money. Along with his colleagues he was a salesman motivated by bonuses/ commission that he could make based on sales. To some extent his attitude is displayed in a Facebook post from August 2012 in which he stated "£1.50 a litre on super unleaded! Mr Cameron and Mr Clegg, instead of robbing me for 60% tax how about you do something fucking useful…" (Page 1715).

49. Moreover, having considered the Facebook and social media posts we also find that it is likely that he would have made a statement along the lines

recorded by the claimant in this allegation. We have taken into account social media which Mr Penny had posted in 2011, 2012 and 2013 (pages 1707, 1710, 1712, 1713 and 1715). We find that Mr Penny would have been quite prepared to defend an account that he wanted to keep in the strongest possible terms.

50. We find that the comment would have been upsetting to the claimant and would have contributed to a hostile environment for him. We also find it likely that Mr Rumsey would not have been engaged in resolving that situation for the reasons we have given in paragraph 35 above.

51. The question arises of whether Mr Penny was motivated by the claimant's race. The question must be considered in the light of all of the evidence and is one we will return when we set out our conclusions. However, we are concerned by the reference to a "cunt *like you"* (our emphasis). Mr Penny has given no explanation for that comment.

5	March 16 on	Clapping	When the Claimant came in late (due to caring for his disabled father before work) his team members would all stand up and clap, yet this would not happen for other team members when they were regularly late.

52. Mr Rumsey, in his witness statement, accepts that on occasion people did clap when the claimant came in late. He states that other members of the team were not clapped but were rarely late. He stated that he was unaware that the claimant's father was disabled or if that was the reason for his lateness.

53. Mr Cleary, in his evidence to us, accepted that there was clapping of the claimant and also standing with clapping. He accepted that he was the ringleader in this respect.

54. In his witness statement for these proceedings, Mr Penny accepted that the claimant would be clapped or cheered when he came in on occasion and he told us that this only happened to the claimant. Karen Harper also told us that she witnessed clapping of the claimant on some occasions. She did not recall anyone standing.

55. The incidents of clapping are not in the claimant's diaries.

56. The claimant's evidence was that "From around March 2016, if I came in a few minutes late (mostly because I was delayed due to caring for my disabled father before work, but later in early 2017, also because of my own depression my Etail team members would all stand up and clap when I arrived at my desk. It was very embarrassing as the whole floor (approximately 70+ people) would turn around and look. This didn't happen when other team members came in late" (paragraph 34).

57. Some of the claimant's other colleagues who were asked in the investigation could not recall that any clapping occurred but we have no reason to believe that Mr Rumsey and Mr Cleary would incorrectly admit

that clapping occurred, if it did not; likewise in respect of Mr Penny and Mrs Harper.

58. Thus we find that, on occasions, clapping did occur throughout 2016 and into 2017. We also find that in accordance with the evidence of Mr Rumsey and Edan Penny only the claimant was clapped. We do not accept the evidence that everyone was clapped if they were late; if that was the case, it would have been in Mr Rumsey's interest to say so in his evidence and we think that he would have done.

59. Thus the claimant was singled out for being clapped (with people standing) when he arrived at work if he was late. That was bound to create a humiliating atmosphere for him.

60. The claimant's diary entries for 16 August 2016 record a discussion with Mr Rumsey when he asked the claimant if he was on drugs. The claimant told him that he was tired, he was not on drugs and the diary entry records "broke down and told him it's my dad" (page 1018B), the diary reads that Mr Rumsey's response was "fucking sort it out". We are inclined to accept that evidence as being true. As we have said, our view was that Mr Rumsey's general concern would be to ensure that sales were being made and would not be particularly sympathetic to personal difficulties.

61. Again we must consider whether the team was motivated by the claimant's race. The treatment of the claimant was unreasonable and no adequate explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

6	March 16	Amazon log-in: to MR	Claimant challenged both Jamie Hughes and Doug Spendlove over Paypal being given Jamie Hughes' Amazon Vendor Central Login, but they dismissed the issue. [7] The Claimant informed Matthew Rumsey that Paypal login this was a serious risk/breach of competition law and data protection law.

62. In respect of this issue the claimant's evidence is that "In March 2016, after I had taken over the PayPal account, [AU] at PayPal asked me for my login details for the Respondent's Amazon Vendor Central account. It turned out that she had a login from Jamie Hughes, so when that stopped working she wanted mine. This was quite wrong. PayPal should only have been able to see their own single product details on Amazon: this access gave them full visibility of detailed information about every single vendor and product that Exertis supplied to Amazon, which gave them an unfair advantage over their competitors. I was concerned that this must be a breach of competition and data protection law"

63. We note that the claimant was not challenged in cross examination in respect of this issue and also that Mr Spendlove did not deny, in his witness statement, the allegation in this respect.

64. We have not heard from AU but on the evidence that we have heard we accept the claimant's evidence that AU did ask for the respondent's vendor contact login and she did so because in the past it had been provided to her. We also accept that being provided with that login would have given PayPal a commercial advantage over their rivals and the claimant reasonably believed that was a breach of competition law.

65. The allegation includes the assertion that the claimant informed Mr Rumsey that the PayPal login issue was a serious risk/breach of competition law and data protection law. In March 2016 the claimant would have been relatively new to the job and finding his feet. He struck us as someone who would be concerned about an issue such as this. It is likely that he would have spoken to Mr Rumsey, as his manager, about this issue and conveyed the information that AU had a login from Jamie Hughes and when that stopped working she wanted the claimant's. That access gave Paypal visibility of detailed information and he was concerned that this was a breach of competition and data protection law.

66. In cross examination of Mr Rumsey, Ms Cunningham took him to page 1256 of the bundle and questions asked of him by Lisa Lischak about sharing of Amazon VC login details with PayPal. Mr Rumsey replied that he was not aware of any compliance breaches within his team at that time.

67. Mr Rumsey was also taken to pages 1541 and 1542. On 22 May 2017 he was suspended to allow the respondent to "fully investigate the alleged serious compliance breaches discussed in our meeting…" On the same day a letter was sent to Mr Rumsey in respect of a protected conversation which states "in the meeting we discussed that there have been serious breaches of compliance in areas in which you have been trained, and the company believes this to be potential misconduct."

68. Mr Rumsey's evidence, in cross examination, was that he did not know what those alleged breaches were; he was not given specifics when he was suspended. Even though he was not given specifics of the allegations against him he decided to leave the respondent despite having worked for it since 2009. He was paid 3 month's notice pay.

69. We do not find it credible that Mr Rumsey would have accepted the termination of his employment with the respondent if he had no real idea of the evidence against him. If it is true that he had not been given specifics at the point when he decided to enter into an agreement with the respondent, it must, in our judgment, mean that he was aware of compliance problems for which he was responsible and which would, probably, lead to the termination of his employment when a disciplinary process had been completed.

70. In circumstances where Mr Rumsey was not willing to be more forthcoming with us as to his knowledge of compliance breaches we accept the claimant's evidence that he did raise the issue of the PayPal/Amazon login with Mr Rumsey as a potential breach of competition law and data protection law.

7	10 March 16	Tuxedo	Steve Ridge informed [C] that [an event] was strictly black tie and he would need a tuxedo. The team agreed and

			suggested that the Claimant had better leave the office and get one. [C] left immediately and rushed to get a tuxedo (costing £180) and rushed back to get on the scheduled coach, but when he walked back into the office with a tuxedo on, the team were crying with laughter and it turned out that the event was smart casual

71. The claimant's evidence in respect of this incident, when given orally varied from his witness statement. In his witness statement the claimant stated

> On 10 March 2016, I was invited to an awards ceremony at short notice for that same evening. Steve Ridge (Etail Account Manager) told me it was strictly black tie, and I would need a tuxedo. Members of the team agreed and suggested that I'd better leave the office and get one. So I left immediately to Slaters menswear shop in the town centre and rushed to buy a tuxedo and rushed back to get on the coach. When I walked back into the office wearing it, the team (Glynn Smith, Stuart Smith, Steve Ridge and others) were crying with laughter. (Paragraph 31)

72. In his oral evidence he gave the following answers to questions about how he went to purchase his black tie outfit. "Yes, but they let me go, they knew what I was going to do, let me out of office", "No I said black tie and they all nodded"

73. Thus we do not find the claimant's witness statement is entirely accurate and we do not find, on the balance of probabilities, that Mr Ridge told the claimant that the dress code was strictly black tie. We find, that his colleagues were likely to have been aware that the claimant was going to purchase a black tie outfit and did not discourage him from doing so. We are not confident, on the balance of probabilities, that the claimant's colleagues were all crying with laughter, we do, however, accept that people would have been amused by the fact Mr Sidhu had turned up on the office floor in the wrong dress.

74. Nevertheless, we found Mr Ridge's evidence in respect of this incident to be wholly unsatisfactory. The claimant returned to the sales floor wearing the black tie he had purchased. As we have set out above Mr Ridge then sent an email to him, Edan Penny and Glynn Smith which stated "Kieran, spot the fatal dress code error…" and with that email forwarded an email about the event which stated "dress code: Smart (not black-tie)". The quote that we have cited from the forwarded email was enlarged and highlighted.

75. Mr Ridge sought to persuade us in his evidence that he was simply seeking to advise Mr Sidhu of his mistake and, therefore, help him. The implication was that the email was sent in a kindly manner. That evidence was entirely disingenuous in our view given that Mr Ridge sat close to the claimant and could simply have spoken to him. He provided no satisfactory explanation as to why he sent an email rather than speaking to him.

76. On its own the incident might be considered to be no more than the type of event which is part and parcel of office life. However, in this case it took place at a time when the claimant's team were singling him out for unpleasant treatment and was part of an ongoing course of action by the team. We find that the email was unnecessary and was an attempt to humiliate and belittle the claimant. It would, reasonably, have created a humiliating environment for the claimant.

77. Again we must consider whether the team was motivated by the claimant's race. Again, in its context the treatment of the claimant was unreasonable and no adequate explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

8	10 March – Nov 16	Hiding things	Team hiding the Claimant's laptop, keyboard, mouse and chair in different locations.

78. Glynn Smith was asked about this allegation and said that he had had his keyboard swapped out every now and again.

79. We found the claimant's evidence in this respect be compelling. He told us that he did not know who had hidden things but everyone was there and everyone must have seen it. He described how sometimes he found his laptop in the bin and on one occasion his laptop was missing as was his mouse and chair. On another occasion the keys had been swapped out of his keyboard. He said that he took the keys being swapped out as a joke but he regarded that differently to the laptop being in the bin which he regarded as disrespectful.

80. We do not find that the claimant invented this allegation and we find that it did happen on occasions. There is no evidence it happened to anyone else apart from, occasionally Glynn Smith and we find that it is likely that it happened to the claimant more than to others. It would reasonably, have created a hostile environment for the claimant when considered alongside the other allegations which we found proved.

81. Again we must consider whether the team was motivated by the claimant's race. No explanation has been given for the treatment. We will return to the question in this respect when we reach our conclusions.

9	March 16 – 11 Nov 16	Gigolo card	Team sticking a MacDonald's advert and a gigolo business card (made for Matthew Rumsey) on his monitor. Mathew Rumsey requested.

82. As we have explained above the gigolo card was clearly created for Mr Rumsey. It can be seen from the photograph at page 814 of the bundle that the job advert was approximately the same size as the gigolo card and there is nothing in respect of the job advert that, on its face, relates to the claimant.

83. Having regard to the diary entry for 28 October 2016 we find that the card and the job advert had, likely, been on the claimant's own screen on 27 October 2016 and were then transferred to a large screen above the heads of the sales team (page 1018 F). Given the emails referring to "Kieran's replacement" (p738) and Mr Ridge's email that the claimant did nothing

when he was there (p754) we think it likely that the team, or part of it, would consider it humorous to put a job advertisement on the claimant's screen.

84. We accept that the cards were probably placed on the claimant's monitor on more than one occasion over the period in question and, the claimant would, reasonably, have considered them to create a degrading atmosphere for him, when taken with other matters, even if that was not the case in isolation.

85. The allegation includes the assertion that Matthew Rumsey requested the team to stick the advertisement and gigolo card on the claimant screen. We do not consider that to be likely. We think that that Mr Rumsey was led by the others in the team rather than leading them. (Indeed this is also the claimant's view as he explained was in evidence).

86. Again we must consider whether the team was motivated by the claimant's race. Again, the treatment of the claimant was unreasonable and no explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

10	March – 1 Dec 16	Middle finger	Doug Spendlove greeting the Claimant with the middle finger and saying "*f*ck your mum*" – daily.

87. Mr Spendlove's evidence was surprisingly brief, in terms of his witness statement. In that respect it followed his response to the claim. It was also reflected in many of his answers in cross examination which was largely along the lines of that he could not recall matters. That does not, of itself, mean that he was not telling the truth; he was being asked to recall matters some 3 years ago.

88. His evidence was particularly unimpressive on an issue about his nickname. It was put to him that his nickname was "Dirty Doug" and, in that respect, he was taken to the evidence at page 1036 being an email from Mr Rumsey stating "… Luckily Dirty Doug isn't with us following last year's performance…".

89. Mr Spendlove's reply was that he had no idea that his nickname was "Dirty Doug".

90. Mr Rumsey was asked about the email at page 1036 and told us that Mr Spendlove's nickname was "dirty" because he had dirty shoes and was scruffy but he did not take offence to it. He clearly understood that Mr Spendlove was fully aware of his nickname.

91. Mr Penny was also asked whether Mr Spendlove had a nickname and he stated that it was "Dirty Doug". When asked where that originated from he said that when Mr Spendlove had worked in the general team downstairs his personal hygiene "wasn't that great". He said it was a nickname that followed him. We find it unlikely that Mr Spendlove was unaware of his nickname and his evidence in this respect we consider to be inaccurate.

92. Mr Spendlove, when asked in evidence about the assertion that he said "fuck your mum" replied, "I would never say that In workplace, it is quite disgusting and disrespectful"

93. We heard from Mr Ridge in this respect. In his witness statement he stated "I understand that [the claimant] says that Doug Spendlove would daily give him the middle finger and saying "*f*ck your mum*". I don't recall him making that gesture, but Doug did say this to most people, including me. This was Doug's way of saying *leave me alone* or *f-off*. I did not take offence when he said this to me as I understood this was just Doug's way. Doug sat to my left and Kieran sat diagonally opposite me on the other side of the bank of desks. I don't recall Doug saying this to Kieran, though he may have in the same way as he said it to me." (Paragraph 16)

94. Mr Rumsey's written response to the claimant's grievance stated "I can't comment on Doug's comments to Kieran as I didn't witnesses if it occurred." Mr Rumsey said in evidence that he did not recall this happening and that he did not believe it was "Doug's way".

95. We consider that it is too much of a coincidence to believe that the claimant would either make this evidence up or be mistaken about it happening at all and yet be supported in that by Mr Ridge's evidence. Thus we find that Mr Spendlove did regularly say to people "fuck your mum" and, therefore, it is difficult to believe that Mr Rumsey would not have been aware of it. This reflects poorly on both Mr Spendlove's and Mr Rumsey's credibility.

96. We must consider, however, whether the incident was directed at the claimant or was a more generally used term. We weigh in the balance that the claimant has not made diary entries, but if this was something he had grown used to that would be less surprising. We find that Doug Spendlove made the comment generally to others as well as the claimant. Thus we do not find that this comment was made because of the claimant's race or related to it, although it would have been upsetting to the claimant.

97. We note that Mr Spendlove left on 12 December 2017 and, therefore, the incident cannot have occurred after that date.

11	April 16	Ballicom	Claimant was given Ballicom account. [NM] informed Claimant that Doug Spendlove had been giving them access to their competitor's pricing through his Yahoo account and by USB stick. C said not prepared to do this

98. The claimant took over the Ballicom account from Doug Spendlove. We have noted the interview with Ben Jones which appears at page 1327 of the bundle which records "BJ had a suspicion that Ballicom had pricing it should not have access to….The only way leaking of pricing could have happened was it being provided directly to Ballicom, either by phone or email. Possibly Doug could have provided it". In this respect we note that closing submissions for the first respondent stated that "Ben Jones' statement was purely speculative." We do not think that is an accurate characterisation. He

was then asked to elaborate and provide an example and stated " Ballicom's pricing was too good to be true. As an account manager whenever I was speaking to my customers they complained that Ballicom's prices were too low…". Mr Jones was familiar with the first respondent and its working practices, with that knowledge he volunteered that there was a possibility that Mr Spendlove could have provided the pricing information to Ballicom. That is not pure speculation.

99. Mr Spendlove did not engage in this allegation in his witness statement apart from making a bare denial.

100. We repeat what we have said above at paragraphs 67-69 in respect of the findings by the first respondent of potential compliance breaches.

101. Given those matters and on the balance of probabilities we consider that the claimant's evidence, given in paragraphs 43 to 50 of his witness statement is likely to be correct and we find it likely, in the circumstances, that NM did inform the claimant that Doug Spendlove had been giving them access to their competitors pricing.

102. In respect of this allegation we note that it is one of refusal by the claimant to give further information, not a disclosure of information. But we find that the claimant would have said that he was not prepared to do that.

12	April 16	Ballicom & Doug Spendlove	Verbally to Mathew Rumsey on various occasions (including April 2016), that team members were aware Doug Spendlove had been passing cost prices to Ballicom and accepting 'entertainment' at weekends in London.

103. Again, having regard to the interview at page 1327 of the bundle the claimant would have reasonable grounds for believing that Mr Spendlove had been passing cost prices to Ballicom.

104. We think it likely that the claimant would have raised those matters with Mr Rumsey in the way that he sets out in his witness statement- "I told him that many team members from the general team downstairs were telling me that Doug had been passing cost prices to Ballicom and accepting entertainment - dinners and visits to strip clubs - at weekends in London" (para 48). We find he reasonably believed that the passing of cost prices to Ballicom amounted to a breach of competition law. It is clear to us that he was not happy with revealing confidential information to Ballicom, but he would also have been aware that failing to do so would be likely to affect his sales. We find it is likely that, in those circumstances, he would have raised the matter with Mr Rumsey. We, further, repeat the matters set out above at paragraph 65, namely that the claimant would have been relatively new to the job, even in April 2016, and struck us as someone who would be concerned about an issue such as this and would have raised it with his manager.

105. We note, in its closing submissions, that the first respondent suggests that the claimant's witness statement in this respect is contradictory between paragraphs 48 and 134 (see closing submissions

paragraph 303 to 304). We think that is a misreading of the claimant's witness statement. In paragraph 134 he is dealing with issues arising from Plantronics, not Ballicom.

106. We find that claimant did reasonably believe that he was acting in the public interest in making the disclosure, it was certainly not in his own interests to do so.

13	April 16	Accessories	Accessories category taken from C for Amazon.

107. As we have already found, the claimant's offer letter at page 695 stated that he will manage "all Accessories business across Amazon and all UC business across Etail excluding Dabs". The email at page 885 of the bundle dated 29 November 2016, planning for the departure of Mr Spendlove states "[the claimant] takes over Accessories for Amazon for the remainder of the month. Exception of Targus/Belkin which goes to Stuart Smith."

108. Thus it is apparent that at some point between starting with the team and November 2016 the Accessories business for Amazon had been removed from the claimant.

109. In his witness statement, Mr Rumsey does not deal with the question of removal of the Accessories category in April 2016, however, he was asked about it by Mark Reynolds at an investigation meeting on 24 March 2017. He stated "absolutely not true, as the GM, I agree the portfolio and what I agreed to give him, he got. 2 months after he joined Belkin and Targus complained about the drop in SLA and as a result Belkin were going to pull the Amazon business, Targus too!" (Page 1245). He was asked if he could provide written evidence from the vendors requesting these changes and stated that he would check.

110. On 24th of March 2017 Mr Rumsey emailed Mark Reynolds stating "I have checked and double checked, I don't have any emails concerning the removal of Belkin/Targus from Kieran" (page 1291)

111. On 20 March 2017, Mr Rumsey emailed Mr Fusco of Belkin stating "in January 2016 you recall Doug Spendlove was replaced by Kieran Sidhu to manage the Belkin portfolio for Amazon. Could you confirm that between Feb – March 16 Belkin requested a new account manager to replace Kieran."

112. Mr Fusco replied stating "Further to our conversation, during this time period, we felt the Belkin portfolio would be best managed by another member of your team." (Page 1483). The email does not say why a request was made, there is no reference to complaints about turnover or sales. The email does, however, refer to a conversation which had clearly taken place leading up to that email. We do not know what was said in that conversation but it is apparent that it took place in the context of Mr Rumsey having been involved in an investigatory meeting and being asked to show evidence of a request for transfer.

113. It was suggested by the claimant that because of inter-company relationships Mr Fusco would be willing to write whatever Mr Rumsey asked him to. Regardless of the truth of the claimant's concerns in this respect, no explanation has been given to us as to why the whole of the Amazon accessories business was removed, even if complaints had been made by Targus and Belkin. Moreover, there is no contemporaneous evidence of complaints by either Targus or Belkin and no evidence of any complaint by Targus at all.

114. In those circumstances we find that the Accessories category was taken from the claimant in respect of Amazon and we are not satisfied that there is any valid reason why. In this respect we note section 48(2) Employment Rights Act 1996 and do not find that the respondent has shown the reason for this removal. In the absence of any credible explanation from the respondent, we find that it is most likely that the reason was because of the disclosures made by the claimant as per allegations 6 and 12 above.

115. Removal of the category would be to the detriment of the claimant since it affected the amount that he could sell and would affect his earnings.

116. This is not an allegation of race discrimination.

14	April 16	Ballicom racism	[Undated, but assumed to be from this date] [BM] would ask the Claimant's team members if he was retarded, she would tell the Claimant that he was a "f*cking idiot" and ask him "are you Sikh or sick?

117. In this respect we note that the individual did not work for the respondent but for Ballicom. The respondents did not challenge the claimant on his evidence that she was saying those things to him or about him.

118. We do not, however, need to decide the truth of the allegation since there is no evidence that she was aware of any of the alleged disclosures or that her motivation was the fact of those disclosures and, therefore, we do not find that this was been a detriment to the claimant on the basis of any disclosure. This is not an allegation of race discrimination.

15	April – Oct 16	"Have a go"	John Cleary shouted at the Claimant on the phone to [BM] that he would have to go up to Coventry and "have a go on her" as this was what Doug Spendlove have done.

119. We have set out above our findings as to the culture of the team in which the claimant worked. We have also noted the admissions made by Mr Cleary in his evidence that unprofessional and infantile banter was directed at the claimant and that, at least in respect of the clapping, he was the leader of the team. Mr Cleary sat next to the claimant and we think that it is very likely that he would have said to the claimant that he should go to Coventry to see her and "have a go on her" as this was what "Doug Spendlove had done".

120. We do not, however, find that he made the comment because of the fact that the claimant had done the things alleged to amount to protected disclosures. There is no evidence that Mr Cleary was even aware that the claimant had made disclosures and we consider it much more likely that he said, what he said, because of his unprofessional and, to use his words, infantile attitude.

121. This is not an allegation of race discrimination.

16	5 July 16	Gross profit	The Claimant emailed Matthew Rumsey regarding gross profit that should be in his name but Glynn Smith refusing to transfer it. Next week- Glynn Smith said to the Claimant "*you see, we know what we are doing, Matt doesn't have a clue and I suggest you don't question me if you want to work in this team*". Claimant missed his target as a consequence.

122. We do not think that the evidence supports the claimant's case that Mr Smith was refusing to transfer gross profit that should be in the claimant's name. The email correspondence at around page 740 suggests that Mr Smith was accepting of the fact that the profit should be changed to the claimant but was of the view that the claimant should ensure that the systems were changed to allow that. His attitude was that it was up to the claimant to make the transfer and if he did not do that than that was the claimant's loss, Mr Smith was not going to assist him.

123. As we have indicated elsewhere in this judgment we find that Mr Rumsey was not a particularly effective leader and was led by the team. He was largely unconcerned as long as the team was hitting its targets.

124. In the light of that we find it likely that Mr Smith did say to the claimant "you see we know what we are doing, Matt doesn't have a clue and I suggest you don't question me if you want to work in this team." Thus we find this part of the allegation proved.

125. However whilst the claimant may have missed his target for that month, we do not find that he missed it as a result of Mr Smith's refusal to transfer the profit the reasons we have already given.

126. Whether the comment was made on the basis of the claimant's race is a more difficult question. The immediate reason was because of the claimant's low status within the group, this was simply another example of him being bullied; but the question arises as to why was the claimant being bullied- why didn't he fit in? Foreshadowing the question which we ask ourselves in the conclusion section of this judgment below, the question is whether the claimant has proved facts from which we could conclude that his race had a significant influence on the decision by the other team members to treat him badly or we could conclude that the treatment was related to race (in respect of the harassment claim) . That is a question

which must be decided in the light of all of the evidence and we return to it below.

17	14 July 16	Drugs	Glynn Smith accusing the Claimant of being on drugs in front team on a works night out to Coal restaurant. Matthew Rumsey late asked Claimant at work what drugs he was on.

127. There is a discrepancy in the dates alleged in respect of this allegation, the schedule of facts and the pleadings giving the date as 14 July 2016 and the claimant's witness statement gives the date of 21 July 2016.

128. Glynn Smith simply denies the allegation. The claimant has not made a diary entry in this respect although he has, on 16 August 2016, recorded a discussion about Mr Rumsey asking him if he takes drugs.

129. The allegation made by the claimant is that at the work night out Mr Smith had accused him, in front of the team, of being on drugs because he had a cold and had kept his jacket on (witness statement paragraph 59).We accept that Mr Smith may have made a comment of the sort alleged, nevertheless we do not consider that this particular comment either was intended to be offensive or was offensive. It is the kind of joking comment which may be made at a works night out and is not seen as serious. We are fortified in our conclusions in that respect by the fact that the claimant did not record the incident in his diary and thus we are satisfied, that in this respect, the respondent did not either treat the claimant unfavourably or, reasonably, create an intimidating, hostile, degrading, humiliating or offensive environment for Mr Sidhu.

130. We accept that Mr Rumsey did, later, ask the claimant, whilst at work, if he was on drugs. We do not find that there was anything inappropriate in him doing so. It would not be surprising to us if this respondent did have issues with staff members taking drugs and Ms Stratton told us that the respondent had a mature and sympathetic approach to individuals with substance addiction. Mr Rumsey did no more than make an enquiry of the claimant in this respect.

18	23 July 16	Bikini	Glynn Smith emailed Edan Penny and copying the Claimant Linked In person (in bikini) who was his replacement.

131. There is no doubt that the email alleged was sent (page 738). We find that it would have been offensive to the claimant because it referenced, as the subject matter, "Kieran's replacement".

132. The comment would have been particularly upsetting for the claimant since, we find, it was likely to have been part of ongoing comments about the fact that the claimant was not good at his job and would be replaced. We have already referred to the example on 28 July 2016, when, in response to an email asking if there was any objection to the claimant taking

a days leave, Mr Ridge replied to the whole team "fine by me, he doesn't do anything when he is here!" (Page 754).

133. We reject Mr Smith's explanation that he sent the email because he became aware that the claimant had been looking at attractive women on LinkedIn. We do not think that the claimant would have behaved in that manner and, even if he was, it does not explain the reference in the subject line to "Kieran's replacement".

134. Again we must consider whether the team was motivated by the claimant's race. The treatment of the claimant was unreasonable and no adequate explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

19	Aug 16	PIP	Unfairly placed on PIP.

135. It is asserted that the claimant was unfairly placed on a Perfromance Improvement Process (PIP) in August 2016. There is no documentation in the papers before us from August to suggest that a PIP was embarked upon and no correspondence between Mr Rumsey and human resources at that time. We note that, later, when a PIP was entered into, there was both such correspondence and a formal documentation process (pages 1105 – 1106).

136. On 21 October 2016, Mr Rumsey sent an email to the claimant, copying Sue Stratton of human resources, referring to "summary and actions following today's review". We find that email is evidence of Mr Rumsey having entered into a more informal process with the claimant, which he described as a framework agreement. However there were no formal targets or review dates within that agreement.

137. Our finding in this respect takes into account Mr Rumsey's response to the claimant's grievance at page 1179 where he stated "it wasn't a formal PIP it was a development plan (see attached). He improved during August and September but then his performance started to drop." It also takes into account the claimant's diary entry for 21st of October 2016 in which the claimant stated "wants to put me on a PIP action plan" (page 1018 E). If the claimant was already on a PIP from August it is difficult to see why he would have been stating that Mr Rumsey wanted to put him on a PIP action plan.

138. We have considered whether it was unfair to put the claimant on a framework agreement. We have considered the email at page 797 of the bundle when, on 25th of October 2016, Mr Rumsey stated "thanks for the summary – calls under a minute shouldn't count, well done on achieving your 20+ calls. You also need to work on expanding your contact/call list – tracker for vendors and customer." We find that email has the appearance of being written in good faith and was so written. Moreover whilst up to August 2016 the claimant sales had been good there was then a significant drop-off in September October and November (see page 1602, the sales recovered in December).

139. Thus there would be reason for Mr Rumsey to feel like it was necessary to work with the claimant to maintain his performance and we do not think that entering into a framework agreement with the claimant at that time was unfair.

20	Aug 16	Google	Glynn Smith googling Claimant's name, looking at his house on google maps and saying he lived in a "shit area", that no one would want to buy his place "you have a happy shopper on your street for f*ck sake, it looks like a terrorist war zone, what's that place called Aleppo?"
21	Aug 16	Car value	Glynn Smith said of the Claimant's car being "the shittest on the team", that the Claimant could not give it away free, typing the Claimant's registration plate number into webuyanycar.com and humiliating the Claimant saying to the team that they are only offering £100 and asking the Claimant what his basic was and replying "is that all? Do you know we are on more than you?

140. We deal with allegations 20 and 21 together given that the claimant's case is that they happened at the same time.

141. Mr Glynn Smith accepted in cross examination that he and others had looked up the claimant's car on "webuyanycar.com" in order to assess its value, but he said it was to compare the claimant's car with other employees' cars and that, in fact, other employees had worse cars than the claimant.

142. We note that this incident is not recorded in the claimant's diary but we note also that the claimant did raise it in his recorded conversation with Mr Rumsey (page 1084). We think that when he raised it with Mr Rumsey he was irritated that it had happened. However the context in which he raised it was primarily in respect of time wasting and he stated "… Like when they're googling my name and that takes time and effort. They're doing it on days I'm not in and saying… Um… Why you looking up my house and then Glynn's comparing my house to his house and my car to my car and that was banter… and then… Some of it though. Its just for my mental health; you're not seeing that as dwindling time. Do you see what I'm saying?"

143. We find, as a fact, that the allegations are well-founded although at the time they took place the claimant was less concerned about it than he considers now. We accept the claimant's evidence in this respect since when read in the context of the discussion on 7th February 2017 the allegations do not have the flavour of either being made up during the conversation or being created for the purposes of bringing a claim. The claimant is simply setting out his recollection of something that happened. His evidence is corroborated, to some extent, by Mr Smith's acceptance that the claimant car was valued by team members. It is also corroborated, though only to a limited extent, by the fact that Mr Rumsey's reply was "yeah okay". Mr Rumsey did not seem in any way surprised by the allegation.

144. The comments in relation to where the claimant lived are likely to have been more offensive than the comparison in respect of his car. The comments about where the claimant lives have the flavour of race about

them when considered in the context of being made about a colleague who one member of the team has described as “fucking for ISIS” and being Syrian (see below). We conclude that this is evidence from which we could conclude that the claimant’s treatment was significantly influenced by race.

22	15 Sept 16	Lingerie	John Cleary tried to force the Claimant to try on some lingerie on the sales floor in front of colleagues, prompting Glynn Smith to ask the Claimant what was wrong, saying "to be fair John couldn't pimp you out for much, maybe if you lose some weight and fly you back to Syria".

145. Mr Cleary accepted that he threw the lingerie to the claimant and asked him to try it on although he denied that he had repeatedly tried to force the claimant try it on. In this respect we believe the claimant. We have heard from Mr Cleary and we consider that it is likely that he would have thought it entertaining to try to persuade the claimant to try the lingerie on and, having decided to do so, would not have left it at simply making one suggestion to that effect. In his diary, the claimant has recorded for 19 September 2016 “JC asking me to try on lingerie persistently”. Whilst the date is slightly different the date of this allegation, we find that this is a contemporaneous record of the allegation.

146. In the claimant’s diary he has recorded Mr Glynn Smith as saying ,

a. on 18 August 2016, “Glynn interjects you ain’t doing nothing but staying in bed and wanking off, wanking off in bed with white socks… They won’t let you back in they will think you was fucking for ISIS” (page 1018 C)

b. on 19th of September 2016, “they won’t pimp me out for much unless I go back to Syria and lose weight” (1018 C)

c. on 23rd of November 2016 “asks how feels the only ethnic on team. Glynn says no to worry Matt won’t take any women on team. I will be the last if I’m anything to go by. (Page 1018 H).

We accept those diary entries as being in substance accurate and they show Mr Glynn Smith to be a person who would willingly target the claimant on the basis of his race (albeit that he is not Syrian). It may be helpful for us to address, at this stage, a submission repeated by both counsel for the first respondent and for the remaining respondents that Glynn Smith is unlikely to be of a racist disposition given that he is married to somebody from Lebanon, who was born in the Middle East and considers herself to be Middle Eastern. We reject that argument. The claimant is not from Lebanon, it is not suggested that anybody thought the claimant was from Lebanon. It cannot, we consider, be suggested that simply because somebody is from Lebanon they would not have adverse views on people of other nationalities, much less do we consider that the fact that somebody marries a person from Lebanon means that that person cannot have adverse views on people other nationalities. We consider the diary entries speak for themselves

147. Thus, notwithstanding that the date in the claimant's diary is 19 September 2016 rather than 15 September 2016, we consider the allegation that Mr Glynn Smith then said "to be fair John couldn't pimp you out for much, maybe if you lose some weight and fly you back to Syria" is also well-founded.

148. It is noteworthy, in respect of the other findings which we must make, that in this respect it was being suggested that the claimant should "fly … back to Syria". There was either a perception amongst the claimant's team that his origin was Middle Eastern or at least a willingness to make assertions to that effect.

149. It appeared to be suggested, at some point in the proceedings, that the claimant was regarding these comments as banter and that is why he was willing to take a photograph of Mr Cleary in the lingerie. We are not willing to accept that. Whilst the claimant may have been attempting to go along with the "banter" as, sometimes, people in his position do, this allegation must be seen in the light of what else was going on in September 2016 as we set out below. We find that both asking the claimant to try on lingerie and the comments made by Mr Smith would have created a humiliating environment for the claimant and it would have been reasonable for him to feel that way in all the circumstances.

150. The race specific comment by Mr Smith is a statement from which we could conclude that in this respect the claimant was being treated less favourably because of race (or that the treatment was related to race). The question of whether there are facts from which we could conclude that the actions of John Cleary were on the grounds of race is one which we will answer in the light of all of the facts when we deal with our conclusions. There is, however, no suggestion that anyone else was invited to try on lingerie.

23	23 Sept 16	Sausage picture	Someone sticking a picture of sausages (a gay reference) on the Claimant's screen, when the Claimant questioned the team they would insinuate it was at Matthew Rumsey's request, and Matthew Rumsey would just laugh.

151. We note that the claimant's diary records an exchange on 23 September 2016 between him and Mr Rumsey in which he states "… They're calling?? On LinkedIn and grindr in front of you maybe that's why I don't have gravitas?" Mr Rumsey is recorded as saying "look go out there and give back. Take that shit off your screen and tell them where to go. Just need you to be aware. I'm getting asked questions said it's not easy. Hold head high." The claimant then says "they will stick it back on. Just think about what I'm saying to you. Doug is telling me to fuck myself and fuck my mum and you're telling me to keep my head high…" (Page 1018D). It is clear, therefore, that something was being stuck onto the claimant screen and Mr Rumsey was aware of it. We consider it likely, in the circumstances, to have been a picture of sausages as alleged.

152. Moreover, we find that the picture of sausages was posted in the context of the team referring to the claimant using Grindr. Grindr is a

networking and online dating phone app for gay people. We find that the claimant's diary entry on 23 September in this respect is correct as is his entry on 16 August 2016 where he records "also non-stop I'm on Grindr and LinkedIn". Further, the picture of the sausages was posted in the context of Mr Cleary "deep throating" a banana as we set out in more detail below. Suffice it to say for now that, on 30 June 2016, the claimant records, accurately we find, that Mr Cleary was deep throating bananas and asking "if I'm hard why not stand up." (Page 1018 B).

153. In that context we find the posting of sausages to have been a gay reference, as alleged. However, we do not believe that the claimant's colleagues believed that he was gay. The use of terms to suggest that he was gay was simply a way of bullying the claimant.

154. We do not think that the posting of the sausages would have been at Mr Rumsey's request. We do not consider that Mr Rumsey was leading the bullying in that way, we find that he was a follower of his team rather than a leader of it. However we do think it likely that he was aware of the actions of the team and thought them funny.

155. Again, it was suggested that the claimant was entertained by the sausage references and reliance is placed upon the photograph of the claimant at page 926A. The photograph was taken in the context of the claimant being presented with some sausages as a "secret Santa" present. We find it impossible to say whether the claimant is smiling because he is genuinely happy, whether it is an anxious or polite smile or indeed whether it is a grimace. It is well known that people who are being made fun of try to go along with the "humour" being found at their expense and try to stop people knowing that it is affecting them. We find no assistance from the photograph at all. We find that, given the context in which these photographs were posted on the claimant's screen, this behaviour would, reasonably, have created an intimidating hostile, degrading and humiliating environment for the claimant.

156. Again we must consider whether the person posting the picture was motivated by the claimant's race in this respect. The treatment of the claimant in this respect was unreasonable and no adequate explanation has been given for it. As with other allegations, we will return to the question in this respect when we reach our conclusions.

24	23 Sept 16	MacDonald's advert	Someone sticking a MacDonald's job advert and a picture of sausages (a gay reference) on to the Claimant's screen.

157. We accept that alongside the sausage picture was a McDonald's advert of the type that can be seen can be seen on the photograph 814. We find the evidence of the claimant to be credible in this respect and borne out by the conversation which he had with Mr Rumsey on 23rd of September 2016 and which we have set out above. We repeat what we have set out above in relation to allegation number 23 in this respect.

25	Oct 2016	Sausage innuendo	Stuart Smith told everyone the Claimant had "cleared out the sausages" from the food van, following this the team then made daily comments to the Claimant including "did you get much sausage last night?", "how big is your sausage?", "do you have sausages in Syria?" and emailing the team with the comment "Siduko - 6 sausages a day does NOT keep the Doctor away".

158. In respect of this allegation we note that Stuart Smith admitted that on 25 October 2016 he had made a comment about the claimant clearing out the sausages. He told us, in cross examination, that the sausages had been cleared out (or eaten) by the claimant and since the cafe was on the bottom floor of the building and the team was situated on the top floor he was simply mentioning it to people because otherwise they would walk downstairs to the cafe and find the sausages gone. This explanation was not given in his witness statement or when interviewed by Exertis (page 1236) and we do not consider the evidence to be credible.

159. We also found Stuart Smith's evidence to be disingenuous in other denials he made. His assertion that the email he sent showing a Vaseline jar was a reference to someone's head getting stuck in railings wholly lacked credibility (see paragraph 172 below).

160. We note he sent an email earlier on the same day timed at 07:56 in which he stated "Siduko-– 6 sausages a day does NOT keep the doctor away" and find it likely, therefore, that comments were made in respect of eating sausages as set out in allegation 25, rather than the canteen running out of sausages. Moreover, given the apparent impression amongst the team that the claimant came from Syria and would have involvement with ISIS (see the diary entries for 18 August and 19 September 2016, page 1018C) and the other references to the claimant being gay as set out above, we think it likely that the allegations set out in this respect are well-founded. We note that in the reply to the Request for Further and Better Particulars, the claimant stated that it was only Glynn Smith who made the comments with reference to Syria on this occasion and we limit our findings accordingly (paragraph 3; page 97).

161. The comments which referenced Syria were likely to be related to or because of race. We will return to the reason for the other comments below. We also find that the comments would be likely to create a hostile or offensive environment for the claimant and it would be reasonable for the claimant to feel that way.

26	Oct 2016	Targus and Belkin	When C was given Accessories back, the accounts for the two largest vendors, Targus and Belkin, were given to Stuart Smith instead.

162. There is no doubt that when the claimant was given Accessories back the accounts for Targus and Belkin were given to Stuart Smith instead as set out in the email at page 885. In paragraph 476-9 of Mr Mitchell's

closing submissions he asserts that the evidence in the claimant's witness statement referred to 29 November 2016 as being the date when Accessories was given back to him and that the entry only appears in the diary for 29 November. Those dates are consistent with page 895. Mr Mitchell argues, that the claimant did not seek to amend his claim in respect of the date and therefore, as a matter of fact, the claim cannot succeed. We understood Mr Mitchell's oral submissions to be somewhat less strident and him to accept that discrepancies in dates would not require an amendment to the pleadings by the claimant before we could find in his favour. This point can be made in relation to a number of the allegations. Having regard to Mr Mitchell's concession, we do not need to consider this point further; suffice it to say that had Mr Mitchell maintained the position that an application to amend was needed, it seemed to us that it would be difficult for the respondents to resist such an application given that it was clear, throughout, the allegations which were in issue. However, that is a provisional view since no application was made and we heard no argument on this point.

163. In resisting this allegation, Mr Mitchell, in his closing submissions, relies upon what Michael Buley says in paragraph 8 of his witness statement, but that seems to us to be dealing with a different issue. If it is not then it provides a different explanation to the one given by Mr Rumsey at paragraph 35 of his witness statement. Mr Rumsey's explanation in his witness statement makes little sense because if that explanation is correct, "Stuart" would have been the single point of contact for Belkin, even before Mr Spendlove left. We have considered whether the withholding of those accounts was because the claimant had raised concerns to Mr Rumsey about compliance issues. We have set out above our findings in respect of Targus and Belkin and repeat that there was a lack of contemporaneous complaints about the claimant by either of them and that the only evidence obtained was from Belkin in response to a direct request from Mr Rumsey at a point where he was being investigated. We also repeat the points above about the suspension of Mr Rumsey due to compliance issues followed by him entering into an agreement to leave the first respondent with only 3m notice pay.

164. In those circumstances we are not satisfied that there was a valid reason for failing to return all of the Accessories accounts to the claimant and the respondent has not proved the reason for failing to do so. The failure to return the accounts would be detrimental to the claimant since it would have an impact upon his sales and, therefore, his earnings.

165. We conclude on the evidence that the failure to return the accounts was because Mr Rumsey was not happy that the claimant was making disclosures about compliance breaches and he did not want the claimant to have access to two large accounts, either to protect those accounts from similar disclosures being made or simply due to annoyance with the claimant for raising the issues.

166. It is not alleged that this action was on the grounds of race.

27	25 Oct 16		The team making comments to the Claimant including "*do you have sausages in Syria*?"

167. As we have stated, in the reply to the Request for Further and Better Particulars, the claimant stated that it was only Glynn Smith who made the comments with reference to Syria, however he also stated that other team members witnessed the event in October (paragraph 10; page 100).

168. Given our other findings in respect of Glynn Smith, we think it likely, on the balance of probabilities that the comment was made and it would have created a hostile environment for the claimant.

169. The comment was made because of, or related to, race.

170. Given the nature of the comments, there are facts from which we could conclude that this comment was made on the basis of the claimant's race.

28	29 Oct 16	Vaseline	Stuart Smith sending a picture of a Vaseline tub and two fingers. Glynn Smith said in response in front of the team that "*Kieran is definitely going to get f*cked the most, I'm surprised he hasn't been sacked already considering how sh*t of a job he does*".

171. There is no doubt that Stuart Smith sent a picture of a Vaseline tub with 2 fingers along with the caption "ouch! – Time to man up [smiley face emoticon]". The subject matter of the email was "November targets" (page 815).

172. To the extent that it is necessary for us to do so we find that the email was intended to be a reference to sex as submitted by the claimant. It appeared to be being suggested by the first respondent at some points during the evidence that it was a reference to a prostate examination. However, when it was put to Mr Stuart Smith that Mr Rumsey had said that the picture had made him think about prostrate examination, Mr Smith did not agree with that explanation. Earlier in his evidence Mr Smith had attempted to explain the photograph to being akin to needing Vaseline if ones head got stuck in railings. We regret that we did not see the link between receiving targets, a caption stating, "time to man up" and getting one's head stuck in railings.

173. In any event, it is largely not necessary for us to resolve that issue since the picture was sent to the whole team, did not single the claimant out and was not aimed at the claimant. The real issue, from the claimant's point of view, is that having received that email Glynn Smith replied "Kieran is definitely going to get fucked the most. I'm surprised he hasn't been sacked already given how shit a job he does".

174. That allegation is recorded in the claimant's diary and is likely, in our judgment, to be true (1018G). The allegation is consistent with the other emails that we have seen and referred to already in this judgment referring to Kieran's replacement etc.

175. This is an allegation of race discrimination. Given that the comment was made by Glynn Smith and that he has also made racially specific unpleasant comments to the claimant, we consider that there are facts from which could conclude that the conduct was because of or related to race and the respondents have not adduced any evidence to the contrary, simply denying that this comment was made.

29	Nov 16	Late hat	Someone in the team putting a straw hat on my desk with a post-it note attached saying "late hat".

176. The respondents and their witnesses were evasive in relation to this hat and when it was used. There is a picture at page 856 of the bundle which shows a straw hat with 2 signs on one stating “I love Dick” and one stating “late hat”. We accept that when the claimant was late the hat would have been put on his desk. We find that is the reason that the claimant was able to take the photograph at page 856 and is entirely consistent with the findings that we have made that he was clapped when he was late and people stood up.

177. We will return to the question of whether the action was because of or related to race, but as with the other allegations, we find that this was part of a bullying campaign against the claimant, for which we have been given no explanation.

30	Nov 16	DP	Placed on Disciplinary Process.

178. On 20 October 2016 Angela Rapley wrote to various people referring to a problem which had affected 381 lines of stock. It referred to a worst-case scenario of a lost value of £471,957. Mr Rumsey forwarded that email on stating “a problem occurred in the last week of October with Kieran Sidhu and a temp…” (Page 820).

179. We accept those emails reflect a genuine problem and it was not suggested that they were in some way constructed against the claimant. Even if that was the claimant’s case we would not accept it.

180. The claimant was, therefore, invited to a investigatory meeting on 14 November 2016 (page 857). The meeting (now called a disciplinary hearing) took place on 22 November 2016 (page 860) and the minutes show a follow-up from Mark Reynolds on 23 November 2016 stating this “having had further conversations with Milke Buley, Matt Rumsey, and Angela Rapley I have decided “no further course of action” as my conclusion, and that this was a genuine mistake by all involved…” (Page 862).

181. We find there was nothing wrong with instigating proceedings against the claimant in the circumstances and the outcome shows that the claimant was not being treated unfavourably or detrimentally.

31	Nov 16 to Feb 17	Plantronics PD	The Claimant raised various concerns with Matthew Rumsey from November 2016 to February 2017 regarding Plantronics.

182. Whilst we have endeavoured, as much as possible, to understand the full nature of this assertion from the claimant's witness statement, ultimately we have been unable to make any clear findings of fact as to what concerns the claimant states he raised with Mr Rumsey or what, if any, information he relayed to him.

183. The Schedule states that these allegations are dealt with in paragraphs 131 to 136 of the claimant's statement, however in paragraph 134 the claimant is talking about events in May 2016 whereas the allegation refers to events between November 2016 and February 2017. Paragraph 133 of the statement appears to be a collection of statements but it is not clear when the claimant says he made those statements or the context in which they were said. Moreover, the early part of paragraph 133 states that the restrictions being placed upon the claimant by Plantronics affected the claimant's ability to sell and earn commission, and in that sense his complaint does not appear to be about potential breaches of the law but about his personal position.

184. There is an email dated 1 December 2016 at page 891A of the bundle which states "they are using a trader in Germany as a launch partner. (I believe it might breach regulations!?)". But the claimant does not explain how that email, in his view, disclosed information which tended to show a breach of regulations. We have been unable to form a judgment, simply from reading that email, as to whether or not it did contain a disclosure of information which in the claimant's reasonable belief was made in the public interest and tended to show one of the matters set out in section 43B Employments Act 1996

185. As Mr Mitchell pointed out in response to Ms Cunningham's closing submissions, when we sought assistance from her in properly understanding the allegation, she was forced to add evidence to that which we had received. It is not appropriate for us to take account of that additional evidence, coming through counsel and without the benefit of cross examination and we simply record it to explain the difficulty in making findings on the evidence which has been presented.

186. In the circumstances we do not find this allegation proved.

32	11 Nov 16	Straw hat	Someone in the team put a straw hat on the Claimant's desk saying "I love dick" and again with a post-it note staying "gay boy" on another occasion and another time someone wrote "gay" on a piece of A4 paper and sellotaped it to the Claimant's chair.

187. The claimant's diary entries for 11 November 2016 read "I love Dick hat again and note" (1018 G). Given those diary entries and the photograph to which we have referred we consider it more likely than not that the allegation did happen as alleged. We accept the claimant's evidence in this respect. Although we have not seen reference to someone writing "gay" on a piece of paper and sellotaping it to the claimant's chair, in the claimant's diary, in the context of the other allegations which we find proved, we think it is likely, on the balance of probabilities, that this event did take place.

188. Again we must consider whether the action was motivated by the claimant's race. The treatment of the claimant was part of the campaign against him, it was unreasonable and no adequate explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

33	23 Nov 16	3 Smiths	Doug Spendlove stated that soon there would be "three Smiths" working on the team, then turned to the Claimant and said "how does it feel being the only ethnic on the team mate? Without you etail is 100% white and that's not a bad thing". Glynn then interjected and said "you will be the last ethnic if you are anything to go by, don't worry Kieran, Matt won't recruit any women either if that makes you feel any better".

189. In respect of this allegation we note that the claimant's diary on 23 November 2016 records an entry "asked how does feels to be only ethnic on team. Glynn says no to worry Matt won't take any women on team. I will be the last if I'm anything to go by."

190. Whilst we consider, on the balance of probabilities, that the first part of the comment was said by one of the claimant's colleagues, given that it is recorded in the diary, a difficult question for us is whether it was said by Mr Spendlove, having regard to the fact that the diary does not record the name of the person saying it.

191. As we have said, in our view, the claimant's evidence was generally given honestly, but his recollection of things has shifted over time. In respect of this evidence the entry in the diary, whilst largely supportive of what the claimant says, is somewhat different to the particularised allegation which refers to the team being 100% white and to his witness statement which includes the additional material that "On 23 November 2016, Doug Spendlove remarked that soon "three Smiths" would be working in the team because Lee Smith was taking over from Doug Spendlove. …."".

192. On balance we conclude that the remark "how does it feel being the only ethnic on the team mate?" was said, but we are not satisfied on the balance of probabilities that the remark was made by Doug Spendlove we

consider that there is a significant risk that looking back over time, the claimant's recollection as to who made the remark has become unreliable..

193. In respect of the comment allegedly made by Glynn Smith we find that the comment in the diary is accurate and in so far as Glynn stated "I will be the last if I'm anything to go by" he was referring to the comment that the claimant was the only ethnic on the team.

194. Both comments singled the claimant out and created a hostile environment for the claimant and were made because of or related to his race.

34	Nov / Dec16	Singing	Brad Nicholson (a colleague) would sing aloud in front of colleagues "*Sidhu, Sidhu, he has a bomb in his shoe, he works at o2, he is a f*cking dirty Arab* *Sidhu, Sidhu, Sidhu he is bigger than me and he has a bomb in his shoe*" (on repeat). Brad Nicholson would also ~~habitually~~ ask the Claimant how many corner shops he owned when he passed him on the stairs.

195. It is apparent from the interview between James Burns and Sue Stratton, recorded at page 1482A that James Burns, who was the claimant's former manager before he joined the team in question, does remember two employees (not now in the claimant's team) singing a song about "Sidhu Sidhu got a bomb in your shoe!". He gave the date as 3 years ago at the date of the interview (being 31 March 2017).

196. We have no doubt that at some point the claimant was subjected to the song in question, however we have considerable reservations as to whether it was in November or December 2016. There is no reference to it happening in the claimant's diary is and it does not appear in the recorded conversation on 7 February. In that conversation the claimant says that since his move of position on that day "I'm not getting called a bloody… shoe bomber…" but does not make reference to the song. (Page 1079).

197. We consider it reasonably likely that at the point where the claimant put in his grievance and looked back over the passage of time he has merged different memories and given the lack of contemporaneous evidence recording the song, combined with the evidence that the song appears to have been in existence around 3 years before March 2017, we are not satisfied on the balance of probabilities that it occurred in November/December 2016 as alleged.

35	Dec 16	Albania	Doug Spendlove saying to the team "*Kieran is f *cked because he will get sent back to Albania*"; John Cleary added "*how will he get cock? They don't have Grindr out there*!"

198. As far as this allegation refers to Mr Spendlove we repeat our comments made above about the quality of his evidence but we also note that there is no reference to this allegation in the claimant's diary.

199. Whilst the allegation is put as having taken place in December 2016 and that is the date that is in the claimant's witness statement, at the outset of the hearing an application was made to amend the date in this respect to August 2016. In his evidence the claimant gave no real explanation as to why he was seeking to change the date from December 2016 to August 2016 or how he came to be mistaken as to the date in the first place. We note that the original grievance in March 2017 gave the date of December 2016 (page 1164).

200. In March 2017, if the incident had happened in December it would have been around 3 months old. If it happened in August it would have been around 7 months old. The season of the year would, obviously, have been different. In the absence of any clear explanation as to how the claimant came to be so mistaken as to the date we are in difficulty accepting the claimant's uncorroborated evidence in this respect.

201. Thus we are not satisfied on the balance of probabilities that this allegation is proved to have taken place.

36	Dec 16	Luke Asekokhai	Luke Asekokhai saying to the Claimant "looking 'rapey' today did you rape anyone last night?" and "are you going to the works night out? I am just to see how many 'bloweys' I can get from the new recruits".

202. Mr Ridge gave evidence that Luke Asekokhai would regularly greet people by saying that they looked "rapey". He particularly made reference to the comments being made if he went to the gym and came back being sweaty.

203. The allegation which the claimant makes is not recorded in the diary and the claimant gives no context to the allegation. The claimant cannot give the date on which the allegation occurred, beyond saying it was in December 2016. The claimant's witness statement is very brief in this respect and gives no details such as where the comments were made or why he was talking to Mr Asekokhai.

204. We are not satisfied, on the balance of probabilities, that the claimant's uncorroborated evidence can be accepted in this respect, taking into account the limitations to the claimant's recollection which we have set out elsewhere in this judgment.

37	1 Dec 16	Work event	Doug Spendlove called the Claimant ["temperamental Syrian"], “ISIS”, "Islamist" and "shoe bombing Turk" throughout an evening work event in front of colleagues and a vendor

205. This incident does not appear in the claimant’s diary.

206. The claimant’s evidence was ostensibly supported by the evidence of Jordan Hussein who, coincidentally, was at the restaurant where the work event was taking place. He told us that he overheard somebody referring to “Turk” and thought it was a reference to him but did not identify Mr Spendlove as making the remark. However, his evidence is somewhat different to the allegation in that he talks about a group of people making the comments whereas the allegation is only made against made Doug Spendlove and pleads that it was Mr Spendlove who made all of the comments complained of.

207. The claimant’s diary does have entries for the 1st of December 2016 but nothing of this nature. Given that there was no contemporaneous record, the claimant, when first making his allegations in this respect, was thinking back over a number of weeks and must have been trying to remember what happened. Given, further, the nature of the event, which was a busy evening in a loud restaurant, and the differing evidence of Mr Hussein, whilst it is possible that some of the comments were made as alleged, we are not satisfied, on the balance of probabilities, they were made by Doug Spendlove and we do not find this allegation proved.

38	1 Dec 16	middle finger	Doug Spendlove said to the Claimant at an evening event in front of vendors "*f*ck your mum*", the Claimant said "*she's dead*" and he said "*good I like them cold*".

208. We have already found that Mr Spendlove did make comments to the effect of “fuck your mum” and we note that this incident is referred to by the claimant in his conversation with Mr Rumsey on 7 February 2017 (page 1090). We note, also, that this comment is not in the claimant’s diary.

209. We have given anxious consideration to the question of whether we can accept the claimant’s evidence in this respect where there is no record of this conversation before the conversation with Mr Rumsey on 7 February 2017. The claimant has given no explanation as to why the comment is not recorded in his diary, simply stating that he wished his diary had been better.

210. We have decided that it is more likely than not that the comment was made as alleged. Given that Mr Spendlove does make comments like “fuck your mum”, we can well see that the claimant would try to neutralise the comment by saying that his mother was dead and we consider Mr

Spendlove is quick enough and would consider it humorous enough to give a quick retort to the effect of "good I like them cold". We do not think that the claimant would simply invent this allegation and we find it proved.

211. We also find that the particularly offensive nature of the comment reflects hostility to the claimant and that he was being bullied generally by the team- the comment would not have been made otherwise. We will return to the question of whether it was because of or related to race below.

39	1 Dec 16	Sex in the NCP	John Cleary replying to an email from Matthew Rumsey to the team regarding a work function with vendors, suggesting the Claimant has sex with him in the NCP afterwards. 'That evening publically humiliating him in front of vendors', Stuart Smith saying that he was sh*t at his job and that he "*couldn't even sell a sausage*".

212. There is no doubt that this email was sent as we have set out above. We also find that the effect of the email would be to create a humiliating and offensive environment.

213. The question of whether Mr Smith said that the claimant was shit at his job and "couldn't sell a sausage" is more problematic. We note that in cross examination of the claimant it was put to him that the statement is a well-known phrase "couldn't sell a sausage".

214. When Stuart Smith was asked about that incident he stated that he could not recall the specific event, that there had been a couple of events and so he could not comment. That answer was evasive and did not address the allegation.

215. It is quite clear that part of the so called "banter" directed at the claimant from the members of his team was that he was not good at his job.

216. Having in mind all of the other comments about sausages and the fact that photographs were placed on the claimant screen, and we find it more likely than not that the comment was made by Mr Smith. Again the comment was part of the ongoing bullying against the claimant and we will return to the question of whether it was because of or related to race below.

40	2 Dec16	Silly	Doug Spendlove called the Claimant a "*silly sand-nigger*".

217. The phrase "sand-nigger" is not in the claimant's diaries and again we have been given no explanation as to why not. There is no independent supporting evidence in respect of this phrase. We are also unable to find any other corroborating evidence. If this phrase had been used we think that the claimant would have recorded it at the time.

218. In this respect, whilst we accept the claimant may now genuinely believe that comment was made, given the lack of any independent supporting evidence or any corroborating evidence we are not willing to conclude, on the balance of probabilities, that the comment was made.

41	7 Dec 16	CEX: to MR	Claimant reported to Matthew Rumsey and David Fairbank of Plantronics that Plantronics products worth £1000's in value were sold into CEX (a pawn shop).

The claimants witness statement states

> 106. I reported to Matt Rumsey and David Fairbank of Plantronics that Plantronics property (Exclusive product samples for VIP buyers) were being sold by CEX (a local pawn shop) stock worth thousands of pounds for personal gain and without payment of any income tax to HMRC. When I reported this, the team just laughed, and Matt did nothing.
>
> 107. On 19 December 2016 I sent a text message to David Fairbank at Plantronics with photos of their headsets in the Basingstoke CEX pawn shop [920]. This clearly showed demo stock worth thousands being sold for personal gain, yet nothing was done about this.
>
> 108. This was common practice at Exertis. Vendor stock was sold on eBay, Gumtree, Amazon, CEX or direct to independent stores in bulk. Matt turned a blind eye to this and so did Plantronics.

219. We consider that the claimant was keen to do things properly and would be upset if he thought that Plantronics equipment was finding its way into pawn shops when it should not be.

220. We have noted

a. the photographs at page 920 which, according to the index of the bundle are within a text message between the claimant and Mr Fairbank. Page 920 shows photographs of equipment in a shop and shows Mr Fairbank asking “what is CEX?” and the claimant replied “a pawn shop chain”. The date is not entirely clear, it may be 19 December, or it may be that is the date that refers to the next entry “5 bottles under my desk…”. Nevertheless we find that the exchange would have been in December 2016.

b. The entry in the claimant’s diary on 16 December 2016 “Plantronics headsets all in CEX. Thousands of £s Were only available through us.” (Page 1018 J)

221. We think it is likely that the claimant did believe that the stock being sold was demonstration stock and so being sold for personal gain and without payment of any income tax to HMRC, otherwise there would be no reason to contact Mr Fairbank about it. We find that the claimant would have told Mr Rumsey about his concerns and would, in doing so, have disclosed the information that headsets were being sold in CEX, which in

his reasonable belief tended to show a criminal offence being committed. Again, the claimant reasonably believed that the disclosure was in the public interest.

42	12 Dec 16	"lucky I'm leaving"	Doug Spendlove saying to the Claimant in front of the team "*I don't know how a sand-nigger like you holds on to your job, you are lucky I'm leaving as you will get Targus and Belkin back*".

222. For the reasons we have given in relation to allegation number 40 we are not satisfied on the balance of probabilities that Mr Spendlove did refer to "sand-nigger" however we can well imagine that he would have said that the claimant was lucky he was leaving as the claimant would get Targus and Belkin back, particularly in circumstances where the claimant thought that he should have those accounts and they had been given to Mr Spendlove. Further, we find it likely that Mr Spendlove said that he did not know how the claimant held onto his job given the other similar comments made by the team.

223. Thus we find that part of this allegation is proved but not the reference to "sand-nigger". We will deal with the question of whether these comments were because of or related to race below.

43	12 Dec 16 - 9 Feb 17		Claimant given accessories back (except Targus and Belkin – 80% of the business) when Doug Spendlove left, between these dates).

224. Page 885 of the bundle records that on 29 November 2016 Mr Rumsey emailed the team stating "Effective… 13th December… Kieran Sidhu takes over Accessories For Amazon for the remainder of the month Exception of Targus/Belkin which goes to Stuart Smith." It is goes on to state that from 3 January Mr Sidhu would pick up the remainder of accessories for Amazon except Targus/Belkin. Thus the factual assertion is proved.

44	12 Dec 16 - 9 Feb 17	AU's demands: to MR	[AU] of PayPal demanded the Claimant's Amazon Vendor Central login on almost a daily basis during this period. The Claimant reported his concern about [AU]'s requests to Matthew Rumsey throughout this time.

225. It does not appear to be in dispute that on or about 12/13 December 2016 the claimant did take on Accessories, which included PayPal (see paragraph 188 of Mr Foster's statement).

226. We refer to our findings above in relation to AU and, on the evidence we have heard, we think it likely that, given that she wanted the Amazon Vendor Central login, she would have asked the claimant for it.

227. Moreover, we think it likely that the claimant would complain about that to Mr Rumsey. It is difficult for us to make precise findings of fact given the lack of evidence as to what the first respondent discovered about Mr Rumsey in its investigation into compliance issues, however on the basis of the evidence we have, we find, on the balance of probabilities, that the claimant reported to Mr Rumsey that he was being asked to give his Amazon Vendor Central Login to AU and in giving that information he, he reasonably believed that reporting his concerns was in the public interest and showed a breach of competition law.

45	Jan/Feb 17	Holiday pay	Failing to authorise the Claimant's 5 day accrued holiday carry over on HR hub (which had previously been given to the Claimant as an exception by Dan Lenan (the Claimant's former manager) and agreed for future years because of his limitations in respect of holiday being a carer for his housebound disabled father).

228. On 19 December 2016 the claimant wrote to the first respondent's human resources officers stating "please carry over my remaining 5 days holiday to 2017. A "five-day option" kindly suggested and agreed by Dan Lenan, last year due to personal circumstances." (Page 919).

229. The agreement referred to at page 919 took place in 2015 and the claimant was permitted to carry over the holiday into 2016. The claimant agreed with Mr Mitchell that he had no express agreement for it to be carried over into 2017.

230. On 29 December 2016, Mr Rumsey asked the claimant to send the email confirmation from Mr Lenan that he had 5 days to carry over and stated that he would be required to use the additional 5 days in 2017. The claimant replied say that he did not have the email. (Page 929).

231. The claimant resigned in 2017 and it is not clear, from the evidence, whether he would have been allowed to carry the holiday over or not, had he not done so. His point was that Mr Rumsey had not actioned it on the system.

232. In any event, this is only pleaded as an allegation of disability discrimination and so has been withdrawn.

46	3 Jan 17	Lee Smith	John Cleary made a comment about Turks and Lee Smith said "*yeah that's why Kieran is down there, we are getting rid of the Turks*" in front of the team and the new graduate passing by.

233. In respect of this allegation Lee Smith told us that if he had used the word "Turkish" it would have been in respect of a colleague Dan Izzo who had been his team leader and with who he had a good relationship. Mr Izzo had said to him, when he had moved from the first to the second floor, "they

let anyone up here" and he replied "be quiet Turkish you should go back downstairs" Mr Izzo's nickname is Turkish.

234. In his witness statement the claimant states that this comment was made on the 2nd of February 2017 and we note that the pleaded date is 3rd of February 2017 (not 3rd of January 2017 as per the schedule).

235. In some respects the evidence of Mr Lee Smith was unsatisfactory. In paragraph 7 of his witness statement he stated "I also remember Kieran joking with people about having a sausage empire and having shares in a sausage company. He would talk about supply and demand, using words relating to sausages instead of a new product for Amazon, for instance." Some time was spent in cross examination on this part of his witness statement to understand what words the claimant would use instead of a new product. His evidence became more and more difficult to understand on this point to the point where Ms Cunningham put to the witness that he, himself, was baffled by this aspect of his witness statement and he replied that he was a little bit. We find that his witness statement is wrong in this respect however, that of itself does not mean that the allegation is true.

236. We note that there is no entry in this respect in the claimant's diary, but we do note that in the covertly recorded conversation on 3 February 2017 the claimant did state to Mr Rumsey "and John made a comment about Turks and Lee just said to me "yeah that's why Kieran is down there, we getting rid of the Turks" in front of the new graduate…" (Page 1060).

237. We do not find that the claimant would have been inventing that assertion and the conversation is contemporaneous evidence of the fact that the comments were made. We have considered the possibility that the claimant misheard the comments but, given the specificity of the claimant's recollection and the fact that he was recalling the account on the same day as it happened we think it is likely that comments were made as stated.

238. We are therefore satisfied on the balance of probabilities that this allegation is proved.

47	25 Jan 17	AU's demands: to MB	Claimant walked into Mike Buley's (Retail Director) room and informed him that PayPal were continuing to demand the Claimant's Amazon Vendor Central login details and Matthew Rumsey was not doing anything about it. Mike Buley replied "what do you want me to do about it? I'm busy", so the Claimant left.
48.	25 Jan 17	Plantronics: to MR and MB	Claimant emailed Matthew Rumsey and Michael Buley forwarding an email from Ian Stevenson of Plantronics instructing him not to sell on Amazon and highlighting to them that this would affect his figures.

49.	25 Jan 17	Plantronics: to MR and MB	Claimant emailed Matthew Rumsey and Michael Buley forwarding on Ian Stevenson's email not to sell on Amazon.

239. In respect of allegation number 47, we note that the date of the alleged discussion is pleaded as being on 25 January 2017,

240. There is no entry in the claimant's diary on 25 January 2017 and the only similar entry is one on 27 October 2016. That entry states "Buley office. Advised Plantronics pulling bids and removed all UC access. Advised they want to increase RRP by using single trader doubling to RRP to Joe Public and I'm losing customers to Harlow. Not happy what I want him to do about it… he is busy." (Page 995) The claimant deals with that entry in paragraph 131 of his statement where he states that he had escalated certain concerns to Mr Buley but he always pushed the claimant off in a frustrated and rude manner saying he was too busy. In that section of his witness statement, headed "Raising Concerns", he does not mention a conversation on 25th January 2017.

241. There is a significant difference between the diary entry for 27th of October 2016 and allegation 47 but they do both reference Mr Buley being too busy to deal with the claimant.

242. It is difficult to see why, if the claimant was sufficiently concerned to make a diary entry on the on 27 October 2016 he would not make a similar one on 25 January 2017, even taking account of the fact that he did not make an entry in his diary for every event that happened. It is clear the claimant was concerned when he considered there were breaches of competition law and when asked about the lack of diary entries the claimant simply said he wished, now, his diary was better.

243. We note, also, that the grievance dated 15 March 2017 does not reference a conversation with Mr Buley on 25th of January 2017.

244. We consider that it is most likely that the claimant is now mis-remembering what happened and attributing the events of October 2016 to January 2017 and we do not find this allegation proved.

245. In respect of allegation number 48, it is asserted that the claimant emailed Mr Rumsey and Mr Buley on 25 January 2017 forwarding an email from Ian Stevenson and that this, also, amounted to a protected disclosure. The email is in the bundle at page 977.

246. There is no doubt that the email was forwarded to Mr Buley and the claimant stated " FYI I have been instructed not to sell on Amazon (see attached) – Therefore the above growth and overall number will diminish, for reasons outside of my remit." (Page 977)

247. Mr Rumsey replied "leave this with me".

248. Mr Buley accepted in his evidence that the email would amount to a red flag and would be investigated. He stated that if what Plantronics was doing was illegal the first respondent would react against that. There is no doubt that the email from Mr Stevenson did exist and the respondent clearly

treated it as reasonable for the claimant to forward it on. In those circumstances it was reasonable for the claimant to believe that a criminal offence was being committed or a person was failing to comply with a legal obligation to which he was subject and he was disclosing information which tended to show that. The claimant did reasonably believe that the disclosure was in the public interest, he was concerned about unfair competition matters, and it is not suggested that he was making it for personal gain.

249. Allegation number 49 is a repeat of allegation number 48 as confirmed by the parties in the closing submissions.

50	26 Jan 17	“Dirty”	Matthew Rumsey reprimanded the Claimant re: ebuyer return saying "*you don't sound so sure, prove it, show me the email of me authorizing this*". John Cleary them shouting out "*Kieran you dirty bitch*", to which Matthew Rumsey burst out laughing, repeating "*Kieran you dirty bitch*" then continued to reprimanding him in front of the team.

250. This allegation is not in the claimant’s diary. It does appear in the claimant’s grievance at page 1165.

251. At the point when the claimant was writing his grievance his recollection of events is likely to have been affected by having decided that he had been the victim of injustice. Moreover, at that point he was likely to be trying to think of all the things which may have happened which he wanted to complain about. We consider that events which are recounted for the first time in a grievance are less likely to be reliable than those which are recorded in contemporaneous documentation.

252. Having considered this allegation we do not consider it has any internal coherence. By that we mean it is not clear to us why, even if Mr Rumsey had been reprimanding the claimant and saying “you don’t sound so sure, prove it, show me the email of me authorising this” Mr Cleary would shout “Kieran you dirty bitch”.

253. We are not satisfied on the balance of probabilities that this event occurred.

51	26 Jan 17	Banana	(3:18pm that day and almost on a weekly basis) John Cleary saying to the Claimant "*Kieran you know what time it is*" and signalling to everyone behind the Claimant who stopped work to turn around to watch (often crying with laughter) while John Cleary would deep-throat his peeled banana, saying "*you know you want some, talk dirty to me bitch*" and "*you must be so hard right now that's why you won't stand up*". Matthew Rumsey was almost always sat next to the Claimant when this happened, yet he did nothing to stop it

254. On 30 June 2016 the claimant recorded in his diary "JC deep throating bananas asking if I'm hard why not stand up. Ash Vine asking not to be a prude. Go on stand-up don't be shy." (1018 B) As we have said, we do not find that the claimant would invent allegations to record in his diary and insofar as the event is in the claimant's diary we are inclined to accept that it is a record of something which happened.

255. We accept that on 30 June Mr Cleary was "deep-throating" a banana and directing it at the claimant, and implying that the claimant would be aroused by it.

256. On 17 August 2016 there is a diary entry recording "JC deep throating banana at me (show Matt!) Asked me if I watch babestation does that even exist." (Page 1018 C). Again we find that this action was directed at the claimant and, again, it was linked with a sexual reference.

257. In the recorded conversation on 7 March 2016 the claimant referred to the deep throating of bananas (page 1083) and Mr Rumsey makes no attempt to deny the assertion. The claimant goes on to state that in respect of the deep throating of bananas "there hasn't been once in 3 days where that hasn't happened. It's like lunchtime is standard process."

258. In Mr Ridge's evidence at paragraph 25 he stated "John Cleary has on occasions 'deep-throated' a peeled banana as a joke but not frequently and it was never to my knowledge directed at Kieran or intended to be offensive.". We accept that as evidence that Mr Cleary did "deep-throat" bananas.

259. In those circumstances we reject Mr Cleary's evidence that he did not do so and we regard his statement, when interviewed by Ms Stratton that "I do eat a banana sometimes, this week at 11-ish. I wonder why Kevin wants to comment on how I eat fruit" (page 1223) as disingenuous.

260. Although the allegation is not recorded in the claimant's diary on 26th of January 2017, having regard to the other entries in the diary, Mr Ridge's evidence and the lack of faith we have in Mr Cleary's denials, we find this allegation is proved and we accept that it had the purpose and effect of violating Mr's Sidhu's dignity and creating a hostile and offensive environment for him. We take the view that it was reasonable for Mr Sidhu to find that the effect of the act was to create a hostile and offensive environment for him.

261. Again we must consider whether the action was because of or related to the claimant's race. The behaviour was unpleasant and no non-discriminatory explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

52	2 – 7 Feb 17	3 options	Matthew Rumsey gave the Claimant three options an exit package, that he move to another role or a PIP which would make his head spin, suggesting that the Claimant should work on his CV (despite acknowledging that the Claimant would have difficulties finding another local job as he could not

			work for Tech Data (a competitor) because of disparaging remarks from the team and the ban agreement in place with Lenovo -which Matthew Rumsey subsequently stated that he could lift for the Claimant and being pressurised to accept the terms of the unfair PIP. Matthew Rumsey informing the Claimant that he was not productive enough during his working day and so he had three options, to leave with two months' pay, to apply for another role or to be put on a performance management plan which would make his "head spin".

262. A meeting took place between the claimant and Mr Rumsey on 2 February 2017. The claimant took a contemporaneous note which appears at page 1040. He records “Matt takes me in room 1. 2 months pay 2. Apply for another role, no promises unlikely I will get one. 3. PIP, that will be so hard it will make my head spin.”

263. Not only do we consider that note is likely to be accurate, given that it was made contemporaneously, we note that in the meeting on 7 March 2016 the claimant said back to Mr Rumsey that Mr Rumsey had said to him to go to “the competition” and Mr Rumsey did not deny that. Moreover in the same meeting Mr Rumsey stated that if the first respondent was letting the claimant go it would probably look at allowing him to work for the competition. (Page 1103).

264. On 2 February 2017 Mr Rumsey wrote to Sue Stratton stating “I spoke to Kieran today… I gave him 3 options:

a. settlement with 2x pay

b. an aggressive PIP which I levelled with him was unlikely to pass

c. actively look at any Product Specialist roles open in the business – as he came from this background.” (Page 1039).

265. That email, again, is consistent with this allegation which we find to be proved.

266. We are not satisfied that there was any good reason for putting the claimant on a PIP on those terms. Having regard to the claimant’s offer letter which set out the sales which he was expected to achieve over the year (page 694) and comparing those with the claimant actual sales at page 1602, the claimant was, overall, meeting the target given at the start of the year.

267. We were not provided with any convincing explanation as to why Mr Rumsey had decided to place the claimant on a PIP and we are concerned by the fact that in effect, the claimant was effectively simply given 3 different ways of exiting the respondent in the meeting on 2 February, either by

settlement agreement or by being given a PIP which he could not pass or by going to work for a competitor. In our judgment the fact that the claimant was being given a PIP and being told it would make his head spin causes concern as to whether the PIP was being given in good faith.

268. We must consider whether the claimant was placed on the PIP because of the fact that he had made disclosures and/or because of race.

269. Given what we have said above about the circumstances of Mr Rumsey leaving his employment, we consider it to be reasonably likely that Mr Rumsey would not be happy about the claimant rocking the boat in terms of the allegations he was making about colleagues and passing of confidential information to the respondent's trading partners.

270. We find that placing the claimant on a PIP was a detriment and we are not satisfied that the respondent has proved to us the real reason for the claimant being placed on the PIP. We find that it is likely that the PIP was because of the disclosures made by the claimant

271. Moreover we find that a significant part of the reason that Mr Rumsey wanted the claimant to leave (and therefore framed the PIP in the way that he did) was because he did not fit with the team. We must consider whether in the light of all of the evidence there are facts from which we could conclude that placing the claimant on the PIP was significantly influenced by or related to race and, as with allegation number 16, we must consider whether the fact that the claimant did not fit was because of race. Again we will consider that in the light of all of our findings, below.

53	3 Feb 17	Verbal complaint	Purported Protected Act. Verbal complaint about discriminatory conduct and grievance.

272. Two conversations took place between the claimant and Mr Rumsey on 3 February 2017, in the 2nd, at page 1060, the claimant made a reference to comments about "Turks" in the context of the claimant's position on the table. He also made reference to being bullied.

273. In our judgment that was a complaint which falls within the definition of a protected act within the meaning of section 27 the Equality Act 2010 in that it was making an allegation that somebody had contravened the Equality Act 2010- the claimant was complaining about the fact that he was being treated unfavourably on the grounds of race.

54	6 Feb 17	2 fatties	Glynn Smith told the Claimant he would be a good match for Angela Rapley (manager), that he should "*have a go on Angela*" and saying "*two fatties, you would be good together, can you imagine how much food your kids would get through*?"

274. In respect of this allegation we note that there is no contemporaneous evidence from the claimant either in his diaries or otherwise.

275. We have particular concerns in relation to this incident since it does not, particularly, fit a pattern which we believe has been established in respect of the claimant in terms of the type of bullying which he endured. Moreover, the claimant does not provide any context as to how this comment was made, devoting only 3 lines in his witness statement to it. Whilst, we acknowledge that there were word limits in respect of the witness statements, the claimant has used other parts of his witness statement on allegations which could be described as background rather than specific allegations.

276. Again, we are not finding that the claimant was being deliberately untruthful when he raised his grievance but we are not sufficiently satisfied that this allegation is being recounted accurately for us to find it proved on the balance of probabilities.

55	6 Feb 17	AA	When the email was sent out regarding AA's decision the team asked the Claimant when he "was going to come out of the closet and tell Matt he wanted to be a woman" and "it will be easier now AA has led the way and that the Claimant should 'give him one' to show his appreciation". Matthew Rumsey would just laugh and say "you need to stop it they are taking this transgender stuff very seriously''

277. Again this incident is not in the claimant's diary but the claimant's witness statement does give the allegation some context, referring to an email being sent out by the company informing everyone about a decision to transition to a woman (paragraph 40). It was not suggested by the respondent in cross examination that such an email was not sent, nor is that suggested in Mr Foster's witness statement.

278. In those circumstances we find on the balance of probabilities that an email was sent informing everyone of the decision of a colleague to transition to a woman and we think it entirely likely, in this workplace, that the comments alleged in respect of allegation number 55 would have been made. We make that finding the in the context of the fact that the claimant has been repeatedly mocked as gay (we should make clear that, as a matter of fact, between being transgender and being gay are not the same things) and having heard Mr Rumsey give evidence we regret that we consider it likely that he would have laughed and simply told the team to "stop it they are taking this transgender stuff very seriously".

279. We find that this conversation would, reasonably, have had the effect on the claimant of causing a hostile or offensive environment for him.

280. Again the comments were part of bullying and we will address below whether they were because of or related to race.

56	6 Feb 17	Legalities of sex change	Doug Spendlove replying "*Linda who was really a man and could only help you on the legalities of your sex change but in return you would have to give her some action*".

281. This allegation is pleaded as occurring in the week commencing 6 February 2017. Mr Spendlove left on 12 December 2016 and so could not have made the comment on that date.

282. The claimant's witness statement at paragraph 95 gives a different account and states "Because my repeated requests for help with the Ballicom account from Matt Rumsey and my request for help from Mike Buley were ignored, on or around November/December 2016 I asked Matt Rumsey and the team for the name of the Company's legal person to override everyone on these serious breaches. Doug Spendlove replied that this was "Linda, who was really a man and could only help you on the legalities of your sex change but in return you would have to give her some action". Matt and my colleagues around me found this hilarious. I found this humiliating and offensive as I felt such talk was also degrading to anyone transgender or otherwise"

283. Thus, there are differences not only as to the date in the witness statement but also the context of the comment being made. Those differences are significant and cause us to have reservations about the accuracy of the claimant's recollection in this respect. There are no diary entries in relation to this allegation and the claimant did not raise any concerns at the time. We are not satisfied on the balance of probabilities that it happened

57	7 Feb 17	Ostracism	Claimant was treated with hostility and ostracised by the team.

284. It appears from the covertly recorded conversations on 7 February 2017 that Mr Rumsey was intending to speak to the claimant's team about their behaviour. Page 1049 records Mr Rumsey as saying "got… got out of control a bit" and a short while later "well I'll erm, I'll send a note out to the team just to say, you know, respectfully just rein it in." (Page 1050).

285. It is likely that Mr Rumsey did speak to the team, given that on 7 February 2017 he stated to the claimant "they've all been… They've all had a conversation." And a short time later stated that the claimant should not be getting any grief from the team now.

286. We note that in the meeting on 7 February 2017, the claimant said to Mr Rumsey, straight after Mr Rumsey stated "they've all been… they've all had a conversation", "you know what, yesterday was a bit awkward and I feel and bad for doing it. But I tell you what yesterday was such a nice day. Today I kept… I slept last night, today was such a nice day.…" After Mr

Rumsey had said “yeah, but you should be getting any grief from the team now,” the claimant said “yeah, I know that now. Maybe… And, don’t know. But it’s better now, it’s a bit awkward out there but I’m down the end of the table. Yesterday was really clear for me… Like I do something, I get an action done, on to the next, boom, call that person and flows.” (Page 1084).

287. The claimant did not suggest that he was now being ostracised or treated with hostility and does not make any entry to that effect in his diary. In those circumstances whilst we accept the claimant may have felt like that when, completing his grievance, he looked back, we do not think that his recollection is accurate. We do not find, from the evidence that we have seen, that the claimant was ostracised by the team or treated with hostility, except as we set out below in relation to issue number 59.

58	7 Feb 17	Pressure to sign PIP	Claimant was pressurised to sign acceptance of a PIP.

288. The recording of the meeting on 7 February 2017 shows that there was some pressure placed upon the claimant to sign the PIP and, in his submissions, Mr Mitchell accepts that. However, we do not find that Mr Rumsey put the claimant under that pressure because the claimant had made complaints about the way he was treated or otherwise done a protected act. We find that once Mr Rumsey had made the decision to put the claimant on a PIP (in respect of which we have set out our findings above) he was then keen to get the claimant to sign the PIP so that he could move on. Moreover, whilst we find that the claimant was clear in that meeting as to the allegations he was making, it is fair to say that, particularly towards the end of the meeting, he started to prevaricate in a way which it is likely that Mr Rumsey would have found frustrating.

289. On the balance of probabilities, we have concluded that the reason that the claim was pressurised to sign the PIP was not because he had done a protected act but was because Mr Rumsey wanted to finalise the position with the PIP and force the claimant into a definite position. Putting it colloquially, he wanted to nail the claimant down.

59	8 Feb 17	See you later	Glynn Smith walking past the Claimant at 18:00 said "*see you later bell-end*" .

290. In his evidence, Glynn Smith stated that he might have said “bell-end” on 8 February 2017 although when it was put to him that it was something that he was in the habit of saying to everyone he said “is not a habitual thing but I would have used some coarse language over the last 11 years.”

291. That evidence did not sit particularly easily with what Glynn Smith said to Ms Stratton when she asked him “is this something you would regularly say” and he replied “yeah I say bell-end to everyone” (page 1231).

292. On the balance of probabilities we find it likely that Glynn Smith did say “see you later bell-end” to the claimant given that he did not deny saying

it to Ms Stratton, simply saying he did not remember it on this occasion, and even if it was said generally (which the Mr Smith denies), it was bound to have a disproportionate impact on the claimant in the circumstances in which he found himself. The claimant had been bullied for a long period, he had raised with Mr Rumsey his concerns, he moved desks and was then confronted with being called a "bell-end". We find that the comment would create a hostile and intimidating environment for the claimant and it was reasonable that it did so. We also find that the comment was said as part of the bullying which the team engaged in and we will return, in that context, to the question of whether it was said because of or related to race; however, given that Mr Smith denied making the comment to everyone, we cannot take the view that the respondent has advanced, as a non-discriminatory reason for this treatment, the fact that the claimant was spoken to in the same way as everyone else.

60	13 Feb 17	IT access	Remote log in to the Respondent's IT system removed after togging on to download the Respondent's Dignity at Work Policy and being told that if he wanted it back on he would have to speak to Matthew Rum

293. There is no doubt that the claimant's access to his IT system was removed as alleged. It is also clear that Mr Rumsey did not explain to the claimant why he was removing his IT access.

294. However, in this respect, we did find Mr Rumsey's evidence persuasive. When asked to explain why he had closed off the claimant's access whilst he was still employed and had only just gone off sick he pointed out that Mr Sidhu had not contacted him except by text and that he was aware that Mr Sidhu was talking to others in the industry. It would have been reasonable for the first respondent to be concerned about those matters. Mr Sidhu had said in the meeting of 7 February 2017 that he had applied to Lenovo (page 1082) and went on to say "I'm trying to get another job and I'm going to find another job, right. I've already but… And again, you said go to the competition, the competition Matt" (page 1103)

295. Whilst it would neither be usual for the respondent to deny access to the IT to somebody who is simply off sick, and nor would it be usual to deny access to somebody who is simply looking for another job, a combination of the circumstances here, with the claimant being placed on a PIP, informing Mr Rumsey that he was seeking alternative employment and then not coming into work and only contacting Mr Rumsey by text message would be enough for Mr Rumsey to become suspicious of his motives and concerned about the need to protect the first respondent's business. The claimant had not, at that point, raised a written grievance but simply made the points he had to Mr Rumsey in conversation. Mr Rumsey was unaware that the claimant had been recording his conversations.

296. In those circumstances we are satisfied that on the balance of probabilities, Mr Rumsey's motivation in blocking IT access was not the fact that the claimant had made reference to bullying or complaints under the Equality Act 2010 but that he was concerned that the claimant was seeking work with a competitor whilst having access to the respondent's IT systems.

297. This is not an allegation of race discrimination.

61	March – May 17	Grievance process	Lengthy grievance process where the discriminators were permitted to collude and close ranks.

65	18 May 17	Grievance outcome	Failing to deal with the Claimant's grievance appropriately or uphold it despite having two months to investigate these serious allegations.

298. The claimant raised a detailed grievance on 15 March 2017 (page 1162). It was received by Sue Stratton she acknowledged it on 16 March 2017 and forwarded it to Mr Foster, human resources director for the respondent (page 1183).

299. The grievance was investigated in 2 parts, the allegations of breach of competition law and the allegations in respect of Plantronics were investigated by Lisa Lischak, in-house counsel, and the remainder of the grievance, and in particular the bullying and harassment claims, were investigated by Ms Stratton.

300. Mr Foster appointed Ms Stratton since she was the human resources manager for the Basingstoke office. Her role was simply to investigate and make recommendations, not to decide the grievance.

301. In conducting her part of the investigation, Ms Stratton sent a copy of the grievance to Mr Rumsey and he inserted comments.

302. Ms Stratton then met, on 24th of March 2017, with Brad Nicholson (page 1215), Joe Robinson (1218), John Cleary on (page 1221), Glynn Smith (page 1226), Stuart Smith (page 1235) Matt Rumsey (1238), Lee Smith (page 1278), Steve Ridge (page 1281) and Edan Penny (page 1285).

303. A grievance hearing took place between Ms Stratton and the claimant on 29 March 2017 (page 1331) and a telephone conversation took place between Ms Stratton and James Burns on 31 March 2017 (page 1482A) as well as with Mr Hamer (page 1478).

304. Mark Reynolds conducted an interview with Matt Rumsey alongside Lisa Lischak (page 1238). Mr Reynolds also conducted telephone conversations on 24 March 2017 with Michael Thompson (page 1292) and Ross Holt (page 1293).

305. An interview took place between Mr Buley, retail sales director for the respondent on 27th of March and Lisa Lischak (page 1296).

306. We find that Ms Stratton concluded that there were grounds for disciplinary action with the probability of dismissal to be taken against John Cleary, Stuart Smith and Glynn Smith and also Matt Rumsey. She

considered that others involved should receive a final written warning. At the same time as reaching those conclusions she discovered a draft protected conversation document in respect of her own position and subsequently was signed off work due to stress. She gave her notes of the investigation to Sam King who passed them to the respondent.

307. Because of Ms Stratton's absence it was necessary for Mr Foster to take over the investigation. He did not re-interview people but relied upon her interviews and investigations and set out his response in a letter sent to the claimant by email on 18 May 2017.

308. Mr Foster told us that he broadly accepted that what he had been told by the claimant was true and he did not consider that the claimant had made his allegations up in order to make money, although when he had met with the claimant and a witness he was taken aback by the witness' enthusiasm for a financial settlement.

309. The investigation and the subsequent conclusions reached by Mr Foster were inadequate. In respect of the allegations that the claimant had been called a "Syrian immigrant ", "temperamental Syrian", "Turk", "shoe bombing Turk" and "sand nigger ", Ms Stratton questioned Mr Rumsey, Mr Cleary, Glynn Smith, Stuart Smith (and Lee Smith to the extent of the isolated reference to "Turk") but no one else. She did not ask other people in the claimant's team or other members of the sales administration team about the allegation or whether they had heard the comments.

310. In respect of the allegation that people would clap when the claimant came in late, Mr Foster recorded that the act of clapping when the claimant came in late was substantiated but several of the employees investigated claim that this happened whenever anybody was late. In fact that was inaccurate, only Mr Stuart Smith suggested anything like that, he said that there was no clapping but, "it would be the same for everyone if they were late, there may be a comment like "good afternoon" or something."" (Page 1236).

311. When Stephen Ridge was asked about the "tuxedo incident" in his interview with Sue Stratton he stated "I have an email that I sent him… that said it was smart casual." He then passed the email to Ms Stratton (page 1282). The only real inference that can be drawn from that is that he was aware of at least one of the allegations in the claimant's grievance and that the claimant's grievance had not been kept confidential. It is also highly likely, therefore, that his negative answer to the question "did somebody say that this was going to be a question today?" was untrue. Mr Foster took no account of that.

312. In respect of the "late hat", Ms Stratton had asked Mr Rumsey whether he was aware of the hat and he had said that he was not. She did not ask any others about it which was, in our view, inadequate. Moreover it is clear that there was a picture of the hat (page 856) which Mr Foster saw between the interviews and writing his conclusion. Mr Foster did not appear to consider whether the picture of the hat, with the statement "I love Dick" on it and the post-it note with "late hat" on it, together with the email referring to sex in the NCP car park corroborated Mr Sidhu's other allegations in respect of bullying on sexual orientation grounds, such as references to Grindr.

313. In respect of the email with subject matter "Kieran's replacement" and the link to a woman in a bikini, Edan Penny had said to Ms Stratton that Glynn Smith was not the kind of guy who would send that email (page 1285-6). That statement was manifestly wrong but did not appear to have caused Mr Foster to consider whether that meant he should have placed more weight on the claimant's evidence rather than the evidence of his colleagues.

314. We consider that the investigation was deficient in that it limited the people who were asked about allegations, largely, to those against whom allegations were made. In respect of some of the allegations, such as the song about Mr Sidhu being a shoe bomber and the statement "fuck your mum", if, as the claimant says, those statements and songs had been made audibly and more than once, it is entirely possible that other people, such as those in the sales administration team, would have heard them. Asking those people would have shed light on the veracity of the allegations (either to the effect that they were true, or the effect that they were not.) In particular we note that Karen Harper was not interviewed.

315. Mr Foster did not resolve the grievance in respect of whistleblowing since it was being investigated by others. However he did not clearly state that position in his grievance outcome, at best stating "in summary there are a number of points that I haven't addressed… partly because there are several internal investigations that have not yet been completed." (Page 1523).

316. His conclusion was, generally, that the claimant's accounts were credible and believable but that the specific events raised by the claimant were generally not supported by the internal investigations. He states "your examples are specific and I take them very seriously and find it frustrating that there is a general lack of primary evidence. Where you have been able to provide primary evidence, I find the conduct of your colleagues unsatisfactory…" (Page 1521 – 1522). We formed the opinion that Mr Foster was trying to please everyone with the grievance outcome but in doing so he shied away from making a proper decision. We are particularly surprised that although he should have been aware from the grievance that that the claimant had kept a diary, he did not ask to see it and when he was offered more evidence generally, he said that he did not need it (pages 1495, 1497 and 1502)

317. We accept the point made by Ms Cunningham in cross examination that, generally, the claimant was therefore treated as a witness whose evidence could only be relied upon where there was independent evidence to corroborate it. We do not, however, accept that such an approach is always wrong. The allegations were serious and the respondent was entitled to consider whether the evidence supported the allegations. Nevertheless, there were flaws in the investigation and in Mr Foster's conclusions in as we have set out above.

318. We do not find that the grievance process was unduly lengthy, Ms Stratton carried out the investigation in good faith and did not delay matters. Mr Foster was bound to take some time when he took over the grievance from Ms Stratton to get up to speed. The grievance was raised on 27 March 2017, the interviews took place as we have indicated and the outcome to the grievance was sent on 18 May 2017. Although we have been critical of

some aspects of the grievance, given the steps which were taken we do not believe that the amount of time which the grievance took was surprising. We do not find that the respondent was at fault in terms of the length of time the grievance took.

319. We do, however, find that discriminators were permitted to collude. We have made the point, in respect of Mr Ridges evidence, above that he clearly knew what the allegations were to be against him. The letters to members of staff inviting them to interviews did not tell them that the meetings would be treated as confidential and when the staff were investigated they were not told that the allegations were to be treated as confidential. We acknowledge Mr Mitchell's submission that confidentiality is not a requirement of the ACAS code but we consider that it is good industrial practice for employees to be able to raise grievances in confidence and for people interviewed in connection with such grievances to be asked to maintain that confidentiality.

320. In those circumstances it is true that the discriminators were permitted to collude and close ranks. The claimant also requested copies of the investigation notes. We have considered whether there is an obligation on the respondent to provide such notes in all circumstances- often they are provided when an appeal is indicated. In this case we find that it was unreasonable for the respondent to fail to address the request, either by giving a reasoned refusal or by giving the notes.

321. However there is no evidence at all to suggest that Ms Stratton permitted collusion (by not telling people that they should not collude) because the claimant had done a protected act, nor do we think that Nick Foster was so motivated. We find that whilst both of them fell short in what was required of them they were not acting in the way that they did because of the protected acts done by the claimant.

322. In those circumstances we do not find that this amounted to an act of victimisation and it is not an allegation of race discrimination.

62	17 Mar June17	Social media	Claimant removed from social media sites (i.e. Face book and LinkedIn) which is used in the industry by Matthew Rumsey and other colleagues.

323. The claimant complains that he was removed both from LinkedIn sites and from Facebook sites. He accepted in cross examination that in so far as he had his own LinkedIn profile, only he could alter it; it could not be manipulated by the respondent. His claim in respect of Facebook is that colleagues "un-friended" him when he stopped working for the respondent.

324. We accept that, on the balance of probabilities, colleagues of the claimant did "un–friend" the claimant once he ceased working for the respondent. We are less satisfied that a similar thing happened in respect of LinkedIn and the claimant was not able to explain, as we understood his evidence, precisely what his complaint was in that respect.

325. We are also willing to accept that a reasonable person would take the view they had been subjected to a detriment if they were un-friended by people on Facebook. In the claimant's industry we accept that social

networking sites are an important part of business networking and, in any event, being un-friended would make a reasonable person feel rejected.

326. However, we have not seen any evidence to suggest the un-friending was because the claimant had raised a grievance and, except in respect of Mr Rumsey, we have not been given the names of anybody who did un-friend the claimant. In respect of Mr Rumsey, the dates of the un-friending are vague and we do not recall this allegation being put to Mr Rumsey in cross examination. If it had been, we anticipate that Mr Rumsey would have denied it

327. It is not clear to us whether Mr Rumsey's Facebook account was one in respect of which the first respondent had any control and we anticipate that it was a personal Facebook account. The allegation was not explored in evidence or closing submissions and it is not clear to us that the operation of the account could be said to amount to anything for which the claimant's employer would be liable.

328. In the circumstances we do not find that the "un-friending" was because the claimant had done a protected act or that it was an act for which the first respondent should be liable. This is not an allegation of race discrimination.

63	30 Mar17	Sick pay	Nick Foster's refusal to exercise his discretion to pay the Claimant full sick pay and his continuing loss despite Nick Foster's later assurance that he would be paid in full.

329. This allegation has been withdrawn

64	May 17		Professional and personal reputation tarnished by breaches of confidentiality (in relation to the nature of the grievance) resulting in the Claimant being subjected to indirect comments that he is unfairly suing the Respondent over being called a "Turk" which was just "banter".

330. Again, the claimant's allegation in respect of rumours was vague. He was unwilling to reveal the names of people who worked at Exertis and who had told him that it was being said that he had "ruined people's lives" amongst other comments. It is unclear whether the comments allegedly being made were being made because the claimant had raised a grievance or some other reason. Without knowing the names of the employees we can not be satisfied that they were employees of Exertis at the time the comments were made or whether the comments that they were reporting were from employees.

331. The allegation in relation to Carla Allen is inaccurately summarised in the claimant's witness statement. Consideration of the transcript of the conversation between the claimant and Mr Hussein shows that somebody called "Carla" was speaking to him about her understanding of a case that

the claimant was bringing against Exertis. It is not clear that she is deliberately misrepresenting the claimant's position, indeed the tone of the conversation suggests that she is simply repeating what she has understood. There is no basis for thinking that she was seeking to do the claimant down because he has raised a grievance or done another protected act.

332. Moreover there is no evidence that anybody deliberately misrepresented the position to "Carla" in order to do the claimant down or because he had done a protected act. The claimant had raised a grievance and a number of people had been interviewed in respect of it. It was not surprising that the contents of the interviews would "leak" as colleagues spoke about matters. It is also not surprising that allegations would change as they were repeated. That is simply an incidence of office culture and the effect of people talking to each other. In our judgment there is no evidence that the claimant was subjected to a detriment in this respect because he had done a protected act.

66	24 May 17	Resignation	The Claimant submitted his resignation with immediate effect in a letter by email, saying that he felt that the R1 had *white-washed* the grievance outcome, and that he was left in an untenable position. *Agreed resignation date*.

333. The claimant resigned on 24 May 2017. His letter of resignation states "due to the way I have been treated over the course of my employment (as set out in my grievance letter), acts of victimisation/retaliation and your whitewash of a grievance outcome, I believe that the company has fundamentally breached my contract leaving me in a completely untenable position." The letter goes on to complain of the fact that the claimant had not heard anything from the respondent despite requesting investigation documentation which had prevented him from putting in grounds of appeal and that there had been an apparent breach of confidentiality in relation to the grievance. (Page 1546).

334. The claimant resigned without notice.

335. We record that on the following day Mr Foster wrote to the claimant stating "I am genuinely sorry that you have decided to resign… I would very much like to discuss these issues further with you, if at all possible. I'd be pleased to arrange an informal meeting with you, at a neutral location if you prefer…" (Page 1547).

336. We find that the reason for the claimant's resignation was an accumulation of all the matters which had gone before, namely those matters which we have found proved as set out above and which we have described as bullying, the way the claimant's grievance was dealt with and those matters pleaded as detrimental treatment pursuant to making a protected interest disclosure which we have found proved above.

67	25 May 17		Claimant seeks payment of £1,619.26 unlawful deduction of sick pay.

337. This allegation is withdrawn,

1.	Jan 2016 on	Name calling.	John Cleary, Stuart Smith, Glynn Smith, Doug Spendlove, referring to Claimant as a "Syrian immigrant", "temperamental Syrian", "Turk" and "shoe bombing Turk" and "sand-nigger" in front of his colleagues and manager.

338. This allegation is not well particularised, simply referring to 4 named people calling the claimant a number of names on unspecified dates from January 2016 onwards. We acknowledge the difficulty of an individual being able to particularise every time when something happened and would not expect a claimant to necessarily be able to give the precise date and words used for every allegation he or she makes.

339. Nevertheless there does need to be an evidential basis for us to reach a conclusion in respect of the allegations made.

340. As we have said above, in respect of Glynn Smith, we consider there is an evidential basis for finding that this allegation is in large part substantiated. In his diary the claimant has recorded Mr Smith as saying ,

d. on 18 August 2016, “Glynn interjects you ain’t doing nothing but staying in bed and wanking off, wanking off in bed with white socks… They won’t let you back in they will think you was fucking for ISIS” (page 1018 C)

e. on 19th of September 2016 “they won’t pimp me out for much unless I go back to Syria and lose weight” (1018 C)

f. on 23rd of November 2016 “asks how feels the only ethnic on team. Glynn says no to worry Matt won’t take any women on team. I will be the last if I’m anything to go by. (Page 1018 H).

341. The diary entries are in substance accurate and show Mr Glynn Smith to be a person who would willingly target the claimant on the basis of his race (albeit that he is not Syrian).

342. We think it likely that Glynn Smith was regularly, on at least a monthly basis, using terms such as “Syrian immigrant”, temperamental Syrian” and “shoe bomber”. We do not find that he used the phrase “sand–nigger”, it only being suggested that Doug Spendlove had used that phrase.

343. However, there is little evidential basis for us to find that the other people named in this allegation were using similar racist language. We find, generally, that they were unimpressive witnesses and we are satisfied that it is overwhelmingly likely they were fully aware of the way Glynn Smith was

referring to the claimant and did nothing to stop him (or even suggest disapproval of him).

344. As we have said, we found Stuart Smith's evidence to be disingenuous in the denials he made. His assertion that the email he sent showing a Vaseline jar was a reference to someone's head getting stuck in railings is so difficult to fathom we consider it to have been untrue. His assertion, made for the first time in evidence, that the reason that he mentioned sausages on 25 October to the rest of the team was because he wanted to preserve colleagues from having to walk to the bottom floor only to be disappointed, we also considered to be untrue. However, we are not able to move from that finding to a finding that, therefore, he used the racist language alleged in this allegation or, indeed, the language referred to in allegation number 2.

345. We have considered whether we should draw, from our finding that Mr Smith did make references to the claimant about sausages, an inference that he also said those matters listed in this allegation but, in the absence of any record to that effect, we consider the risk is too great that the claimant is attributing remarks to team members with the benefit of hindsight which may not be accurate. Thus we are not satisfied on the balance of probabilities.

346. We have also found that Mr Cleary used the word "Turk" on 3rd of February 2017. We find that if he used it once it is likely he used it more than once and thus we find this allegation is proved against him to that extent. However, again, we do not consider that from that finding we can move to a finding that he also called the claimant "Syrian immigrant", "temperamental Syrian" or "shoe bombing Turk". Thus, we are not satisfied that Mr Cleary did more, in respect of this allegation that call the claimant "Turk".

347. We are not satisfied on the evidence we have seen that Mr Spendlove used these words. There is no diary entry of him or any other record of him using the words.

2	Jan 2016 on	Grindr etc.	Glynn Smith, Stuart Smith, John Cleary, Doug Spendlove asking the Claimant almost on a weekly basis "what action" he was getting, asking if he is gay and accusing him of being on a gay dating app 'Grindr' when using his mobile for business purposes, saying that the Claimant needed to get on Grindr as maybe he "didn't get enough dick last night".

348. In respect of this charge there is certainly sufficient evidence to find that John Cleary was asking the claimant if he was gay, accusing him of being on Grindr and making other comments to suggest that the claimant was gay. Indeed we regard Mr Cleary's general attitude as being one of finding such matters humorous.

349. There is also evidence that Glynn Smith joined in such comments and so, for instance, on 15 September 2016, said to the claimant that Mr

Cleary couldn't pimp him out for much unless he lost weight and flew back to Syria, as set out above.

350. Again we must consider whether the comments were because of or related to race. The treatment of the claimant was unreasonable and no adequate explanation has been given for it. We will return to the question in this respect when we reach our conclusions.

351. For the reasons we have given we are not satisfied that there is sufficient evidence against Stuart Smith to find that he is guilty of this allegation, nor is there any evidence of Mr Spendlove using the language alleged although, again, we find that it is likely that both were aware of the language being used and enjoyed the claimant's discomfort.

Statutory Defence

352. Although not listed in the schedule of issues it is necessary for us to make findings of fact as to the training given to staff in order to consider the first respondent's defence that it had taken all reasonable steps to prevent its employees from doing the acts alleged or anything of that description (as per section 109 Equality Act 2010).

353. The only evidence of training of an equalities nature is in the records at page 618 of the bundle. They show that some members of staff were trained on equality and diversity and the "DCC code of conduct" in July and November 2017. We have been shown no records for training that took place prior to the allegations and we find that none took place.

354. We think it likely, and certainly possible, that if proper training had been given to the respondent's employees on matters of equality and diversity the type of office culture which we have set out above would have been discouraged. The first respondent's staff would have appreciated that the first respondent did not approve of such behaviour and would not be willing to tolerate it. Training does affect the way people behave. In this case, not only has the respondent not indicated its disapproval of the culture to which we have referred and the racist comments which we have found but, through Mr Rumsey at least, has tacitly endorsed it.

Paragraph 26.10 of the Amended Particulars of Claim

355. In this paragraph an allegation is made that the respondent caused the claimant to suffer personal injury as a particular of Victimisation. The claimant withdrew all other allegations of causing personal injury under other heads of claim and we anticipate that this claim has been left in the Amended Particulars of Claim, in error. However, for the purposes of clarity, given our other findings on victimisation, we would not find that the claimant had suffered personal injury (if that were the case) because he was subjected to a detriment as a result of a protected act.

The Law

Discrimination

356. The following, are relevant sections from the Equality Act 2010.

9 Race

(1) Race includes—
(a) colour;
(b) nationality;
(c) ethnic or national origins.

13 Direct discrimination

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

26 Harassment

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

(2) A also harasses B if--
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

…

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

5) The relevant protected characteristics are—
…
race;
…

27 Victimisation

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

(2) Each of the following is a protected act--
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) …

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

…

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

….

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of

A's employment it is a defence for B to show that B took all reasonable steps to prevent A--

(a) from doing that thing, or

(b) from doing anything of that description.

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

Section 136 Burden of Proof

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

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

212 General interpretation

(1)

…

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

357. In *Madarassy v Nomura International plc* [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
>
> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the

tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

358. In *Hewage v Grampian Health Board* [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) 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. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

359. In *Birmingham City Council and another v Millwood* UKEAT/0564/11/DM the EAT considered the question of whether an inadequate explanation for treatment would cause the burden of proof to shift. Langstaff J said

> "**[25].**..We approach this question by remembering that the purpose of the provisions is to identify a proper claim of discrimination, recognising that it is highly unlikely in the real world that there will be any clear evidence that that has occurred. The inference will have to be drawn if a claim for discrimination is to succeed at all. Though a difference in race and a difference in treatment to the disadvantage of the complainant is insufficient and something more is required, Mr Beever was prepared to accept that where as part of the history that the tribunal was examining an employer had at the time of the alleged discriminatory treatment given an explanation for it which a tribunal was later to conclude was a lie, that might, coupled with the difference in race and treatment, justify a reversal of the burden of proof. We agree.
>
> **[26]** What is more problematic is the situation where there is an explanation that is not necessarily found expressly to be a lie but which is rejected as opposed to being one that is simply not regarded as sufficiently adequate. Realistically, it seems to us that, in any case in which an employer justifies treatment that has a differential effect as between a person of one race and a person or persons of another by putting forward a number of inconsistent explanations which are disbelieved (as opposed to not being fully accepted), there is sufficient to justify a shift of the burden of proof. Exactly that evidential position would have arisen in the days in which *King v Great Britain-China Centre* [1991] IRLR 513, [1992] ICR 516 was the leading authority in relation to the approach a tribunal should take to claims of discrimination. Although a tribunal must by statute ignore whether there is any adequate explanation in stage one of its logical analysis of the facts, that does not mean, in our view, to say that it can and should ignore an explanation that is frankly inadequate and in particular one that is disbelieved.

360. In *Shamoon v Chief Constable RUC* [2003] IRLR 337, the House of Lords held "No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason-why issue. The two issues are intertwined" (paragraph 8).

361. In considering questions of causation, in *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

362. In deciding whether the claimant was treated unfavourably we have had regard to the decision in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11 that, in respect of the definition of detriment,

> "As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.
>
> But once this requirement is satisfied, the only other limitation that can be read into the word is that in-dicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

363. In *Bahl v Law Society* [2004] IRLR 799, the Court of Appeal stated:

> **"[101]** In our judgment, the answer to this submission is that contained in the judgment of Elias J. in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from *Anya* are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with *Zafar*. It is not the case that an alleged discriminator can only avoid an

adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J. observed (para 97):

"Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case."

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way".

364. In respect of the statutory defence, in C*anniffe v East Riding of Yorkshire Council* [2000] IRLR 555. Burton J stated, at paragraph 14: 'We are satisfied that the proper approach is: (1) to identify whether the respondent took any steps at all to prevent the employee, for where it is vicariously liable, from doing the act or acts complained of in the course of his employment; (2) having identified what steps, if any, they took to consider whether there were any further acts that they could have taken which were reasonably practicable. The question as to whether the doing of any such acts would in fact have been successful in preventing the acts of discrimination in question may be worth addressing, and may be interesting to address, but are not determinative either way. On the one hand, the employer, if he takes steps which are reasonably practicable, will not be inculpated if those steps are not successful; indeed, the matter would not be before the court if the steps had been successful, and so the whole availability of the defence suggests the necessity that someone will have committed the act of discrimination, notwithstanding the taking of reasonable steps; but on the other hand, the employer will not be exculpated if it has not taken reasonable steps simply because if he had taken those reasonable steps they would not have led anywhere or achieved anything or in fact prevented anything from occurring."

365. However, in *Croft v Royal Mail* [2003] IRLR 592, the Court of Appeal stated, in paragraph 61 "I agree that a consideration of the likely effect, or lack of effect, of any action it is submitted the employers should have taken is not the sole criterion by which that action is to be judged in this context. In considering whether an action is reasonably practicable, within the meaning of the subsection, it is however permissible to take into account the extent of the difference, if any, which the action is likely to make. The concept of reasonable practicability is well-known to the law and it does entitle the employer in this context to consider whether the time, effort and expense of the suggested measures are disproportionate to the result likely to be achieved. The tribunal were entitled to conclude that, at each stage, the respondents did take such steps as were reasonably practicable to prevent the acts complained of."

Victimisation

366. *Martin v Devonshires Solicitors* [2011] ICR 352, held that (from the headnote) "on any claim of victimisation, the tribunal had to determine the reason the respondent did the act complained of, and, if it was wholly or substantially that the claimant had done a protected act, he would be liable for victimisation, and, if not, he would not be so liable; that there would be cases where an employer dismissed an employee, or subjected him to some other detriment, in response to the doing of a protected act but where it could be said, as a matter of common sense and justice, that the reason

for the dismissal was not the protected act as such but some feature of it which could properly be treated as separable, such as the manner in which the employee made the complaint relied on as the protected act"

Time

367. In *Commissioner of Police of the Metropolis v. Hendricks* [2003] ICR 530 the Court of Appeal stated:

> 52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period" … the focus should be on the substance of the complaints made that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed."

368. In terms of an extenstion of time, Harvey on Industrial Relations summarises the position thus:

> The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by s 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (*British Coal Corpn v Keeble, DPP v Marshall*, above). Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (*e*) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see *British Coal Corpn v Keeble [1997] IRLR 336, at para 8*)

Protected Interest Disclosure

369. The law is found in different sections according to whether a person is certainly have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

> An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure

370. S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

[(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

[(1A) A worker (—W‖) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W‘s employer in the course of that other worker‘s employment, or

(b) by an agent of W‘s employer with the employer‘s authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker‘s employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker‘s employer.

(1D) In proceedings against W‘s employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

371. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

372. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

373. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

374. As the EAT has set out in *Dray Simpson v Cantor Fitzgerald* “UKEAT/0016/18/DAthe question in each case, as has now been made clear, is whether a particular statement or disclosure is a “disclosure of information which, in the reasonable belief of the worker making the

disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". However, in order for a statement or disclosure to be a qualifying disclosure, it has to have a "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)". The question of whether or not a particular statement or disclosure does contain sufficient content or specificity is a matter for evaluative judgment by the Tribunal in light of all the facts of the case (para 39).

375. In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of"

376. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

Constructive Dismissal

377. A termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The Court of Appeal made clear in *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27,* it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

378. In this case the claimant, in respect of the breach of contract, relies upon a breach of the impled term of trust and confidence.

379. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, the term (was held to be as follows: "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

380. In *Omilaju v Waltham [2005] ICR 481 Dyson LJ said:*

> **14** The following basic propositions of law can be derived from the authorities.
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the

relationship of confidence and trust between employer and employee: see, for example, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, 610 e– 611a (Lord Nicholls of Birkenhead), 620 h– 622c (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, 672 a. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud* , at p 610 h, the conduct relied on as constituting the breach must

"impinge on the relationship in the sense that, looked at *objectively* , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in *Harvey on Industrial Relations and Employment Law* , para DI [480]:

"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

…

19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671 f– g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its

essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20 I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22 Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above).

381. In *Kaur v Leeds Teaching Hospitals* [2019] ICR 1, Underhill LJ gave the following guidance at paragraph 55:

> In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach?

Conclusions by reference to the List of Issues

382. We now set out our conclusions by reference to the List of Issues at page 61 of the bundle.

Race discrimination

383. We preface this section by acknowledging that most of the matters that we have found proved that would amount to a detriment within the meaning of s39 Equality Act 2010 would also amount to harassment and, therefore, by virtue of section 212 Equality Act 2010 should be treated as acts of harassment rather than direct discrimination.

384. In respect of issue 1.1 and 1.3 we have set out above the conduct which we find the claimant was subjected to. The treatment, overall, amounts to a campaign of bullying against the claimant by his team. He was, as Ms Cunningham submitted, “the team victim”.

385. In respect of issue 1.2 and 1.3, we have to consider whether the claimant has shifted the burden of proof and whether there are facts from which we could conclude that the conduct we have found proved was on the basis of the claimant’s race.

386. We have set out above the allegations which are race specific and in respect of those we find that the burden of proof shifts. They are numbers 1,20, 22 (to some extent), 25 (to some extent), 27, 33, 46 in the Schedule.

387. We have also identified a number of allegations where the behaviour has been unpleasant or unreasonable and the respondents have offered no explanation for its behaviour or we have rejected the explanation as untrue. We find those allegations formed a course of bullying of the claimant. Thus, although there are a number of different allegations, in many respects there has been one ongoing act, namely the bullying of the claimant which has manifested itself in different ways.

388. In respect of those allegations (numbers 2, 4, 5, 7-9, 16, 18, 21, 22 23, 24, 28, 29, 32, 38, 39, 42, 51, 52, 55 and 59 of the Schedule) we find that the claimant has proved facts from which we could conclude that race was a significant influence on the way that he was treated. Firstly we rely upon the race specific allegations that we have referred to in the previous paragraph. They show that the claimant’s colleagues were either using discriminatory language or content to be part of a culture in which it was used against a member of their team. Taking the evidence as a whole, the claimant’s actual or perceived race appears to have been an issue for the team. Secondly, we have noted the guidance in paragraph 101 of *Bahl* that whilst unreasonable treatment of itself will not shift the burden of proof, a

lack of an explanation may do so. In this case the respondents have not advanced any (or any credible) explanation for the bullying and events which we have found proven, such as there being aspects of the claimant's personality which caused the team to take against him which were not protected characteristics under the Equality Act 2010.

389. We find, therefore, that in respect of all of the matters complained of which are pleaded as being race discrimination, the claimant has proved facts from which we could conclude, in the absence of an explanation, that his treatment was because of or related to race. The respondents have provided no evidence which explains the conduct on non-discriminatory grounds.

390. We have considered whether, in fact, it is more likely that the claimant simply did not have the right temperament for the job in question which led to him being bullied and, whether perhaps, a non-white employee with the same personality as the claimant's team members, would not have been bullied or, alternatively, a white person with the same personality as the claimant would have been. We think it is possible that is the case, however to go down that route would be speculation on our part since no evidence has been adduced to that effect.

391. In those circumstances we find, in answer to the question in paragraph 3 and 4(b) of the List of Issues that the reason for the less favourable treatment in respect of allegations numbered 1, 2, 4,5,7-9, 16, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 32, 33, 38, 39, 42, 46, 51, 52, 55 and 59 of the Schedule was the claimant's race.

392. The List of Issues does not distinguish between claims against the first respondent and claims against the 2nd to 4th respondents.

393. There is no dispute that the allegations which we have referred to above and found proved are ones for which the first respondent is liable.

394. There is, however, an additional alleged act of discrimination in paragraph 17.16 of the Amended Particulars of Claim, namely that the claimant was constructively unfairly dismissed on 24 May 2017.

395. We find that the claimant resigned because of a combination of everything which had happened to him, the acts of discrimination, the matters that we have found amounted to detrimental treatment because of his public interest disclosures (see below) and the way his grievance was dealt with. However we are satisfied that the acts of discrimination had a significant influence on his decision to resign and, therefore, his constructive dismissal did amount to an act of discrimination.

396. In respect of respondents 2 to 4, no application was made to amend the claim in the same way as paragraph 17 of the Particulars of Claim was amended.

397. Thus in respect of the 2nd respondent, Mr Glynn Smith, we find that;

a. paragraph 39.1 of the Amended Particulars of Claim is proved to the extent that we find it likely that Glynn Smith was regularly, on at least a monthly basis, using terms such as "Syrian immigrant", temperamental Syrian" and "shoe bomber". We do not find a used

the phrase "sand–nigger", it only being suggested that Doug Spendlove had used that phrase,

b. paragraph 39.2 is proved,

c. paragraph 39.3 is proved

d. paragraph 39.4 is proved.

e. the other allegations of discrimination (apart from victimisation) been withdrawn,

f. paragraph 39.14 is not proved.

398. In respect of the 3rd respondent, Stuart Smith,

a. paragraph 40.1 of the Amended Particulars of Claim is not proved

b. paragraph 40.2 is proved, to the extent we have set out above in respect of allegation number 25.

c. the other allegations of discrimination (apart from victimisation) been withdrawn,

d. paragraph 41 is not proved.

399. In respect of the 4th respondent, John Cleary,

a. paragraph 42.1 of the Amended Particulars of Claim is proved to the extent of him using the word "Turk" on occasion

b. paragraph 42.2 is proved

c. paragraph 42.3 is not proved

d. paragraph 42.4 is proved.

e. the other allegations of discrimination (above victimisation) been withdrawn,

f. paragraph 43 is not proved.

400. In respect of the 5th respondent, Douglas Spendlove, the claims are out of time, however, if we were wrong in that we would have found that none of the pleaded allegations have been proved against him except in relation to paragraph 44.6 of the Amended Particulars of Claim, to a limited extent.

Harassment

401. We have set out, above, our findings in respect of the individual allegations we found proved.

402. We find that all of the conduct was unwanted by the claimant and, having regard to the shift in the burden of proof, the conduct was related to race.

403. As we have endeavoured to set out above, and for the purpose of clarity, in respect of all of that conduct which is alleged to amount to race discrimination and we have found proved, we do accept that the conduct would have had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for him and, having regard all the circumstances of the case, including the perception of the claimant, it would be reasonable claimant to feel that the conduct had that effect.

404. All of the claims of race discrimination are properly to be considered as harassment, in our judgment, except for the allegation pleaded at paragraph 17.16 of the Amended Particulars of Claim (dismissal) which, in our judgment, is properly considered an act of direct discrimination.

405. The claims of religious discrimination, sexual orientation discrimination, gender reassignment discrimination and disability discrimination have been withdrawn.

Victimisation

406. There appears to be something of a divergence between the Schedule and paragraph 23 of the List of Issues. The schedule only relies upon the disclosure of 3 February as being a protected act. We have found, above, that it was. In those circumstances it is not, strictly, necessary for us to consider whether the assertions made by the claimant on 7 February 2017 also amounted to a protected act.

407. For the purposes of clarity, however, were the question of whether the assertions made by the claimant on 7 February 2017 amounted to a protected act in issue, we would have found that they were. In the recording of that conversation, as we have set out above, the claimant clearly complains about race specific abuse which he has received, which would amount to a complaint that a person has breached the Equality Act 2010.

408. Therefore we find that the complaints made by the claimant as set out in paragraph 23 List of Issues do amount to protected acts within the meaning of section 27 (2) Equality Act 2010.

409. Issue 6.2, paragraph 25, requires us to consider whether the claimant was subjected to the detrimental treatment pleaded. For the purposes of clarity we find that the claimant was subjected to detrimental treatment in respect of numbers 58, 60, 61 (to the extent that discriminators were permitted to collude and close ranks), 62 and, to the extent that the claimant's grievance was not upheld, 65 of the Schedule.

410. In respect of issue 6.3, we have not found that any of the detrimental treatment was because the claimant had done a protected act. We have set out our reasons for so finding within the particular allegations within the Schedule.

Statutory Defence

411. The first respondent has not proved that it took all reasonable steps to prevent its employees from doing the things they did or anything of that description. In fact, we find the respondent took no steps. It should have trained its staff in respect of equal opportunities, particularly in the light of

the workplace culture which existed and the respondent knew or ought to have known existed.

Whistleblowing claims

412. We have found that, in respect of issue 8, the alleged disclosures set out in paragraphs 28 a, b, and c of the List of Issues were made. They correlate to numbers 6 and 44 in the Schedule. We are not satisfied that the disclosure set out in paragraph 28d was made (number 47 in the Schedule).

413. We do not find that the alleged disclosure set out in paragraph 28 e of the List of Issues (correlating to allegation 31 in the Schedule) was made.

414. We find that the allegations set out in paragraphs 28f and g of the List of Issues were made (and correlate to numbers 41 and 48 in the Schedule).

415. The disclosure in paragraph 28h of the List of Issues (correlating to number 12 of the Schedule) is also proved.

416. The disclosure pleaded in paragraph 28i of the List of Issues correlates to number 56 of the Schedule when account is taken of the paragraph of Mr Sidhu's witness statement which deals with this issue (paragraph 40). The alleged disclosure does not appear in the Schedule but, in any event, for the reasons we have given in respect of number 56 of the Schedule we do not find this allegation proved.

417. The disclosure pleaded in paragraph 28j of the List of Issues does not appear in the Schedule and did not feature in the cross-examination of witnesses. To the extent that this is pursued, we do not find it proved.

418. In respect of paragraph 29 of the List of Issues, the disclosures set out at numbers 6 and 44 of the Schedule were disclosures of information (namely that in the past confidential information had been given to PayPal which would give them an unfair advantage over competitors and that PayPal were still seeking that information). The claimant stated that he believed that was a breach of competition law and it has not been suggested either that such a disclosure would not be in the public interest or that the claimant did not have a reasonable belief either that the information was true or that there would be a breach of competition law if it was true. We find that the claimant did have such a reasonable belief.

419. In respect of number 41 of the Schedule, the belief of the claimant was that the equipment had been stolen in the sense that it was product samples for VIP buyers (as per paragraph 28.7 of the Amended Particulars of Claim and paragraph 107 of the claimant's witness statement). We find that was a reasonable belief and the claimant was disclosing information to that effect. We find that the claimant reasonably believed that the information was in the public interest.

420. In respect of number 48 of the Schedule, the email sent did disclose information and we find that the claimant reasonably believed that the disclosure was in the public interest (otherwise he would not disclose it, it was against his interest to do so) and tended to show that there was a breach of competition law. Mr Buley accepted that the email would raise a red flag.

421. In respect of number 12 of the Schedule, again we find that the claimant did reasonably believe that disclosing the information that Exertis staff had been passing information to Ballicom in exchange for entertainment was in the public interest and that doing so would amount to a breach of competition legislation.

422. The disclosures were all to the claimant's employer.

423. Issue 9 requires us to consider whether the claimant was subjected to detrimental treatment as pleaded in paragraph 30 of the particulars of claim. In fact that should, now, read paragraph 31 of the Amended Particulars of claim. We note that under section 48(2) Employment Rights Act 1996, it is for the respondent to show the ground of any act or failure to act, however, we are not obliged to draw an adverse inference if the respondent has not proved the ground for the act. We are entitled to do so but, in this respect, the law is different from that in respect of discrimination.

424. By reference to the numbers in the Schedule, as set out above;

a. paragraph 32.1 of the Amended Particulars of Claim correlates to number 13 of the Schedule and we have found that was detrimental treatment. The respondent has not shown the reason for the treatment and we find that it was because of the protected disclosures made, there was no good reason to move the account;

b. paragraph 32.2 of the Amended Particulars of Claim correlates to number 26 of the Schedule, and the reasons we have given we find that, also, was because the claimant had made a disclosure;

c. paragraph 32.3 of the Amended Particulars of Claim correlates to number 14 of the Schedule, for the reasons we have given we do not find that the treatment by BM was because the claimant had made a protected disclosure;

d. in relation to paragraph 32.4 of the Amended Particulars of Claim we do not find that the claimant was placed on a PIP in August 2016;

e. in relation to paragraph 32.5, we do not find that the claimant was unfairly subjected to a disciplinary process in November 2016;,

f. in relation to paragraph 32.6 of the Amended Particulars of Claim we do find that the allegation set out therein (correlating to number 52 of the Schedule) was a detriment because the claimant had made a protected disclosure;

g. paragraphs 32.7 to 32.9, inclusive, were withdrawn at the outset of the claim

h. paragraph 32.10 of the Amended Particulars of Claim requires us to consider whether the sole or principal reason for the resignation of the claimant was the detriment which he has suffered as a result of making the protected interest disclosures. Whilst we find that his decision to resign was influenced by those matters we do not find that they were the sole or principal reason for his resignation and, therefore, the claimant was not unfairly dismissed by reason of the

protected interest disclosures which he made. This finding deals with issue 10 within the List of Issues.

Unfair dismissal

425. In respect of issue 11.1 in the List of Issues, we have set out above the reasons why the claimant resigned.

426. We find that the respondent was in repudiatory breach of the contract of employment in that;

a. the bullying by the claimant's colleagues, for which the respondent is liable, amounted to a repudiatory breach of contract itself, that bullying amounted to a campaign until the claimant went off work in February 2017,

b. the failure by Mr Rumsey to tackle the bullying beyond, possibly, an ineffectual suggestion that the team should stop clapping him in February 2018 was an ongoing repudiatory breach of contract by the respondent,

c. the way in which the respondent dealt with the grievance amounted to a breach of the implied term of trust and confidence in that it did not properly investigate it,

d. the respondent subjected the claimant to a detriment because he had made protected disclosures was a repudiatory breach of contract.

427. The term which has given rise to our finding of a repudiatory breach of contract by the respondent is the implied term of trust and confidence. We find that the conduct which we have found proved would destroy or seriously damage the trust and confidence which an employee is entitled to have in his employer.

428. In respect of issue 11.2, we are satisfied that the claimant did resign in response to the breaches which we have found.

429. In respect of issue 11.3 we do not find that the claimant affirmed the contract by remaining an employee from 8 February 2017 to 24 May 2017. It is not suggested that there was affirmation before that date. In this respect, firstly, we note that the claimant was off sick (fit notes appear at pages 1186 and 1512 of the bundle). It is not normally the case that an employee affirms the contract of employment when he is off sick. We do not find that the claimant did anything whilst off sick which would amount to an affirmation of contract and the respondents do not seek to point to any such act.

430. In any event, even if there was affirmation in that respect, the claimant received his grievance outcome on 18 May 2017. For the reasons we have given that outcome was deficient. It is clear, in our view, that even if the claimant had affirmed contract, he was entitled to rely upon that outcome as being "the last straw".

431. In those circumstances we do not consider that the claimant lost the right to resign and claim constructive dismissal.

432. In respect of issue number 12, the respondent has not sought to advance a potentially fair reason for the dismissal.

433. The claims in respect of sick pay and holiday pay have been withdrawn.

434. In respect of paragraph number 42 of the List of Issues, we accept that the claimant was entitled to be paid notice pay and, in the circumstances, has been a breach of contract by the respondent.

Time limits

435. In respect of the discrimination claim against the first respondent we consider that the acts of bullying leading up to the period when the claimant went off sick amounted to conduct extending over a period. There was an underlying state of affairs in which the claimant was treated less favourably because of race for which the respondent was responsible. The claimant went off sick on 9th February and that was the date when the period ended, which was after the agreed "cut-off date" of 22nd January 2017. Thus, the claim against the first respondent was presented in time.

436. In respect of the discrimination claim against the individuals, it was not entirely clear from Mr Hunt's submissions whether he was arguing that the claim against all of the individuals was out of time or simply the claims against Mr Spendlove, who resigned his employment with the first respondent in December 2016 and left on about 12 December 2016.

437. Having regard to the decision of HHJ Hand QC in *Galilee v The Commissioner of Police of the Metropolis U*KEAT/0207/16/RN, and his decision that amendments take place from the date of the time permission to amend is given and do not relate back to the time when the original proceedings were commenced, it seems to us that the claims against all 4 of the respondents were out of time at the date of issue. The claim was presented against them when they were added as parties on 24 August 2017.

438. Ms Cunningham argued that the claims were all in time because there was conduct extending over a period. Her submission was that one looks to the course of conduct and if an individual contributed to the conduct at some point and, thereafter, the conduct continued, s/he remains liable and a claim is in time against him/ her even if they have left employment and have ceased to contribute to the conduct. Her submission went as far as asserting that even if an employee left employment, say, 5 years before the claim was brought, if the conduct continued after s/he left, a claim against them was still in time.

439. We are unable to accept that submission. S123(3), in our judgment, has to be considered in the context of the claim being brought. Where a claim is being brought against an individual, it is the individual's conduct that is in issue. In considering whether the conduct extends over a period it is that individual's conduct which must be considered, not any conduct to which the claimant was subjected.

440. However, we do agree with Ms Cunningham that where the conduct in issue is the conduct of a team over a period and an individual was part

and parcel of the team behaviour, the conduct of the members of the team should be treated as part of the individual's conduct extending over a period for as long as the individual remains a member of the team.

441. However, even that argument does not avail Ms Cunnigham if the claims against the second to fourth respondents were only presented in August 2017.

442. We must consider, therefore, whether it is just and equitable to extend time in relation to the discrimination claims.

443. We have considered those matters set out in paragraph 49 of the submissions of the first respondent, namely

i. The length of the delay;

a. The reason for the delay;

b. The extent to which the Respondent's behaviour has contributed to that delay;

c. Whether the Claimant has taken steps to take obtain advice;

d. Whether the Claimant acted promptly once made aware of the possibility of taking legal action.

e. Any Prejudice to a party or a witness accused of discriminating.

444. We have also reminded ourselves that Parliament has deliberately chosen a short period of limitation in relation to discrimination claims.

445. In respect of the respondents Glynn Smith, Stuart Smith and John Cleary, we take the view that the claimant has a good reason for the delay. He only sought to join those respondents when the first respondent raised the statutory defence. In not seeking to join them before that point we find that he was acting reasonably and in a measured way. It is often undesirable to make particular individuals liable for discrimination if a claimant has a remedy against his or her employer.

446. The length of the delay is not particularly long, the original claim was presented on 19 June 2017 and they were added as parties within 2 months thereafter.

447. The respondents did not contribute to that delay. We note that the claimant had taken advice, although we see nothing wrong in someone advising the claimant only to proceed against the first respondent prior to it raising the statutory defence.

448. There is no real prejudice to those respondents who still worked for the first respondent at the time of the grievance being presented and who were aware of the allegations from the time they were interviewed (on 24th March 2017). The original claim was issued in time.

449. In those circumstances we consider it is just and equitable to extend time in relation to Glynn Smith, Stuart Smith and John Cleary.

450. We consider the position, however, to be different in relation to Mr Spendlove. He left the first respondent's employment in December 2016. We find that should have crystallised matters in the claimant's mind. The claimant was aware of the allegations he sought to make against Mr Spendlove and could have made them at that time. He did not do so and did not raise a grievance until 29 March 2017. The first time that Doug Spendlove would have been aware of the claim is likely to have been in August 2017 when he was joined as a party since he was not notified of the allegations.

451. The delay is lengthy when considered from December 2016, when Mr Spendlove left, to April 2017 when he was joined as a party. We find that the question of whether there is a good reason for the delay is qualitatively different where an employee leaves his or her employment and leaves behind the environment in which the discrimination occurred before any allegation of discrimination is made. If the claimant intended to bring a claim against Doug Spendlove he should have done so much more quickly.

452. Thus, we find that there is not a good reason for the delay in respect of Doug Spendlove and the delay was too long in the context of him not being aware of the allegations through his employment.

453. We also consider that there is prejudice to someone who has left the employment in which the discrimination is alleged to have occurred before any allegation of discrimination is made, has moved on and who then, 8 months later, is suddenly faced with serious allegations. Generally speaking, a person should be able to leave employment without the risk of proceedings being brought against him some eight months later.

454. Thus, we do not consider it just and equitable to extend time in respect of the claims against him.

455. In respect of the protected interest disclosure claims which were only brought against the first respondent, we find that the detriments which we have found proved were all similar acts. They were all acts done because the claimant had made disclosure to Mr Rumsey about compliance issues. The acts within the allegations numbered 13 and 26 in the Schedule penalised the claimant by removing accounts from him and so kept him from some of the first respondent's customers, they also affected his earnings. The act in allegation number 52 of the Schedule was intended to cause the claimant to leave the business, which was also had the effect of removing accounts from him and keep him from some of the first respondent's customers, it also affected his earnings. The claim was presented within 3 months of the last act (when the early conciliation process is taken into account) and so the claim is not out of time.

SUMMARY OF CONCLUSIONS

456. The first respondent has directly discriminated against the claimant because of race by constructively dismissing him on 24th of May 2017.

457. The first respondent has harassed the claimant, within the meaning of section 26 Equality Act 2010 by virtue of conduct set out in allegations numbered 1, 2, 4,5,7-9, 16, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 32, 33, 38, 39, 42, 46, 51, 52, 55 and 59 of the Schedule.

458. The first respondent has subjected the claimant to detriments on the ground that he made a protected disclosure in respect of allegations numbered 13, 26 and 52 of the Schedule.

459. The claimant was constructively unfairly dismissed by the first respondent but the sole or principal reason for the dismissal was not that he had made a protected interest disclosure.

460. The first respondent is in breach of contract in that it has not paid the claimant notice pay.

461. The 2nd respondent has harassed the claimant within the meaning of section 26 Equality Act 2010 by virtue of his conduct set out in allegations numbered 1, 23, 27 and 33 of the Schedule.

462. The 3rd respondent has harassed the claimant within the meaning of section 26 Equality Act 2010 by virtue of his conduct set out in the allegation numbered 27 in the Schedule.

463. The 4th respondent has harassed the claimant by virtue of his conduct set out in allegations number 1 (to the extent of calling the claimant a Turk), 22 and 46.

464. The claims 5th respondent are dismissed, on the basis the tribunal lacks jurisdiction to determine them but, in any event, the allegations against him are not proved except paragraph 44.6 of the Amended Particulars of Claim, to a limited extent.

Employment Judge Dawson
Date: 14 October 2019

Judgment sent to the Parties: 10 May 2021

FOR THE TRIBUNAL OFFICE

APPENDIX ONE

#	DATE	ISSUE	FACTS ALLEGED	Claim	Witness evidence
1	Jan 2016 on	Name calling.	John Cleary, Stuart Smith, Glynn Smith, Doug Spendlove, referring to Claimant as a "*Syrian immigrant*", "*temperamental Syrian*", "*Turk*" and "*shoe bombing Turk*" and "*sand-nigger"* in front of his colleagues and manager.	RACE **15:**17.1	KS 23 BB 9,10 SR 9,11 NF, 54 EP, 8,10
2.	Jan 2016 on	Grindr etc.	Glynn Smith, Stuart Smith, John Cleary, Doug Spendlove asking the Claimant almost on a weekly basis "*what action*" he was getting, asking if he is gay and accusing him of being on a gay dating app 'Grindr' when using his mobile for business purposes, saying that the Claimant needed to get on Grindr as maybe he "*didn't get enough dick last night*".	SEX ORI **18:**21.1	KS 23 NF 55, 255 SR 10,11 EP 9, 10
3.	Jan 2016 on	"Truffle pig"	Ross Holt calling the Claimant a "*truffle pig*" amongst other degrading terms.	ConDis **28:**34.1	KS **not** NF 56 SR 10,11 EP 9,10
4.	Feb 16	Handover	Edan Penny said to Claimant "*you can f*ck right off if you think I am just going to hand them over to a c*nt like you*". Matthew Rumsey shrugged his shoulders.	ConDis **28:**34.2	KS 51,52 EP 18 NF 57
5.	March 16 on	Clapping	When the Claimant came in late (due to caring for his disabled father before work) his	DISA D **21:**25.1	KS 34,35 NF 314, 256, 257 KH 9

			team members would all stand up and clap, yet this would not happen for other team members when they were regularly late.		SR 14 SS 7 EP 20
6.	March 16	Amazon log-in: to MR	Claimant challenged both Jamie Hughes and Doug Spendlove over Paypal being given Jamie Hughes' Amazon Vendor Central Login, but they dismissed the issue. [**7**] The Claimant informed Matthew Rumsey that Paypal login this was a serious risk/breach of competition law and data protection law.	DISCL **23:**28.1 DISCL **23:**28.1	KS 24-30 NF 187, 188, 189
7.	10 March 16	Tuxedo	Steve Ridge informed [C] that [an event] was strictly black tie and he would need a tuxedo. The team agreed and suggested that the Claimant had better leave the office and get one. [C] left immediately and rushed to get a tuxedo (costing £180) and rushed back to get on the scheduled coach, but when he walked back into the office with a tuxedo on, the team were crying with laughter and it turned out that the event was smart casual	ConDis **28:**34.3	KS 31-32 NF 62, 64-66 SR 18, 19
8.	10 March – Nov 16	Hiding things	Team hiding the Claimant's laptop, keyboard, mouse and chair in different locations.	ConDis **28:**34.4	KS 37 NF 63, 66
9.	March 16 – 11 Nov 16	Gigolo card	Team sticking a MacDonald's advert and a gigolo business card (made for Matthew Rumsey) on	ConDis **28:**34.5	KS 38 NF 60, 126, SR 17

			his monitor. Mathew Rumsey requested.		
10.	March – 1 Dec 16	Middle finger	Doug Spendlove greeting the Claimant with the middle finger and saying "*f*ck your mum*" – daily.		KS 39, 100-105 NF 59 SR 16
11.	April 16	Ballicom	Claimant was given Ballicom account. NM informed Claimant that Doug Spendlove had been giving them access to their competitor's pricing through his Yahoo account and by USB stick. C said not prepared to do this	ConDis **29:**34.10	KS 43-50 NF 70-76, 93, 94, 125, 133, 134, 266, 272
12.	April 16	Ballicom & Doug Spendlove	Verbally to Mathew Rumsey on various occasions (including April 2016), that team members were aware Doug Spendlove had been passing cost prices to Ballicom and accepting 'entertainment' at weekends in London.	DISCL **26:**28.9	same
13.	April 16	Accessories	Accessories category taken from C for Amazon.	DETRI **26**:32.1	KS 49, 123, 124
14.	April 16	Ballicom racism	[Undated, but assumed to be from this date] BM would ask the Claimant's team members if he was retarded, she would tell the Claimant that he was a "*f*cking idiot*" and ask him "*are you Sikh or sick?*	DETRI **27**:32.3	KS 45
15.	April – Oct 16	"Have a go"	John Cleary shouted at the Claimant on the phone to BM that he would have to go up to Coventry and "*have a go on her"* as this was what Doug Spendlove have done.	DETRI **27**:32.3	KS 47

16.	5 July 16	Gross profit	The Claimant emailed Matthew Rumsey regarding gross profit that should be in his name but Glynn Smith refusing to transfer it. Next week- Glynn Smith said to the Claimant "*you see, we know what we are doing, Matt doesn't have a clue and I suggest you don't question me if you want to work in this team*". Claimant missed his target as a consequence.	ConDis **29:**34.11	KS 55-58 NF 84
17.	14 July 16	Drugs	Glynn Smith accusing the Claimant of being on drugs in front team on a works night out to Coal restaurant. Matthew Rumsey late asked Claimant at work what drugs he was on.	ConDis **29:**34.7	KS 59-60, 74 NF 23, 87
18.	23 July 16	Bikini	Glynn Smith emailed Edan Penny and copying the Claimant Linked In person (in bikini) who was his replacement.	ConDis **29:**34.6	KS 54 NF 81 EP30
19.	Aug 16	PIP	Unfairly placed on PIP.	DETRI **27**:32.4	KS 74-87 SS 9 NF 102, 118, 119
20.	Aug 16	Google	Glynn Smith googling Claimant's name, looking at his house on google maps and saying he lived in a "shit area", that no one would want to buy his place "you have a happy shopper on your street for f*ck sake, it looks like a terrorist war zone, what's that place called Aleppo?",	ConDis **29:**34.8	KS 63 NF 98-100

21.	Aug 16	Car value	Glynn Smith said of the Claimant's car being "the shittest on the team", that the Claimant could not give it away free, typing the Claimant's registration plate number into webuyanycar.com and humiliating the Claimant saying to the team that they are only offering £100 and asking the Claimant what his basic was and replying "is that all? Do you know we are on more than you?	ConDis **29:**34.8	KS 63 NF 99-100 EP 33
22.	15 Sept 16	Lingerie	John Cleary tried to force the Claimant to try on some lingerie on the sales floor in front of colleagues, prompting Glynn Smith to ask the Claimant what was wrong, saying "*to be fair John couldn't pimp you out for much, maybe if you lose some weight and fly you back to Syria*".	RACE **15:**17.2	KS 66 NF 105-107 JC 13 GS 12, 16
23.	23 Sept 16	Sausage picture	Someone sticking a picture of sausages (a gay reference) on the Claimant's screen, when the Claimant questioned the team they would insinuate it was at Matthew Rumsey's request, and Matthew Rumsey would just laugh.	SEX ORI **18:**21.3	KS 67 NF 108-111, 315
24.	23 Sept 16	MacDonald's advert	Someone sticking a MacDonald's job advert and a picture of sausages (a gay reference) on to the Claimant's screen.	ConDis **29:**34.9	KS 38, 67 NF 60, 108, 126 SR 17 EP 21
25.	Oct 2016	Sausage innuendo	Stuart Smith told everyone the Claimant had "*cleared out the sausages*" from the	SEX ORI **18:**21.4	KS 70-73 NF 115-117

			food van, following this the team then made daily comments to the Claimant including "*did you get much sausage last night*?", "*how big is your sausage*?", "*do you have sausages in Syria*?" and emailing the team with the comment "*Siduko - 6 sausages a day does NOT keep the Doctor away"*.		
26.	Oct 2016	Targus and Belkin	When C was given Accessories back, the accounts for the two largest vendors, Targus and Belkin, were given to Stuart Smith instead.	DETRI **26**:32.2	KS 93, 122-124 NF 159-160, 186
27.	25 Oct 16		The team making comments to the Claimant including "*do you have sausages in Syria*?"	RACE **15:**17.3	KS 70 NF 115, 124
28.	29 Oct 16	Vaseline	Stuart Smith sending a picture of a Vaseline tub and two fingers. Glynn Smith said in response in front of the team that "*Kieran is definitely going to get f*cked the most, I'm surprised he hasn't been sacked already considering how sh*t of a job he does*".	SEX ORI **18:**21.5	KS 85 NF 131, 256, 257, 312 SR 22 KH 13 EP 36
29.	Nov 16	Late hat	Someone in the team putting a straw hat on my desk with a post-it note attached saying "late hat".	DISA D **21:**25.2	KS 86, 87 NF 60, 136-139, 316 KH 9
30.	Nov 16	DP	Placed on Disciplinary Process.	DETRI **27**:32.5	KS 89-92 NF 141, 145,
31.	Nov 16 to Feb 17	Plantronics PD	The Claimant raised various concerns with Matthew Rumsey from November 2016 to February 2017 regarding	DISCL **24:**28.4	KS 131-136 NF 42, 153, 154, 155, 158, 167, 168,

			Plantronicsthese arrangements.		194, 201-207, 211, 215, 216, 283
32.	11 Nov 16	Straw hat	Someone in the team put a straw hat on the Claimant's desk saying "I love dick" and again with a post-it note staying "gay boy" on another occasion and another time someone wrote "gay" on a piece of A4 paper and sellotaped it to the Claimant's chair.	SEX ORI **18:**21.6	KS 86 NF 136-140 SR 15 EP 37
33.	23 Nov 16	3 Smiths	Doug Spendlove stated that soon there would be "three Smiths" working on the team, then turned to the Claimant and said "how does it feel being the only ethnic on the team mate? Without you etail is 100% white and that's not a bad thing". Glynn then interjected and said "*you will be the last ethnic if you are anything to go by, don't worry Kieran, Matt won't recruit any women either if that makes you feel any better*".	RACE **15:**17.4	KS 94 NF 151 EP 38
34.	Nov / Dec16	Singing	Brad Nicholson (a colleague) would sing aloud in front of colleagues "*Sidhu, Sidhu, he has a bomb in his shoe, he works at o2, he is a f*cking dirty Arab Sidhu, Sidhu, Sidhu he is bigger than me and he has a bomb in his shoe*" (on repeat). Brad Nicholson would also ~~habitually~~ ask the Claimant how many	RACE **15:**17.5 RELIG **17:**19.1	KS 14, 15, 99 NF 161, 162

			corner shops he owned when he passed him on the stairs.		
35.	Dec 16	Albania	Doug Spendlove saying to the team "*Kieran is f * cked because he will get sent back to Albania*"; John Cleary added "*how will he get cock? They don't have Grindr out there*!"	RACE **16:**17.9 SEX Dec 16OR**19:**21.8 SEX OR **18:**21.2	KS 64, 65 NF 169, 171
36.	Dec 16	Luke Asekokhai	Luke Asakoi saying to the Claimant "*looking 'rapey' today did you rape anyone last night*?" and "*are you going to the works night out? I am just to see how many 'bloweys' I can get from the new recruits*".	SEX OR **19:**21.8	KS NF 170 SR 24
37.	1 Dec 16	Work event	Doug Spendlove called the Claimant ["*temperamental Syrian*"[5]], "ISIS", "*Islamist*" and "*shoe bombing Turk*" throughout an evening work event in front of colleagues and a vendor	RACE **15:**17.6 RELIG **17:**19.3	KS 23 NF 54 SR 9,11 EP 8, 10
38.	1 Dec 16	middle finger	Doug Spendlove said to the Claimant at an evening event in front of vendors "*f*ck your mum*", the Claimant said "*she's dead*" and he said "*good I like them cold*".	ConDis **29:**34:12	KS 102-104 NF 174
39.	1 Dec 16	Sex in the NCP	John Cleary replying to an email from Matthew Rumsey to the team regarding a work function with vendors, suggesting the	SEX ORI **18:**21.7	KS 100 NF 172, 177, 255, 256, 312, 316 KH 13

[5] This phrase is only included in the Religious Discrimination claim.

			Claimant has sex with him in the NCP afterwards. 'That evening publically humiliating him in front of vendors', Stuart Smith saying that he was sh*t at his job and that he "*couldn't even sell a sausage*".		SR 26
40.	2 Dec16	Silly	Doug Spendlove called the Claimant a "*silly sandnigger*".	RACE **15:**17.7	KS 105 NF 178
41.	7 Dec 16	CEX: to MR	Claimant reported to Matthew Rumsey and David Fairbank of Plantronics that Plantronics products worth £1000's in value were sold into CEX (a pawn shop).	DISCL **24:**28.7	KS 106-109, 119-121 NF 181, 194
42.	12 Dec 16	"lucky I'm leaving"	Doug Spendlove saying to the Claimant in front of the team "*I don't know how a sand-nigger like you holds on to your job, you are lucky I'm leaving as you will get Targus and Belkin back*".	RACE **16:**17.8	KS 122-124 NF 186, 232, 258,
43.	12 Dec 16 - 9 Feb 17		Claimant given accessories back (except Targus and Belkin – 80% of the business) when Doug Spendlove left, between these dates).	DISCL **23:**28.1	KS 124, 93 NF 159, 160, 263, 291,
44.	12 Dec 16 - 9 Feb 17	AU's demands: to MR	[AU] of PayPal demanded the Claimant's Amazon Vendor Central login on almost a daily basis during this period. The Claimant reported his concern about [AU]'S requests to Matthew Rumsey throughout this time.	DISCL **23:**28.1	KS 24-30, 83(e), 132, 145, NF 187-189
45.	Jan/Feb 17	Holiday pay	Failing to authorise the Claimant's 5 day accrued holiday carry over on HR hub (which had previously been	DISA D **21:**25.3	KS 191-192 NF 46, 192, 197, 198,

			given to the Claimant as an exception by Dan Lenan (the Claimant's former manager) and agreed for future years because of his limitations in respect of holiday being a carer for his housebound disabled father).		
46.	3 Jan 17	Lee Smith	John Cleary made a comment about Turks and Lee Smith said "*yeah that's why Kieran is down there, we are getting rid of the Turks*" in front of the team and the new graduate passing by.	RACE **16:**17.10	KS 154 LS 14 NF 259 SS
47.	25 Jan 17	AU's demands: to MB	Claimant walked into Mike Buley's (Retail Director) room and informed him that PayPal were continuing to demand the Claimant's Amazon Vendor Central login details and Matthew Rumsey was not doing anything about it. Mike Buley replied "*what do you want me to do about it? I'm busy*", so the Claimant left.	DISCL **23:**28.1	KS 30 NF 163, 165
48.	25 Jan 17	Plantronics: to MR and MB	Claimant emailed Matthew Rumsey and Michael Buley forwarding an email from Ian Stevenson of Plantronics instructing him not to sell on Amazon and highlighting to them that this would affect his figures.	DISCL **25:**28.6.5	KS 140, 141 NF 207
49.	25 Jan 17	Plantronics: to MR and MB	Claimant emailed Matthew Rumsey and Michael Buley forwarding on Ian Stevenson's email not to sell on Amazon.	DISCL **25:**28.8	~~KS 140, 141~~ ~~NF 207~~

50.	26 Jan 17	"Dirty"	Matthew Rumsey reprimanded the Claimant re: ebuyer return saying "*you don't sound so sure, prove it, show me the email of me authorizing this*". John Cleary them shouting out "*Kieran you dirty bitch*", to which Matthew Rumsey burst out laughing, repeating "*Kieran you dirty bitch*" then continued to reprimanding him in front of the team.	ConDis **30:**34.13	KS 151-153 NF 208, 258
51.	26 Jan 17	Banana	(3:18pm that day and almost on a weekly basis) John Cleary saying to the Claimant "*Kieran you know what time it is*" and signalling to everyone behind the Claimant who stopped work to turn around to watch (often crying with laughter) while John Cleary would deep-throat his peeled banana, saying "*you know you want some, talk dirty to me bitch*" and "*you must be so hard right now that's why you won't stand up*". Matthew Rumsey was almost always sat next to the Claimant when this happened, yet he did nothing to stop it	SEX OR **19:**21.9	KS 53 JC 13 SR 25 NF 209, 255, 258
52.	2 – 7 Feb 17	3 options	Matthew Rumsey gave the Claimant three options an exit package, that he move to another role or a PIP which would make his head spin, suggesting that the Claimant should work on his CV (despite acknowledging that the	RACE **16:**17.11 RELIG **17:**19.4 SEX OR**19:**21.10 DETRI **27**:32.6	KS 156-161 NF 214, 215-218 SS 9

			Claimant would have difficulties finding another local job as he could not work for Tech Data (a competitor) because of disparaging remarks from the team and the ban agreement in place with Lenovo - which Matthew Rumsey subsequently stated that he could lift for the Claimant and being pressurised to accept the terms of the unfair PIP. Matthew Rumsey informing the Claimant that he was not productive enough during his working day and so he had three options, to leave with two months' pay, to apply for another role or to be put on a performance management plan which would make his "head spin".	DISA D **21:**25.4	
53.	3 Feb 17	Verbal complaint	Purported Protected Act. Verbal complaint about discriminatory conduct and grievance.	VICT **22:**26	KS 160
54.	6 Feb 17	2 fatties	Glynn Smith told the Claimant he would be a good match for Angela Rapley (manager), that he should "*have a go on Angela*" and saying "*two fatties, you would be good together, can you imagine how much food your kids would get through*?"	ConDis **30:**34:14	KS 162
55.	6 Feb 17	AA	When the email was sent out regarding AA's decision the team	SEX ORI **20:**23.1	KS 40 SS 15

			asked the Claimant when he "*was going to come out of the closet and tell Matt he wanted to be a woman*" and "*it will be easier now [AA] has led the way and that the Claimant should 'give him one' to show his appreciation*". Matthew Rumsey would just laugh and say "*you need to stop it they are taking this transgender stuff very seriously"*		
56.	6 Feb 17	Legalities of sex change	Doug Spendlove replying "*Linda who was really a man and could only help you on the legalities of your sex change but in return you would have to give her some action*".	SEX ORI **20:**23.2	KS 95 NF 166
57.	7 Feb 17	Ostracism	Claimant was treated with hostility and ostracised by the team.	VICT **22:**26.1	KS 164
58.	7 Feb 17	Pressure to sign PIP	Claimant was pressurised to sign acceptance of a PIP.	VICT **22:**26.2	KS 84
59.	8 Feb 17	See you later	Glynn Smith walking past the Claimant at 18:00 said "*see you later bell-end*" .	ConDis **30:**34.15	KS 163
60.	13 Feb 17	IT access	Remote log in to the Respondent's IT system removed after togging on to download the Respondent's Dignity at Work Policy and being told that if he wanted it back on he would have to speak to Matthew Rum	VICT **22:**26.3	KS 166 SS 10
61.	March – May 17	Grievance process	Lengthy grievance process where the discriminators were permitted to collude and close ranks.	VICT **22:**26.6	NF 286
62.	17 Mar June17	Social media	Claimant removed from social media sites (i.e. Face book and	VICT **22:**26.4	KS 168-187

			LinkedIn) which is used in the industry by Matthew Rumsey and other colleagues.		NF 238-328
63.	30 Mar17	Sick pay	Nick Foster's refusal to exercise his discretion to pay the Claimant full sick pay and his continuing loss despite Nick Foster's later assurance that he would be paid in full.	VICT **22:**26.5	
64.	May 17	Rumours	Professional and personal reputation tarnished by breaches of confidentiality (in relation to the nature of the grievance) resulting in the Claimant being subjected to indirect comments that he is unfairly suing the Respondent over being called a "Turk" which was just "banter".	VICT **22:**26.7	KS 188 NF 349
65.	18 May 17	Grievance outcome	Failing to deal with the Claimant's grievance appropriately or uphold it despite having two months to investigate these serious allegations.	VICT **22:**26.8	KS 183-184 NF 328
66.	24 May 17	Resignation	The Claimant submitted his **resignation** with immediate effect in a letter by email, saying that he felt that the R1 had *white-washed* the grievance outcome, and that he was left in an untenable position. *Agreed resignation date*.	DETRI **27**:32.10	KS 189
67.	25 May 17		Claimant seeks payment of £1,619.26 unlawful deduction of sick pay.	**30**:35	

APPENDIX TWO

iN THE BRISTOL EMPLOYMENT TRIBUNAL **Case No.1400943/2017**
B E T W E E N:

MR KIERAN SIDHU

Claimant

and

EXERTIS (UK) LTD

Respondent

RESPONDENT'S PROPOSED AMENDED LIST OF ISSUES

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*This is an amendment to the Claimant's draft list of issues on liability

A. EQUALITY ACT 2010 ("EA") CLAIMS

1. Race discrimination

1.1 Factual issues

1. Was the Claimant ("C") subject to the conduct pleaded at paragraph 17 of the Particulars of Claim ("PoC") ("the alleged racist conduct")?

1.2 Direct discrimination (s.13 EA)

2. In so far as the alleged racist conduct is admitted or proven, was C treated less favourably in this regard than R treats or would treat:

    a. A hypothetical comparator who is not a British national of Scottish/Indian descent in materially the same circumstances;

    b. Putative actual comparators[6], namely ("the actual comparators"):
        i. Edan Penny, Etail team member;

[6] C understands that the actual comparators have the following protected characteristics:
1. White British;
2. No religion;
3. Heterosexual and not perceived to be homosexual;
4. Not (or not perceived to have / be) undergone / proposing to undergo gender reassignment;
5. Not a carer for / associated with a disabled person.

ii. Steve Ridge, Etail team member.

3. If so, what was the reason for the less favourable treatment? Was it because of C's race?

1.3 Harassment (s.26(1) EA)

4. In so far as the alleged racist conduct is admitted or proven:

    a. Was the conduct unwanted?

    b. Was the conduct related to race?

    c. Did the conduct have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for him ("the necessary purpose or effect")?

2. Religious discrimination

2.1 Factual issues

5. Was C subject to the conduct pleaded at paragraph 19 PoC ("the alleged discriminatory (on grounds of religion) conduct")?

2.2 Direct discrimination (s.13 EA)

6. In so far as the alleged discriminatory (on grounds of religion) conduct is admitted or proven, was C treated less favourably in this regard than R treats or would treat:
    a. A hypothetical non-Sikh/Christian[7] comparator in materially the same circumstances;

    b. The actual comparators.

7. If so, what was the reason for the less favourable treatment? Was it because of C's religion, namely [Sikhism/Christianity TBC]?

2.3 Harassment (s.26(1) EA)

[7] R seeks clarity about this aspect of the claim.

8. In so far as the alleged discriminatory (on grounds of religion) conduct is admitted or proven:

    a. Was the conduct unwanted?

    b. Was the conduct related to religion?

    c. Did the conduct have the necessary purpose or effect?

3. Sexual orientation discrimination

3.1 Factual issues

9. Was C subject to the conduct pleaded at paragraph 21 PoC ("the alleged homophobic conduct")?

3.2 Direct discrimination (s.13 EA)

10. In so far as the alleged homophobic conduct is admitted or proven, was C treated less favourably in this regard than R treats or would treat:

    a. A hypothetical comparator who was not perceived to be homosexual, in materially the same circumstances;

    b. The actual comparators.

11. If so, what was the reason for the less favourable treatment? Was it because C was perceived to be homosexual?

3.3 Harassment (s.26(1) EA)

12. In so far as the alleged homophobic conduct is admitted or proven:

    a. Was the conduct unwanted?

    b. Was the conduct related to sexual orientation?

    c. Did the conduct have the necessary purpose or effect?

4. Gender reassignment discrimination

4.1 Factual issues

13. Was C subject to the conduct pleaded at paragraph 21.11 and 27 PoC ("the alleged discriminatory (on grounds of gender reassignment) conduct")?

4.2 Direct discrimination (s.13 EA)

14. In so far as the alleged discriminatory (on grounds of gender reassignment) conduct is admitted or proven, was C treated less favourably in this regard than R treats or would treat:

    a. A hypothetical comparator in materially the same circumstances, who was not perceived to be proposing to undergo gender reassignment;
    b. The actual comparators.

15. If so, what was the reason for the less favourable treatment? Was it because C was perceived to be proposing to undergo gender reassignment?

4.3 Harassment (s.26(1) EA)

16. In so far as the alleged discriminatory (on grounds of gender reassignment) conduct is admitted or proven:

    a. Was the conduct unwanted?

    b. Was the conduct related to gender reassignment?

    Did the conduct have the necessary purpose or effect?

5. Disability discrimination

5.1 Factual issues

17. Was C subject to the conduct pleaded at paragraph 23 PoC ("the alleged discriminatory (on grounds of disability) conduct")?

5.2 Disability status (s.6 EA)

18. Was C's father a disabled person within the meaning of the s.6 EA at all material times i.e. from March 2016 to 24 May 2017?

    a. Did C's father suffer from the following impairments:

        i. Type 2 diabetes;

        ii. IgA (Berger's) nephropathy.

    b. Did the impairment(s) have an adverse effect on C's father's ability to carry out normal day-to-day activities?

    c. Was the adverse effect substantial?

    d. Was it long-term?

5.3 Direct discrimination (s.13 EA)

19. Did the Respondent have knowledge of the Claimant's father's disability at the material time? Did the Respondent know the Claimant had caring responsibilities?

20. In so far as the alleged discriminatory (on grounds of disability) conduct is admitted or proven, was C treated less favourably in this regard than R treats or would treat:

    a. A hypothetical comparator who was not a carer for a disabled person but was otherwise in materially the same circumstances;

    b. The actual comparators.

21. If so, what was the reason for the less favourable treatment? Was it because of C's father's disability?

5.4 Harassment (s.26(1) EA)

22. In so far as the alleged discriminatory (on grounds of disability) conduct is admitted or proven:

    a. Was the conduct unwanted?

    b. Was the conduct related to disability?

    c. Did the conduct have the necessary purpose or effect?

6. Victimisation (s.27 EA)

6.1 Protected acts (s.27(2) EA)

23. The Claimant relies on the following complaints ("the complaints"):

a. On 3 and 7 February 2017 did C make verbal complaints to Matthew Rumsey regarding allegedly discriminatory conduct during the course of the meetings that C had with Matthew Rumsey on those dates?

b. It is admitted that C raised a formal grievance on 15 March 2017.

24. In so far as the complaints are admitted or proven, do these amount to protected acts within the meaning of s.27(2) EA?

6.2 Detrimental treatment (s.27(1) EA)

25. Was C subject to the conduct pleaded at paragraph 24 PoC ("the detrimental treatment (victimisation)")?

6.3 Reason why

26. In so far as the protected acts and detrimental treatment (victimisation) are admitted or proven, was C subject to the detrimental treatment (victimisation) because he had done a protected act?

7. Statutory defence (s.109(4) EA)

27. Has R proven that it took all reasonable steps to prevent its employees, against whom allegations of discrimination are made:

a. From doing that thing; or

b. From doing anything of that description.

B. WHISTLEBLOWING CLAIMS

8. Alleged protected disclosures (s.43A Employment Rights Act 1996 ("ERA"))

28. Did C make the following disclosures ("alleged disclosures"):

Paypal disclosures:

a. In March 2016 did C challenge Jamie Hughes and Doug Spendlove about the provision of the Amazon Central login to Paypal ("the Paypal issue"), as pleaded at paragraph 26.1 PoC?

b. In March 2016 did C inform Matthew Rumsey about the Paypal issue and that this was a serious risk/breach of competition law and data protection law (paragraph 26.1 PoC)?

c. In the period December 2016 to February 2017, did C report his concerns regarding the Paypal issue to Matthew Rumsey (paragraph 26.1 PoC)?

d. On 25 January 2017 did C inform Mike Buley that Paypal were continuing to demand his Amazon Vendor Central login details and Matthew Rumsey was not doing anything about it (paragraph 26.1 PoC)?

Plantronics disclosures:

e. In the period November 2016 to February 2017 did C raise concerns with Matthew Rumsey regarding the arrangements with Plantronics as pleaded at paragraphs 26.2-26.3 PoC ("the Plantronics issues") (paragraph 26.4 PoC)?

f. On 7 December 2016 did C report to Matthew Rumsey that Plantronics products were being sold into CEX, a pawn shop (paragraph 25.5[8] PoC)?

g. On 25 January 2017 did C email Matthew Rumsey and Michael Buley, forwarding an email from Ian Stevenson of Plantronics (paragraph 26.7 PoC)?

Ballicom disclosures:

h. Did C raise verbal concerns to Matthew Rumsey on various occasions (March/April 2016 – February 2017) including during April 2016 regarding Doug Spendlove giving Ballicom access to their competitor's pricing through his Yahoo account and by USB stick (paragraph 26.9 PoC)?

Attempt to escalate disclosures:

[8] The paragraph number should actually be 26.6.6 but due to a typographical error it is 25.5

i. In or around November / December 2016 did C ask Matthew Rumsey, Doug Spendlove, John Cleary and Stuart Smith on the Etail Account Team for the name of R's legal person to escalate his concerns (paragraph 27 PoC)?

j. Did C raise concerns with Gareth Baker (February – December 2106), Matt Rumsey (February 2016 – February 2017) and Mike Buley (25th January 2017) and Sue Stratton (February – March 2017) regarding his ignored protected disclosures (paragraph 28 PoC)?

29. In so far as the alleged disclosures are admitted or proven, were they:

a. A disclosure of information?

b. In C's reasonable belief, a disclosure made in the public interest?

c. In C's reasonable belief, a disclosure tending to show one or more of the relevant failures at s.43B(1) ERA (relevant sub-section to be confirmed by C in respect of each disclosure);

d. A disclosure to C's employer within the meaning of s.43C ERA?

9. Protection from detrimental treatment (s.47B ERA)

30. Was C subject to the detrimental treatment pleaded at paragraph 30 PoC ("the detrimental treatment (whistleblowing)")?

31. In so far as the protected disclosures and detrimental treatment (whistleblowing) are admitted or proven, was C subject to the detrimental treatment (whistleblowing) because he had made protected disclosure(s)?

10. Automatic unfair dismissal (s.103A ERA)

32. If C was dismissed (see section 11 below) was the reason or principal reason for the dismissal because C had made a protected disclosure?

C. UNFAIR DISMISSAL

11. Dismissal

11.1 Repudiatory breach of contract

33. Was C subject to the following conduct ("the alleged repudiatory conduct"):

    a. The alleged racist conduct;
    b. The alleged discriminatory conduct (on grounds of religion);
    c. The alleged homophobic conduct;
    d. The alleged discriminatory conduct (on grounds of gender reassignment);
    e. The alleged discriminatory conduct (on grounds of disability);
    f. The detrimental treatment (victimisation);
    g. The detrimental treatment (whistleblowing);
    h. The conduct pleaded at paragraph 32 PoC;
    i. The unlawful deductions from wages pleaded at paragraph 33 PoC[9].

34. In so far as the alleged repudiatory conduct is admitted or proven, did this (singularly or cumulatively) amount to a repudiatory breach of ("the repudiatory breach(es) of contract"):

    a. The implied term of mutual trust and confidence;

    b. An express term that C would be paid in full for his period of sickness absence as pleaded at paragraph 33 PoC. R denies the existence of this term.

11.2 Causation

In so far as the repudiatory breach(es) of contract is admitted or proven, did C resign in response to the same?

11.3 Affirmation

35. Did C, who remained an employee from 8 (or alternatively 15) February 2017 to 24 May 2017 affirm the contract of employment?

12. Fairness of dismissal

36. In so far as the dismissal is admitted or proven, has R proven a potentially fair reason within the meaning of s.98(1) ERA?

[9] This forms part of the alleged discriminatory conduct see paragraphs 17.14; 19.7; 21.5 and 23.7 of PoC

In so far as R proves a potentially fair reason for dismissal, was the dismissal fair or unfair having regard to s.98(4) ERA?

D UNAUTHORISED DEDUCTION FROM WAGES

13. Sick pay

37. On 20 April 2017, did Nick Foster exercise his discretion to award C full pay for his period of sick pay (as pleaded at paragraph 33 PoC)?

38. If so, what sum was properly payable to C between the period February 2017 and 25 May 2017 (paragraph 33 PoC)?

39. Did R make unauthorised deductions from wages in respect of C's sick pay, within the meaning of s.13 ERA?

14. Holiday pay

40. Was C paid for his accrued but untaken holiday on termination? C asserts that pay in respect of 15.5 days' annual leave was properly payable to him (paragraph 35 PoC)?

41. Did R make an unauthorised deduction from wages in respect of C's holiday pay, within the meaning of s.13 ERA?

E. NOTICE PAY (CONSTRUCTIVE WRONGFUL DISMISSAL)

42. In the event that C was dismissed, was he entitled to be paid notice pay:

    a. In accordance with his contract of employment; or

    b. Pursuant to the provisions of ss.86-88 ERA.

F. Jurisdiction - time limits (s.123 EA)

43. Are the complaints brought under the Equality Act 2010 in time in respect of acts or omissions prior to 22nd January 2017 having regard to section 123(3) ERA? If not, does the Claimant seek an extension of time and would it be just and equitable to grant the same pursuant to section 123(1)(b) ERA?

44. Are the whistleblowing complaints pursued under ERA in time in respect of acts or omissions prior to 22nd January 2017 having regard to sections 48(3)(a) and 48(4) ERA?

NB. The relevant dates are:

a. C first notified ACAS prior to his resignation, on 21 April 2017 (Day A), the certificate was issued on 21 May 2017 (Day B)[10]

b. C notified ACAS again after his resignation, on 30 May 2017 (Day A) and the certificate was issued on 1 June 2017 (Day B);

c. The claim form was lodged on 19 June 2017.

G. Other – Additional Respondents

45. If and to the extent the Claimant applies to amend the claim to add claims against four individual respondents, does the Tribunal have jurisdiction to permit the same in the absence of any early conciliation notification in respect of any of the individual respondents in question?

46. If so, ought the Claimant be permitted to amend the claim in any event?

Amended

ELEENA MISRA

Counsel for the Respondent

22nd August 2017

[10] The Respondent has not seen the certificate and was unaware of this, but has been given this information by the Claimant's solicitors.

APPENDIX THREE

REASONS FOR PERMITTING AMENDMENT

1. The claimant applies to amend the Particulars of Claim. The existing Particulars of Claim are those which appear at page 12 of the bundle. Although an application to amend had been foreshadowed last week, in fact Ms Cunningham, on behalf of the claimant, sought to amend the claim form in different ways to those foreshadowed. A number of deletions were made to the Particulars of Claim which were uncontroversial and are permitted. Two, more controversial, amendments were also sought.

2. The 1st application was to add, to paragraph 17 of the Particulars of Claim, the words "and the conduct set out in the subparagraphs to paragraphs 19, 21, 25 and 33" between the words "conduct" and "amounted".

3. The 2nd application was to change the date in paragraphs 17.9 and 21.8 from December 2016 to August 2016.

The First Application to Amend

4. We note that, in fact, following the deletions to the Particulars of Claim, the remaining allegations of religious discrimination largely already appear as allegations of race discrimination since only allegations 19.1, 19.3, 19.4 and 19.5 remain and they are repetitions (at least substantially) of paragraphs 17.5, 17.6, 17.11 and 17.16.

5. The allegations in subparagraph 21 are allegations which relate to alleged discrimination on the grounds of sexual orientation and are different to those which are presently pleaded as amounting to race discrimination.

6. In relation to the allegations currently pleaded in the subparagraphs to paragraph 25, paragraph 25.4 is substantially pleaded as an allegation of race discrimination at paragraph 17.3 but the others are particular to the allegation of disability discrimination.

7. In relation to the allegations currently pleaded in the subparagraphs to paragraph 33 (actually 34), given that they are expressly stated to be in addition to the conduct complained of "above" it follows that they are particular to the claim of constructive dismissal.

8. Ms Cunningham submitted that, in reality, she was presenting a simplification of the case and was motivated by the concern that if we took the view that all of the factual allegations were proved but happened because of the race of the claimant rather than, say, his perceived sexual orientation or on the grounds of disability, the tribunal would be in a position of not being able to find for the claimant and, therefore, justice could not be done between the parties. She submitted that if the amendment was permitted, it is likely that many of the allegations of other discrimination would fall away since the focus of the case is really about race. She stated that the delay in making the application was because it was only in the last

week that she had taken the opportunity to stand back and look at the case holistically.

9. Ms Cunningham's initial submission was that the application to amend was, in effect, an application to re-label existing facts. However in response to Mr Mitchell's submissions, we understood her to modify her submission to accept that the application was not one of mere re-labelling but fell between re-labelling and the pleading of a wholly fresh claim. It is obvious, from the way the draft amendment is put, that there is no attempt to plead wholly new facts by the claimant, the application is to take existing pleaded allegations and assert that those allegations amounted to discrimination on the grounds of race.

10. Mr Mitchell, in a powerful submission, took us in considerable detail through the period of time between the allegations now said to amount to race discrimination and today's date and and it is right to say that that period of time is extensive. He also submitted that there was considerable prejudice to the respondent. For example;

    (a) in relation to the allegation numbered 3 on the Schedule of Facts, he told us that the respondent had chosen not to call evidence on that point since it was only a claim of constructive dismissal, whereas the respondent's decision may have been different if it was aware that the claim was one of race discrimination,

    (b) he made the point that in relation to, say, allegation number 4, although Mr Penny is to be called, he has given no instructions as to whether what he said (if anything) was on the basis of race,

    (c) in relation to allegation number 7, an incident in relation to the claimant wearing a tuxedo to an event, Mr Mitchell asserted that the allegation is not made only against Mr Rich but against lots of individuals who would not be able to defend themselves against a serious allegation of race discrimination, he made similar points in relation to other allegations,

    (d) in relation to allegation number 16, Mr Rumsey will not have had an opportunity to consider the allegation - that the acts are alleged be because of the claimants race - before he gives evidence; he made similar points in relation to allegations 17 and 20 and 38.

11. Mr Mitchell also asserted that if the amendment is allowed he will need to take each of the witnesses of the respondent, in evidence in chief, to the allegations made and ask them what their motivation was. He points out that there are a significant number of allegations, there are 20 against Mr Cleary, 34 against Mr Spendlove, 32 against Mr Rumsey and so on. He candidly accepted that the alleged acts or omissions have not changed, but the question of what was the motivation for them has.

12. Further Mr Mitchell pointed out that the claimant is not seeking to amend the claim to simplify matters since he is not withdrawing the allegations of

discrimination on the grounds of sexual orientation etc but simply adding to them.

13. Mr Mitchell stated that it is not fair that people who are not even being called to give evidence should, suddenly, have allegations made against them of racism without any opportunity to answer those allegations and that if the application is allowed he will need an adjournment, firstly to warn those individuals of the allegations against them and secondly to take instructions. He may also want to run the statutory defence in relation to those allegations and he reminded us that judgments are, nowadays, published on the Internet. Mr Mitchell also reminded us of the numerous case management discussions which have taken place in this case and stated that leaving it to 1½ days into the trial before making the application to amend was to leave matters too late.

14. Mr Hunt largely aligned himself with Mr Mitchell's submissions but made the additional point that initially the claims were not presented against the 2nd to 5th respondents and the time for the respondent to "take stock" was when those respondents were joined.

15. In her response to those submissions, Ms Cunningham stated that she was content to limit the amendment to allegations against those persons the respondent was calling as a witness and for the new allegations to be dealt with in examination in chief. If that truncated the amount of time available for cross-examination by her (having regard to the agreed timetable) then she was content, but in fact she thought that amending the case would speed matters up. She pointed out that, in reality, the claimant did not know people's motivations for the way they acted, that was a matter of inference from the evidence.

16. Ms Cunningham also urged us to consider the witness statements of the respondent, both to consider their brevity in relation to dealing with matters and also to note that, generally, they either deny the allegations took place at all or say that they were not targeted on the claimant. In those circumstances there would be no need to call additional evidence.

17. Ms Cunningham made clear that if the tribunal took the view that an amendment would necessitate an adjournment she would not pursue the application to amend.

The Law

18. In considering the application to amend we have considered the overriding objective which requires

> **Overriding objective**
>
> **2.** The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

19. We have also regard to the Presidential Guidance on General Case Management and in particular guidance note 1. The guidance note requires that tribunals must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the management.

20. We have considered *Selkent v Moore [1996] ICR 836, 843F in which the EAT stated "*It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory [1996] ICR 836 at 844provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to

consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

21. The respondent referred us to the case of *Foxton's Limited v Ruiwel* UK EAT/0056/08/DA, a case in which the tribunal allowed an amendment to add a sex discrimination claim to an existing unfair dismissal claim. At paragraph 11 the EAT referred to *Housing Corporation v Bryant* and noted that the Court of Appeal in that case held that "in order for the claimant to be able to allege that there was a mere re-labelling exercise it had to be shown that there was a proper factual substratum for the claimant now being made. That in turn required there to be a causative link between the making of the allegation of sex discrimination and the dismissal.".

22. In paragraph 12 the EAT went on "… In order for the exercise to be a truly re-labelling one, the claim form must demonstrate the causal link between the unlawful act and the alleged reason for it. In other words, in this case it would have to identify not merely that there had been some discrimination but that the dismissal was by reason of sex discrimination."

Conclusions

23. We accept that this is not a true re-labelling exercise. In those circumstances it is necessary for us to consider the other factors set out in *Selkent Bus* as well as the overriding objective and the presidential guidance.

24. We note that the application has been made extremely late in the day and we do not consider there is any good reason for that lateness. It must have been possible for the claimant decide how he put his case long before now. We note that the application is made only after exchange of witness evidence and after the tribunal has completed 1 ½ days of reading. We note too, however, that no live evidence has yet been called.

25. If we do not permit the amendment then there is potential prejudice to the claimant. It is possible that the tribunal could conclude that some of the matters pleaded as, say, disability discrimination, did occur but the motivation for them was not the claimant's father's disability but the claimant's race. If the tribunal reached that conclusion then it might be in a position of being unable to give the claimant a remedy for a wrong he has suffered. That would be the claimant's fault in that he left the application so late, but also undesirable and a factor which we must weigh in the balance.

26. There is some prejudice to the respondent for the reasons set out by Mr Mitchell, however, we do not consider that the prejudice is as great as he suggests.

27. In respect of his point that allegations will now be made against people who did not know that allegations of race discrimination were being made against them, the prejudice is mitigated by Ms Cunningham's concession that she will restrict the amendments to allegations against people being called as witnesses. If we find those people are guilty of race discrimination there is no significant prejudice in the allegation having been made late, likewise if we exonerate them. Where there is an allegation against a group, whilst we may need to name witnesses from whom we have heard, it should usually not be necessary for the tribunal to name other people.

28. Moreover, even if the application to amend was not permitted, we would still have to make findings of fact as to why any incidents that we find proved, took place. Thus it is likely we will have to find the motivation for an act or omission regardless of whether it is pleaded as an allegation of race discrimination or not. If we took the view that the reason for the action was because of the claimant's race we would have to make that finding even if we had not allowed an amendment.

29. We accept Ms Cunningham's submission that most of the respondents' witness statements do not go beyond either denying the allegations or saying that they were not targeted at the claimant. It is unlikely that the statements would have been very different simply because certain existing allegations had been alleged to be on the grounds of race. We do not consider that, in fact, much extra evidence will be needed in chief. The witness statements should already deal with the question of whether the alleged acts it omissions happened and, if they did, the reasons for them. It will not require much more evidence to consider the alleged reason of race. Nevertheless, we will permit the respondents to reasonably address the particular allegations in chief and will truncate the time available for cross examination to ensure that the respondents are not prejudiced in this respect.

30. The respondent is already running the statutory defence in relation to the existing race discrimination claim and it is difficult to see what extra evidence it would want to call in this respect.

31. We do not consider that the respondents need an adjournment to deal with the amendments; the amended allegations will be limited to allegations against people they are calling, they will be able to deal with the allegations in evidence in chief and the respondents' witnesses will not be called until next week in any event. In terms of cross-examining the claimant, the respondents did not suggest that they were prejudiced by the amendment.

32. We agree with Mr Mitchell that it is not obvious that this amendment will simplify the case and, in any event, we would not consider that to be a good reason for granting the amendment.

33. Taking all of the above matters into consideration, we take the view that it is appropriate to allow the amendments to be made, subject to the qualification that amendments are not permitted against people who are not being called as witnesses by the respondent.

<u>The Second Application</u>

34. That leaves the second application, to change the date from December to August 2016. Mr Mitchell, very properly, conceded that he was not prejudiced by that change and, in those circumstances, his only argument was that there is a contradiction between the claimant's witness statement and the proposed amendment.

35. No application has been made to correct the witness statement in that respect. If no application is made to correct the witness statement then, clearly, the claim would be likely to fail.

36. If an application to correct the witness statement is made, then the claimant could not be forced to swear a witness statement which he believed to be false but Mr Mitchell would be able to cross-examine on the reason for the change and to adduce evidence from his witnesses in chief on this point.

37. In those circumstances it seems to us that there is no prejudice in allowing the amendment and it is allowed.