EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr C Sano	AND	Royal Mail Group Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP) **ON** 12 to 19 April 2021

EMPLOYMENT JUDGE GRAY **MEMBERS: MR N CROSS and MRS C DATE**

Representation
For the Claimant: **In person (assisted by Mrs O Rouse a Portuguese speaking interpreter)**
For the Respondent: **Mrs J Linford (Solicitor)**

JUDGMENT

The unanimous judgment of the tribunal is that:

- **By consent, the parties agree that the Claimant is owed £1,500 gross of holiday pay and the Respondent is ordered to pay the net amount of that to the Claimant.**

- **The complaints of unfair dismissal / automatic unfair dismissal, wrongful dismissal and direct discrimination and harassment because of race, fail and are dismissed.**

JUDGMENT having been delivered orally on the 19 April 2021 (and then having been sent to the parties on the 6 May 2021) and in view of the extent of email correspondence received from the Claimant since oral Judgment was given (14 emails between 19 April 2021 and 10 May 2021) suggesting the decision is wrong, needs to be reconsidered and/or appealed, written reasons would appear necessary, so in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the Claimant, who was dismissed by the Respondent on 25 February 2019 claims that he has been unfairly dismissed, and that he was discriminated against because of a protected characteristic, namely race. The

claim is for direct discrimination and harassment – the four allegations are pleaded in the alternative (as confirmed by the parties at the commencement of this hearing and recorded at paragraph 5 of the Case Management Order of EJ Goraj (see page 45 of the agreed bundle)).

2. The Claimant also claims unpaid holiday pay. He confirmed that the amount he claims was £1,500 and the Respondent agreed to pay this. It was suggested that judgment for that could therefore be issued by consent. The Claimant asked that this be considered after we had heard all matters, and then the judgment to be made was agreed.

3. There is also a complaint of wrongful dismissal. When discussing the issues, the Claimant accepted that the notice he claims is for 3 weeks (see page 84).

4. The Respondent contends that the reason for the dismissal was conduct, that the dismissal was fair and not wrongful, and that there was no discrimination.

5. For this hearing we were provided:
    a. Agreed Hearing Bundle and index;
    b. Witness statements of the Respondent:
        i. Andrew Parker
        ii. Peter Keable
        iii. Jason Neary
        iv. Daniel Acton
        v. Chun Siu
        vi. Jayaraj Selveraj
        vii. Tony Bradford
        viii. Joe Miranda
    c. and Claimant; and
    d. Cast list and chronology.

6. There have been three case management preliminary hearings in this matter, where the first two set out the complaints and the issues. They were:
    a. EJ Reed – 21 January 2020 (pages 28 to 32);
    b. EJ Goraj – 8 June 2020 (pages 43 to 49); and
    c. EJ Dawson – 10 February 2021 (pages 304 to 306)

7. The agreed Issues were set out in an agreed list of issues a copy of which is at pages 50 to 52 of the bundle. They are (using the numbering from the previous case management hearings):

    <u>Unfair Dismissal/Automatic Unfair Dismissal</u>

    3. The claimant was summarily dismissed by the respondent on 25 February 2019 as a consequence, the respondent says, of an incident that occurred on 10 December 2018. The respondent says that the reason for the claimant's summary dismissal was that the claimant demonstrated aggressive, abusive and threatening behaviour towards his managers and failed to follow a

reasonable instruction. The claimant says his dismissal was unfair on the following grounds:

3.1. The actual reason for his dismissal was his refusal to carry out duties for which he had not been trained. The claimant relies on section 100 (1) (c) (ii) of the Act – the claimant contends that he brought his health and safety concerns to the attention of Mr Peter Keable. As discussed during the Hearing, it is necessary for the claimant to explain in his witness statement the nature of any health and safety concerns and further why he says that it was not reasonably practicable for him to have raised any such concerns with a health and safety representative at the respondent/ the respondent's health and safety committee.

3.2 The evidence before the respondent was such that the respondent could not reasonably conclude that he had been acting in a threatening way.

3.3. He was unaware of the fact that he was currently on a final written warning.

3.4. (in respect of the claimant's unfair dismissal claim pursuant to section 98 of the Act), - if the Tribunal finds that the claimant has been unfairly dismissed it will also be required to consider whether the claimant has contributed to his dismissal by reason of any culpable or blameworthy conduct on his part and if so, whether any awards of compensation should be reduced accordingly.

Race Discrimination

6. Turning to the claim of race discrimination, the claimant identifies himself as black African and says he was directly discriminated against and/or harassed by the following acts:

6.1. He was called a monkey. The claimant alleges that Mr Neary made such comments on 13 and 15 December 2016 and 10 December 2018.

6.2. He was asked to undertake tasks and particularly manual handling tasks that no-one else would do. The claimant contends that the alleged discriminators are Messrs, Keable and/or Parker and/or Neary (the claimant has paid a deposit order to continue with this claim. He says this treatment occurred between 22 August 2016 and 31 July 2017 and the comparators are Simon Bree, Saron Johnson, Rujires Alexander ('Boo'), Norinka and Rachel).

6.3. He was not provided with training despite requests from him. The claimant alleges that he made requests for training in October 2016 and 2017 and September 2018. The claimant's comparators are Norinka and/or Rachel. (It was agreed that the respondent will endeavour to locate the claimant's training records).

6.4. The respondent's employees lied in the course of the disciplinary process resulting in his dismissal, insofar as they contradicted his version of events. The

alleged discriminators for such purposes are – Chun Sui, Peter Keable, Daniel Acton, Jason Neary and Jay Selvaraj.

6.5 Time limits – the Tribunal will be required to consider for the purposes of the claimant's race discrimination claims any issues relating to time limits including (a) whether any alleged acts which occurred outside the primary time limit (as extended by the ACAS EC process) are part of a discriminatory course of conduct and/or (b) whether it is in, any event, just and equitable to extent time to allow them to be determined by the Tribunal. The claimant should address such matters in his witness statement including why he did not bring his claims earlier and why it would, if relevant, be just and equitable for the Tribunal to extend time to allow him to bring any claims which were not presented within the statutory time limit.

Wrongful dismissal and holiday pay

7. The claimant was summarily dismissed. He says he did not commit gross misconduct, such that the failure to give him notice was a breach of contract entitling him to damages.

8. Finally, he says he was not paid his full entitlement to holiday pay. He will provide full details of that allegation in his schedule of loss.

8. So, to our findings of fact. We have heard from the Claimant. For the Respondent we have heard from its eight witnesses.

9. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

The Facts

10. The Claimant confirmed in his oral evidence that he had worked for the Respondent as an agency worker in November 2015.

11. He then worked as a casual from 3 May 2016 and says he became permanent in August 2016.

12. The Claimant refers us to page 289 of the bundle in support which is a letter dated 23 August 2016 that records a variation to the contract of employment saying that he is now a Postman at OPG grade.

13. There is no dispute that the Claimant was dismissed on the 25 February 2019.

14. We were presented with a copy of the Claimant's terms and conditions of employment (pages 79 to 92) that were signed by the Claimant on the 15 June 2018 (see page 92).

15. These confirm a number of matters relevant to this case:
    a. The terms and conditions of employment are for a Long-Term Contract for an Operational Postal Grade (or OPG) (page 79).
    b. Those contract terms started on the 11 June 2018 (page 79).
    c. The continuous service date is from the 3 May 2016 (page 79).
    d. Job title is (at page 80)

    Job Title

    6 Your job title is Postman/Postwoman. Details of your duties will be provided by Royal Mail. You will also be required to undertake such other duties as may be required from time to time which Royal Mail considers you capable and competent to perform.

    e. Notice of termination for the Claimant's length of service (less than 3 years) is 3 weeks (page 84) unless dismissed for proven gross misconduct (pages 84 and 85 (clause 15.4)).

16. A key aspect of the work the Claimant undertook that is at the heart of this claim is working on the IMP machine. We understand this to be a sorting machine, with what is known as an "A Feed" where letters and parcels are tipped and then fed through the machine for sorting.

17. About this machine the Claimant's evidence is that, as per paragraph 3 of his statement … "Throughout my time at Royal Mail I had also been asked to work on the IMP machine whose operators receive extra higher payments which I was receiving from time to time.".

18. The Claimant says that he had been working on the IMP machine in 2016 without the extra payment (known as a TPM payment). He says he was working on all parts save for the computer control section. He was then told about the extra payments, he raised this with Kelly at the Respondent and then these were authorised and back dated for him as can be seen by the pay advice at page 265 dated 17 February 2017. It records the Claimant being paid for 102 hours of "Arrears of Advanced TPM Allow ADJ".

19. It is the Claimant's evidence then, as at paragraph 3 of the Claimant's statement … "… I did not question my management's requirement for me to work on that machine until my trade union the CWU pointed out to me that I should not have been working on that machine due to my not having undertaken the proper training to do so. The training involved a 5 day course after which a certificate would be issued.".

20. About this interaction with the CWU, the Claimant's statement does not say who it was with at the CWU or when it was. He was asked about this in

questions during his oral evidence and confirmed that it all arose from him being questioned by work colleagues Norinka and Rachel as to why he was not working on the computer part of the machine. When it was confirmed he had not been trained to use the computer part he says he was then told what he says he was told by the CWU.

21. We have noted that there is no evidence from the CWU about this matter. The CWU represented the Claimant throughout the disciplinary process and no evidence was presented by them about this during that process either.

22. The Claimant confirmed in his oral evidence that he believes his contact with the CWU about this was around August/September 2017, and he says that he did not work on the IMP machine again after that.

23. The Claimant explained that for December 2017 to January 2018 he was required to work in a different area on his own following the disciplinary incident involving another colleague, Mrs Guzman.

24. This is contrary to the evidence of Mr Neary which at paragraph 8 of his statement says "Carfala only worked for me during Christmas 2017…I have no recollection at all of Carfala doing any manual work for me between August 2016 – July 2017.".

25. Then at paragraph 9 "Whilst working for me on the A-feed during Christmas 2017, Carfala would have been one of 5 people tipping mail bags into a machine (the mail centre had 5 machines). The other A -Feed machines were operated by 3 female members of staff and one of which was over 60.".

26. We were informed during the parties' evidence that the Christmas busy period for the Respondent was usually the last week in November (if not sometimes the week before before) to Christmas Eve.

27. There is a factual divergence on dates here so we have considered relevant documents that may assist us:

28. Within the appeal hearing notes the Claimant is noted as saying the following (page 221 of the approved notes - paragraph 85)

> **It came up in conversation before. I had been working with the first group, they never complained. But then I was given a contract. Two ladies came in and asked why I did not work on the computer part of the machine and I explained that I had not been trained. They went to the CWU. The CWU then raised it with management who then stopped me working on the machine and instead do the mini Yorks.**

29. Looking at what the Claimant is recorded to have said about being given a contract in this note, this must logically be the one we have been referred to

that he signed in June 2018, as the variation of contract document was in 2016, and the Claimant was paid for arears of TPM payments in 2017.

30. We were also referred to by the Claimant a meeting note dated 12 February 2019 between Mr Bradford and DN at page 171 which the Claimant said may assist us in confirming the correct dates. In that document DN is recorded as saying that the TPM payments stopped for the Claimant last year (so that would be 2018) after other IMP operators complained the Claimant was not due them.

31. In submissions the Respondent's Solicitor referred us to page 178 of the decision report of Mr Bradford which notes …

> • Dean Noyce was interviewed and asked if Mr Sano had received any coaching before he worked for him on the late shift. He confirmed that Kevin Nelthorpe, (work place coach) had completed his on/off coaching on the IMP A feed work area. That Mr Sano had carried out the full range of work activity in this area and received TPM payments. That this continued through to 2018. Mr Sano has received 43 TPM payments since 27th March 2017 with the last payment being made in w/c 3rd Sept 2018

32. From this review of the documentary evidence we, on the balance of probability, accept the Respondent's evidence on this issue, that the Claimant did work in 2018 on the IMP, until his contact with the CWU, and therefore his initial working with Mr Neary was from the end of 2017.

33. The incident on the 10 December 2018

34. There is then an incident on the 10 December 2018 that is the subject matter of the reasons for the dismissal of the Claimant.

35. About the incident the dismissing officer Mr Bradford wrote to the Claimant inviting him to a formal conduct interview to take place on the 4 January 2019 (pages 152 to 154) to answer the following allegations about the Claimant's conduct on the 10 December 2018:

"1. Displaying aggressive, threatening and abusive behaviour toward Mr J Neary (Work Area Manager), Mr P Keable (Shift Manager) when asked to follow a reasonable instruction.

2. That you failed to follow a reasonable instruction requested by Mr J Neary (Work Area Manager) to move from the Portsmouth packet area to operate the A feed on IMP 5. Subsequently, failed to follow the same reasonable request from Mr P Keable (Shift Manager)"

36. The letter informs the Claimant that he has a right to attend with a trade union representative or a work colleague. Also, that consideration would be taken of his conduct record which had a live 24 month suspended dismissal effective

from 26 January 2018. Finally, that as the allegations were being considered as gross misconduct an outcome could be dismissal without notice.

37. The formal conduct interview then takes place on the 4 January 2019. The Claimant was represented by a CWU representative.

38. The notes from this hearing, as signed and approved by the Claimant with his handwritten amendments, are at pages 155 to 160 of the bundle.

39. There are two accounts of the incident on the 10 December 2018, one by the Claimant and the other by the Respondent and its witnesses.

40. The account of the Respondent, as said to be believed by the dismissing officer Mr Bradford, is (at paragraphs 22 to 25 and 30):

"22 In respect of notification 1 - Aggressive, threatening and abusive behaviour:

22.1 Carfala had been heard by at least five members of staff who gave evidence that he was shouting and uttering intimidating words.

22.2 Carfala's demeanour and posture observed by the witnesses indicated that he appeared to be threatening and aggressive.

22.3 I deemed there to have been a likelihood of further escalation of the above behaviours had Peter not intervened.

22.4 Despite being removed from the operational floor and given the opportunity to calm down, Carfala continued to behave aggressively and with a raised voice.

22.5 When asked to leave the premises, Carfala continued to have a raised voice and refused to leave despite the fact that he had been told the police would be called. Carfala only left when asked by a union representative to do so.

23 Upon balance I was therefore satisfied that this notification in this case was substantiated.

24 In respect of notification 2 – Failure to follow a reasonable instruction:

24.1 Carfala admitted that he had failed to follow the instruction, repeatedly. The question I had to consider was whether it was a reasonable one. I will comment on this further below.

25 Upon balance I was therefore satisfied that this notification in this case was also substantiated."

"30.3 Carfala's mitigation in respect of the second notification was that the instruction was not reasonable, on the basis he had not received training. He also claimed that he had been told by the union he could not work on the machine because he did not have TPM training. However, Carfala confirmed to me that he had completed the work before, but not since being taken on permanently (he was previously a Christmas casual). He also stated that he had received cut and tip instruction from Dean Noyce [page 156] and Dean Noyce confirmed that he was given training by the workplace coach on this [page 171]. It was cutting and tipping that Jason had asked Carfala to perform on the night in question.

30.4 I noted that Peter's evidence was that Carfala had initially accepted he had received training but then later that night said he had not (although he did acknowledge he had done the work before).

30.5 I noted that Dean Noyce told me that the work place coach, Kevin Nelthorpe, had completed coaching in the IMP A feed area, and also that Carfala had completed the full range of work activity in the area previously. I also noted that Carfala had previously received TPM payments (43 payments between March 2017 and September 2018).

30.6 I concluded that the instruction given by Jason was reasonable, in view of Carfala's previous training, experience and knowledge to perform the work he was being asked to do. Carfala was sufficiently capable to complete the work."

41. As to the witnesses that Mr Bradford says supports his finding he summarises this in his statement at paragraph 42:

"There were a number of witnesses interviewed in this matter. As per their evidence:

42.1 "The aggressive behaviour and facial expression I thought that Mr Sano was about to attack Mr Neary " (Peter Keable [page 131])

42.2 "I can recall Sano shouting back at Jason… while he was also walking towards Jason at the same time…" (Chun Siu [page 133])

42.3 "I heard a louder than normal conversation… Mr Sano 'I'm not scared of you, I'm ready to go, I'm not scared of you' (This was said in a raised voice)… Mr Sano in an aggressive manner and raised voice.. " (Daniel Acton [page 134])

42.4 "From this point on Mr Sano became aggressive telling me hey big man, I'm not scared of you, come on then I'm ready to go. Mr Sano was getting aggressive and edging towards me. " (Jason Neary [page 135])

42.5 “It was at that point he stepped between Mr Sano and Jason because Mr Sano’s demeanour and aggressive nature of the way he was approaching Jason led him to believe that Mr Sano may have been intending to strike Jason. ” (Peter Keable [page 161])

42.6 “Mr Sano continued to say no in raised voice displaying an aggressive manner…” (Peter Keable [page 161)

42.7 “Believed that he was quite threatening” (Jason Neary [page 167])

42.8 “Reaffirmed that Mr Sano shouted at Jason and not just a raised voice” (Simon Bree [page 168])

42.9 “Carfala continued shouting ‘I can go away home’ (Jay Selveraj [page 172])”.

42. Save for Mr Bree, all the other witnesses mentioned by Mr Bradford attended this hearing and confirmed the statements they gave about the incident were true to the best of their knowledge and belief. They all denied that they had lied and did so because of the Claimant’s race.

43. We also note in cross examination that the Claimant accepted that–
    a. he refused to work on the IMP machine.
    b. Mr Neary advised him to change his attitude.
    c. he did say to Mr Neary that he was not scared of him and he was ready to go, but he did not accept he was aggressive or that he was referring to a fight.
    d. Mr Keable had asked him to change his position.

44. In paragraph 16 of the Claimant’s statement he explains … “If I was angry it was because I was being pushed by management to do something for which I was neither paid nor trained to do even being threatened with the loss of my livelihood and removal by police for my refusal. Anyone in that position would want to defend their position.”. Despite this evidence the Claimant did not accept in cross examination that he was angry, he says this was an explanation as to why he would be angry, if he was.

45. At paragraph 8 of his witness statement the Claimant says … “Peter Keable then took me to one side into a meeting room and asked me why I was refusing to work on the machine when I had worked on it in the past. The conversation was becoming aggressive and I felt that I wasn't being given a chance by him to explain properly that even though I had worked on it in the past my trade union had since told me that I had not received the proper training nor was I receiving the higher extra payments that the IMP machine operators received. Neither was he giving me a chance to ask him to check my records.”. The Claimant denied that he became aggressive.

46. It was put to the Claimant during cross-examination that there is no reference to him being called a monkey by Mr Neary, as a motivation for why he might have been angry, if he were angry, although the Claimant denies he was angry. The Claimant explained that a lawyer had helped him draft his statement but he agrees it is his evidence and true, and he is not changing it.

47. A decision outcome meeting takes place on the 25 February 2019 where it is confirmed that the allegations have been upheld and the Claimant is summarily dismissed on that day. The decision is communicated to the Claimant in writing, see pages 173 to 178 and 298.

48. The Claimant signed for the written outcome on the 25 February 2019 (page 179) confirming he wishes to appeal.

49. The grounds of appeal as understood by the Respondent and as addressed by the appeal hearing officer Mr Miranda are (as recorded in paragraph 7 of his witness statement):

    "7 The appeal hearing went ahead as scheduled. Present was myself, Carfala, and his CWU Representative Paul Garraway ('Paul') [pages 183-201]. In summary, the key points of appeal were:

    7.1 That the first notification had been 'bumped up' to make it more serious than it was;

    7.2 That in respect of the second charge, the instruction was unreasonable; and

    7.3 Procedural errors.".

50. It was noted in evidence that the "procedural errors" challenged by the Claimant related to matters prior to the decision to dismiss.

51. Mr Miranda fully addresses these grounds in his appeal process and as explained in his witness statement and he upholds the dismissal decision.

52. The notes from the appeal hearing as approved by the Claimant are at pages 209 to 223 of the bundle.

53. The Claimant presents no evidence in his statement that the appeal process was unfair in anyway, it is also not part of any of his allegations raised in this case.

54. Importantly we note from the disciplinary and appeal process that:
    a. The Claimant at no time during the process suggested the witness statements given against him were motivated by his race.
    b. The Claimant does not submit that the live 24 month suspended dismissal effective from 26 January 2018 was not in place.

55. The Claimant's challenge to the fairness of the dismissal as set out in the agreed issues is:
    a. The reason is automatically unfair pursuant to section 100(1)(c)(ii) of the Employment Rights Act, so because he brought to his employer's attention matters he believed were harmful or potentially harmful to health and safety, refusing to carry out duties for which he had not been trained.
    b. The evidence before the Respondent was such that the Respondent could not reasonably conclude that he had been acting in a threatening way.
    c. He was unaware of the fact that he was currently on a final written warning.

56. The Claimant does not set out in his witness statement that he communicated the health and safety issues that arise from him not being trained on the IMP machine to the Respondent.

57. At paragraph 5 of his statement he says …. "On 10th December 2018 a different manager to mine Jason Neary approached me and asked me to stop doing my usual job and go and work on the IMP machine. I refused to do that complaining that I had not received the proper training to work on that machine. After having been advised by my union about the training I was then concerned about continuing to operate it.".

58. Then at paragraph 6 … "… I continued to complain that I wasn't properly trained on the IMP machine. I asked him what he had meant by 'bye bye' which he told meant that I would be sacked if I didn't follow the instruction. I told him that I didn't believe I would be sacked for refusing to do something that wasn't in my job description and for which I had not received the proper training.".

59. The Claimant then says at paragraph 7 … "I then repeated to Peter Keable why I was refusing to work on the IMP machine.".

60. At paragraph 8 the Claimant says that he wanted to explain to Mr Keable his concerns and he says … "I felt that I wasn't being given a chance by him to explain properly that even though I had worked on it in the past my trade union had since told me that I had not received the proper training nor was I receiving the higher extra payments that the IMP machine operators received.".

61. At paragraph 14 he says … "It was not unreasonable for me not to follow the instruction to operate the IMP machine. I should never have operated that machine without having received the formal 5 day training with certification to do so. That's why the IMP operators receive the higher TPM payments because they are more highly skilled.".

62. At paragraph 15 the Claimant explains about working on the sorter part of the IMP machine that it … "…involves taking letters from the machine, putting

them into a correctly labelled box at ground level, lifting the full box onto a caged trolley and then pushing that trolley once loaded into the warehouse. Not only does that work involve bending and lifting but also pushing a trolley weighing around 250 kg into the warehouse. The health and safety risks involved were potential for development of a bad back, cutting of fingers and electric charge and lack of training also posing risks to colleagues.".

63. This appears to be what the Claimant was concerned about happening as a result of his lack of training, albeit he specifically links the lack of training to him being a risk to colleagues.

64. The Claimant does not state that he has any concerns about working on the A feed part of the machine. He does not explain either what risk his lack of training would cause his colleagues.

65. As to the instructions given to the Claimant on the 10 December 2018, it is the Respondent's case that he was asked to work on the A Feed of the IMP machine.

66. Mr Neary says he asked the Claimant to work on the A feed part of the machine (see paragraph 26 of his statement and his statement at page135 of the bundle).

67. Mr Keable says he asked the Claimant to work on the A feed part of the machine (see paragraph 34 of his statement and his statement at page 131 of the bundle).

68. The Claimant says he was just asked to work on the machine.

69. So, considering the documents to assist us in determining which version is proven on the balance of probability.

70. We note that it is recorded at paragraph 43 of the appeal hearing minutes (page 194 and 216 of the approved version) that the Claimant says, "He said to go on 'A' feed".

71. When asked about this is cross examination the Claimant referred to the sentence before which says "Maybe, I don't know", to mean that it was maybe said to him to go on the A feed. This does not appear to make sense though as the notes go on to record the Claimant explaining the work he would need to do on the A feed. It is also not subject to any correction or clarification by the Claimant in his amendments to the appeal hearing notes.

72. We therefore find on the balance of probability that the Claimant was asked to go on the A Feed.

73. The Claimant's refusal to work on the machine does in his own evidence appear to be linked to him believing his lack of training means he will not get the higher payment.

74. The Claimant has not presented any evidence to say why he would not have been able to raise this issue with a H&S representative at the time, as it appears to have been accepted by the parties in evidence that a H&S CWU representative is on site during the night shift.

75. The second matter asserted by the Claimant relies upon us finding that the witnesses relied upon by the Respondent had lied due to the Claimant's race. We deal with this later in respect of the allegations of race discrimination.

76. We would note at this stage, relevant to the evidence relied upon by Mr Bradford to uphold the allegation of the Claimant displaying aggressive, threatening and abusive behaviour, that there is a high level of corroboration between the supporting witnesses relied upon by him and the Respondent.

77. In respect of the third matter the Claimant himself does acknowledge he was on some form of sanction as recorded in paragraph 73 of the appeal hearing minutes (pages 199 and 220 of the approved version). It is also made clear to him before the decision of dismissal is made that it would be considered and this is not challenged by the Claimant or his union representative.

78. Mr Keable was categoric in his oral evidence that he handed a copy of the outcome letter at pages 125 to 129 to the Claimant at 22:30 on the 26 January 2018. We note that it is recorded in handwriting on page 129 that the Claimant refused to sign and this is signed by Mr Keable and dated 26 January 2018.

79. We therefore find on the balance of probability that the Claimant was aware of the sanction and that it would form part of the considerations about matters he was then dismissed for.

80. The Race discrimination allegations

81. There is a time limit jurisdictional issue for us to decide in respect of the allegations of race discrimination.

82. The claim was received on the 4 April 2019 as can be seen from page 1 of the bundle.

83. The ACAS early conciliation period ran from 22 March 2019 to 4 April 2019 (see page 15).

84. Therefore, a complaint about matters on and after the 23 December 2018 would be in time. Complaints before that are potentially out of time.

85. About this the Claimant says in his statement at paragraph 26 … **"**Delay in Discrimination process we seek the services of lowyer because they are acknowledgeable of the matter. I Apologizes for delay. there is all.". The Claimant had confirmed at the outset of the hearing that he had not included any further matters relevant for the time limit jurisdictional issues by mistake, so it was agreed he could confirm his position by way of supplemental oral evidence.

86. From that oral evidence the Claimant said:
    a. In respect of the services of a lawyer that he refers to in his statement, he confirmed that he had obtained his ACAS certificate on the 4 April 2019 (see page 15), he then met with a lawyer the same day and had assistance drafting his grounds of claim before submitting his claim on the same day, 4 April 2019 (see page 1).
    b. He explained that he had been waiting on the outcome of his appeal against his dismissal before he issued his claim, but after someone at work (he did not want to say who this was) told him to not wait and submit his claim to protect his position he did so before the outcome.
    c. In response to being asked if there was anything that prevented him putting his claim into the Tribunal before the 4 April 2019, he confirmed "yes – he was waiting on the decision of Joe Miranda", but when he got the advice he acted and confirmed that he had put his claim into the Tribunal before he had Mr Miranda's decision.

87. During cross examination the Claimant was questioned further about the matters he had referred to and he confirmed, when asked if prior to 2016 he was aware of the 3-month time limit for Employment Tribunal claims, that he was aware of it before he had started with the Respondent and that he can do his own searches in Google.

88. We note from this evidence that the Claimant has not presented any evidence that he was therefore prevented in some way from issuing his claim before the date he did.

89. As to evidential prejudice to the Respondent we note that:
    a. There are no contemporaneous documents to support matters alleged by the Claimant.
    b. The allegations are reliant on recollections of matters said or done from 2016 and 2017 and there is an inconsistency on dates. Although the Claimant says he knows the alleged "Monkey" comments happened on the 13 and 15 December 2016, as he says he had noted those dates as working on the IMP machine in his personal diary, he has chosen not to submit his personal diary as evidence. Further, Mr Neary's evidence is he did not work with the Claimant in 2016, and about this we have accepted the Respondent's evidence and that the Claimant worked with Mr Neary from the end of 2017.

c. The only complaint of discrimination that was raised with the Respondent during the disciplinary process is in respect of Mr Neary calling the Claimant a monkey on the 10 December 2018. However, this is recorded as being withdrawn by the Claimant through his union representative as recorded in the appeal hearing notes (see page 191 and in the amended version at page 221) and there is no record of the Claimant objecting to this.

90. The "monkey" allegations

91. The Claimant's evidence about this is in paragraph 18 "I — a black man — have been referred to as 'monkey' on 3 separate occasions by Jason Neary. On 2 occasions in 2016 (13th and 15th December) and again on the 10th December 2018."

92. The Claimant confirmed in answer to questions in cross examination that he did not consider raising a grievance when he says Mr Neary called him a "monkey" in 2016 because he says that at the time Mr Neary apologised saying it was just a joke and he accepted that.

93. Mr Neary denies he ever called the Claimant that and also states as his evidence that he did not interact with the Claimant until around December 2017.

94. We have already found that the Respondent's evidence as to the dates of the Claimant's work on the IMP machine is proven on the balance of probability, which would mean that the comments made to the Claimant he says were in 2016, if made, would have been in 2017.

95. It is for the Claimant to prove on the balance of probability that the comments were made by Mr Neary. The comments are denied by Mr Neary, there are no other witnesses to the matter and no contemporaneous documents about it.

96. About the alleged comment on 10 November 2018, as Mr Bradford notes at paragraph 48 of his statement "In respect of the allegation that Jason called Carfala a 'monkey', Carfala had initially raised this to me during the formal conduct interview as a point of mitigation. I interviewed Jason and asked him about this and he denied it. I found Jason to be a credible witness and believed him when he told me he had not made that comment.". Reference to the Claimant raising this issue can be seen in the notes at page 155.

97. Mr Neary is asked about it in his interview with Mr Bradford on the 14 January 2019 (pages 165 to 167 – in particular at page 166). He denies it:

TB: Asked whether he called Mr Sano Monkey at any time on this day or ever.

JN: Responded that he had not in any way shape or form. That he hardly had any contact or spoke with Mr Sano usually.

98. At the appeal hearing (page 221 – paragraph 69.40), the Claimant's union rep is recorded as saying:

> I have not gone into the allegation of racist comments as there were no witnesses, so it is just one person's word against another. I do believe however, that CS was told that he would be sacked if he did not do as he was told. Which was part of the reason why CS reacted the way he did.

99. This is understood by the Respondent as being the Claimant no longer pursuing the allegation. This can be seen at paragraph 49 of Mr Bradford's statement and he expresses that he was surprised therefore at it being pursued again now.

100. The Claimant's explanation of why the allegation was dealt with in this way was he was tired about complaining about racism and he wasn't listened to. The position is though that no further investigation was done into the matter by the Respondent. We are therefore not presented with sufficient evidence by the Claimant for him to prove on the balance of probability that the comments were made by Mr Neary.

101. Further, the Claimant has presented no evidence to say why this allegation is connected to any later allegation (that would be in time so to an act on or after the 23 December 2018), so we cannot find it is conduct extending over a period. As already noted, the Claimant has also not presented any evidence that he was prevented in some way from issuing his claim before the date he did.

102. The tasks allegations

103. The Claimant's evidence about this is at paragraphs 19, 20 and 22:

> "19. I also believe I was treated differently to my colleagues with the same job description as me. I believe particularly I was treated differently by Peter Keable (the shift manager) and Jason Neary (the machine line manager).
>
> 20. I was regularly asked to perform tasks that were not within my remit and which my colleagues with the same job role weren't. In particular I was regularly asked to perform tasks by Andy Parker and Peter Keable particularly that required physical strength for example pushing the heavy trolleys mentioned earlier into the warehouse.
>
> 22(6.2) clarification I was asked to undertake tasks and particularly manual handling tasks that no-one else would do. the contend that the alleged discriminators are;(Peter Keable, shift manager, Andy parker southampton parcel manager, Neary johson machine manager) this treatment occurred between 22 Augusto 2016 till and 31 july 2017 and the comparator are Simon

Bree, Saron Johnson,Rujires Alexander(boo) Norinka and Rachel. I want to Added a knee injury that I had at time in the same job that not my job discription I went to doctor and give then a warning that I can not do such work because my knee may get worse but they Ignore the Medical warning they continued to force me to do the same otherwise I have to leave. I will Request all paper from hospital for finaly hearing to prove this.".

104. This allegation is denied by those accused.

105. This allegation relates to a specific window of time of the 22 August 2016 to 31 July 2017. There are no specifics presented in evidence by the Claimant from which he could challenge the Respondent's witnesses about on this. For example, on a particular date or time period I was asked to do this specific task and I complained to you about it.

106. During cross examination the Claimant says that he did raise concerns about this matter at the time but accepted that there is no evidence in the bundle to support this. We also note that there is no evidence in the Claimant's statement to support this either. About the witness statement the Claimant said he had assistance writing it from the lawyer who had assisted him with the claim form and he confirmed that he stood by its content.

107. The Claimant accepted that there was no evidence in the bundle that supported his assertion that he was allocated tasks because of his race. He also accepted that he did not raise a formal grievance about the issue.

108. We note that the Claimant confirmed in evidence that he was a member of the CWU, his own evidence is that he had been advised by them about not working on the IMP machine, and that he had union reps at the dismissal and appeal hearing. The Claimant has not presented evidence to say that he did not know how to or could not raise a grievance if he wanted to.

109. This lack of any such specific evidence now is prejudicial to the Respondent evidentially as it cannot defend such generalised assertions being claimed for a time period that is nearly 2 years before the claim is submitted to the Tribunal.

110. The Claimant has presented no evidence to say why this allegation is connected to any later allegation – so we cannot find it is conduct extending over a period. He has also not presented any evidence that he was prevented in some way from issuing his claim before the date he did.

111. The training allegation

112. The Claimant's evidence about this is in paragraph 21 "I also put my name forward for the formal IMP machine training which was offered on a yearly basis. My place on the training was rejected in the first year of my employment due to lack of service and colleagues with longer service were prioritised for it which I accepted. In my second year of service I again put my name forward

for the training but was rejected again. However I then discovered that colleagues with less service than me - for example Norinka and Rachel — had been accepted for the training.".

113. It does not appear to be in dispute that Norinka and Rachel had the formal training. They are the individuals that appear to have complained in 2018 about the Claimant receiving the IMP payment when he is not formally trained.

114. Mr Neary also refers to them and the IMP training in his witness statement (paragraphs 15 and 16):

"15 However as for their training, my understanding is that the duty room at the mail centre arranged their machine training to help in the first instance cover the machines over the weekend. This something I would not have had any involvement in.

16 I was not aware of Mr Sano putting his name down for IMP training personally as I was not his line manager or had any contact with him outside of a limited amount of contact during Christmas 2017 and on 10 December 2018."

115. What Andrew Parker says about this, as the Claimant's manager in the parcel area, is at paragraphs 14, 15 and 16 of his statement:

14 Finally, in regards to IMP training, I have no recollection of Carfala ever 'putting his name down for this training'. However, I was aware that Carfala already had training to work on the front end of the IMP (the A-feed), but not the back end (Sorting).

15 In any event, we do not operate a 'put your name down' system for training requests. Training courses are run whenever there is a demand for them and not annually as suggested by Carfala, although it is likely that they would commence in October or November due to that being a busy time of year, leading up to Christmas pressure.

16 When the courses are required, managers will supply delegates for the courses based on their duty pattern, ability and availability. The resourcing team would then arrange for them to attend the training. As Carfala's Line Manager he should have confirmed to me that he had an interest in this training and I would have made the decision to put him forward for this if it was appropriate."

116. In view of this contested evidence it is our view that the Claimant has not presented sufficient evidence to us to discharge the burden of proof to support that he did put his name forward, when he did so, who to and who rejected it.

117. Even if his case is taken at its highest and he did do as he says, he has provided an explanation in his evidence to this Tribunal as to why he did not get it for a reason unconnected with his race.

118. In cross examination the Claimant was asked if he understood that his alleged requests for the formal training were rejected on the grounds of his length of service. He agreed saying that they said he did not need it. He was asked why that part was not in his witness statement and he confirmed that he couldn't remember, and he thought that they think he didn't need the training when he put his name forward.

119. He was asked whether in his opinion he thought the Respondent had concluded that he didn't need the 5-day training as he was already working on the machine. The Claimant confirmed that he didn't know, but he believes that they based their opinion on that. He said the reason why is he was already receiving the TPM payments so what is the point of spending money to train him when he is already doing it.

120. A significant amount of time was spent during oral evidence reviewing the Claimant's training records at page 93 of the bundle.

121. About this the Claimant says in his statement at paragraph 24 "I would like to know about bundle page 93 who as sign and who are tick box. Everything is false include training date also are false.".

122. During cross examination though the Claimant clarified that some of the ticks on the form were his (for example for the first two tasks and the last three tasks) but not all of them. He therefore thought there was another version of the form with less ticks that he would have signed. None of the Respondent witness statements referred to page 93 so there was no written witness evidence about the document, its creation or authenticity from the Respondent side.

123. The Claimant's initial position was that whole document was false, however in cross examination he accepted that some of what it recorded was accurate. As the Claimant's allegation about training as set out in his witness evidence focuses on the IMP machine and requests he made for that in 2016 and 2017 this document does not assist us with that matter.

124. The Claimant has presented no evidence to say why this allegation is connected to any later allegation – so we cannot find it is conduct extending over a period. He has also not presented any evidence that he was prevented in some way from issuing his claim before the date he did.

125. ***That the Respondent's witnesses lied***

126. The allegation is that the Respondent's employees lied in the course of the disciplinary process resulting in the Claimant's dismissal, insofar as they

contradicted his version of events. The alleged discriminators for such purposes are – Chun Sui, Peter Keable, Daniel Acton, Jason Neary and Jay Selvaraj.

127. The evidence presented by the Claimant about this allegation is at paragraph 23 of the Claimant's witness statement:

"23/(6.4) clarifications the respondents employees lied in the course of the Disciplinary process Resulting in my Dismissal inso far Are;(
Chun SUI- portsmouth parcel area mamager
Peter Keable shift manager
Daniel Acton- portsmouth track area manager
Johson Neary-imp Machine Manager
Jay Selvaraj- portsmouth track area Manager"

128. All of these witnesses attended this hearing and all under oath deny that they lied about what they said in their statements for the disciplinary or that they did so because of the Claimant's race.

129. It is for the Claimant to prove on the balance of probability that the witnesses have lied. We do not find that the Claimant has discharged this burden of proof.

130. The statements of Mr Keable, Mr Acton and Mr Neary were all dated the 10 December 2018 and Mr Sui is dated in the early hours of 11 December 2018.

131. These all therefore predate the complaints being in time date of 23 December 2018.

132. Mr Selvaraj did not give a statement but was interviewed by Mr Bradford on the 12 February 2019 (see page 172). This would therefore be an act complained of in time.

133. However, the Claimant has presented no evidence to say why this allegation is connected to any previous allegation, so we cannot find (even if it were found to be discrimination) that it is conduct extending over a period, with the complaints that are potentially out of time.

134. The Claimant has also not presented any evidence that he was prevented in some way from issuing his claim before the date he did.

135. Further allegations of race discrimination were raised by the Claimant during him being cross-examined, as he said he thought he could bring them up now and talk about them at this hearing. It was explained that was not the fair process, particularly as there had been three previous case management preliminary hearing to confirm the issues. The issues were also agreed and confirmed at the start of this hearing and the Respondent had already presented its evidence. If he intended to add further allegations he would need

to make an application to amend. The Claimant confirmed that he only pursued the allegations as set out in the agreed list of issues.

The Law

136. Having established the above facts, we now apply the law.

137. The reason for the dismissal as asserted by the Respondent was conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ("the Act").

138. We have considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

139. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to a set of factual circumstances within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

140. We were directed to the cases of:
    a. British Home Stores Limited v Burchell [1980] ICR 303 EAT; and
    b. Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.

141. As to the automatic unfair dismissal complaint:

142. We have considered section 100 (1)(c) of the Act. This subsection provides that an employee will be regarded as automatically unfairly dismissed if the reason (or principal reason) for dismissal was that the employee brought to the employer's attention, by reasonable means, circumstances connected with his or her work that the employee reasonably believed were harmful or potentially harmful to health or safety. It only applies if there was no safety representative or safety committee at the employee's place of work or, if there was such a representative or committee, it was not reasonably practicable for the employee to raise the matter by those means.

143. We remind ourselves of the case of Balfour Kilpatrick Ltd v Acheson and ors 2003 IRLR 683, EAT, where the EAT identified three requirements that need to be satisfied for a claim under S.100(1)(c) to be made out. It must be established that:
    a. it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee;
    b. the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety, and
    c. the reason, or principal reason, for the dismissal must be the fact that the employee was exercising his or her rights.

144. The Claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.

145. We have not addressed the Holiday Pay complaint as this matter is now subject to judgment agreed by consent.

146. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination or in the alternative harassment.

147. The protected characteristic relied upon is race as set out in section 4 and 9 of the EqA.

148. As for the claim for direct discrimination, under section 13(1) of the EqA 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.

149. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

150. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

151. We were directed to the cases of
    a. Madarassy v Nomura International Plc [2007] ICR 867 CA and Ayodele v Citylink Ltd and Anor CA [2017];

152. In Madarassy v Nomura International Plc, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant 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 act of discrimination". The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd [2018] ICR 748.

153. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (Madarassy). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

154. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

155. Time Limits

156. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

157. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

158. We have considered the principals from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***;

159. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:
    a. The length of and the 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 parties co-operated with any request for information.
    d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
    e. The steps taken by the claimant to obtain appropriate professional advice.

160. We note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

161. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

The Decision

162. The complaints of Unfair / Automatic Unfair Dismissal

163. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):
    a. that the employer did believe the employee to have been guilty of misconduct; ***- we find that the Respondent did believe that the Claimant refused to follow an instruction and displayed aggressive, threatening and abusive behaviour, on the 10 December 2018***.

b. that the employer had in mind reasonable grounds on which to sustain that belief; ***- we find that the Respondent did have these grounds as we accept the evidence of Mr Bradford as to what he relies upon and we have had five witnesses give evidence to us under oath confirming what they witnessed on the 10 December 2018***; and
c. that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. ***We find that the Respondent did do this***.

164. As to the complaint of automatic unfairness, we do not find that:
a. it was not reasonably practicable for the Claimant to raise the health and safety matters through the safety representative;
b. the Claimant brought to the Respondent's attention by reasonable means the circumstances that he reasonably believed are harmful or potentially harmful to health or safety, and
c. the reason, or principal reason, for the dismissal was fact that the employee was exercising his rights.

165. The Claimant has not presented sufficient evidence (such as any documentation or evidence from the CWU) to show on balance of probability that he had reasonable grounds for believing that there were circumstances harmful to health and safety. Nor why he could not raise the matter with the CWU H&S rep.

166. The raising of the safety issue is the protected act, so that has to be the principal reason for the dismissal. In this case the reason for dismissal is the refusal and aggressiveness.

167. The Claimant is genuinely believed by the Respondent to have committed the acts alleged. This was based on reasonable grounds after a reasonable investigation, and while the Claimant was under a live 2-year suspended dismissal warning. We therefore accept that the decision to dismiss would fall with the band (or range) or reasonable responses.

168. The complaint of unfair dismissal and automatic unfair dismissal, therefore fails and is dismissed.

169. The complaint of Wrongful Dismissal

170. In respect of the complaint of Wrongful Dismissal it is for the Respondent to show on the balance of probability that the Claimant actually committed the gross misconduct alleged which is the Claimant's refusal to follow instruction and aggressiveness. We find that:

a. The Claimant accepts that he refused to follow instruction, although he submits a reason for not doing so.
b. The Respondent has presented evidence through its witnesses under oath that the Claimant displayed aggressive, threatening and abusive behaviour on the 10 December 2018 and there is a high level of corroboration between the supporting witnesses relied upon by the Respondent in this respect.
c. We accept therefore that the Respondent has discharged this burden of proof.

171. The complaint of wrongful dismissal therefore fails and is dismissed.

172. The complaints of Race Discrimination.

173. Considering first the time limit jurisdictional issues.

174. We have not been presented evidence to say why matters are connected or that something prevented the Claimant from submitting his claim before he did. We also note there would be prejudice to the Respondent due to the length of the delay; as that delay has prevented and inhibited it from investigating the claim while matters were fresh. This is with the exception of the complaint about Mr Selvaraj which would be in time. However, the Claimant has presented no evidence to say why this allegation is connected to any previous allegation, so we cannot find it is conduct extending over a period, with the potentially out of time complaints.

175. However, despite this finding we have gone on to consider the complaints had they been in time or we had exercised our discretion to extend time because it was just and equitable to do so, as well as the complaint about Mr Selvaraj.

176. There are four allegations made by the Claimant.

177. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

178. Regarding the claim for harassment it is for the Claimant to prove on the balance of probability that the alleged unwanted conduct happened.

179. We find the following in respect of the four allegations:
a. Mr Neary of the Respondent calling the Claimant a monkey on the 13 and 15 December 2016 and 10 December 2018; ***- We do not***

find that the Claimant has proven this happened on the balance of probability.

b. Between the 22 August 2016 to 31 July 2017 asking the Claimant to undertake tasks and particularly manual handling tasks that no-one else would do; ***- We do not find that the Claimant has proven this happened on the balance of probability.***

c. Not being provided with training despite requests from the Claimant. The Claimant alleges that he made requests for training in October 2016 and 2017 and September 2018 although he only provides evidence about 2016 and 2017 in his witness evidence; ***- We do not find that the Claimant has proven this happened on the balance of probability, but even if we take his case at its highest and he did make such requests and they were refused, it is his own evidence that the reason for this was not connected to his race***.

d. The five witnesses lied about what they say they saw and heard on the 10 December 2018; ***- We do not find that the Claimant has proven this happened on the balance of probability***.

180. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred. In these circumstances the Claimant's claims of direct discrimination and harassment fail and are dismissed.

181. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 7; the findings of fact made in relation to those issues are at paragraphs 10 to 135; a concise identification of the relevant law is at paragraphs 136 to 161; how that law has been applied to those findings in order to decide the issues is at paragraphs 162 to 180.

Employment Judge Gray
Date: 17 May 2021

Reasons sent to the Parties: 24 May 2021

FOR THE TRIBUNAL OFFICE