



EMPLOYMENT TRIBUNALS

Claimant: Mr I Sarmadi

Respondents: Hala Limited

Heard: Remotely (by video link) **On:** 4, 5, 6, 7 and 14 May 2021

Before: Employment Judge S Shore
NLM – Mrs C Hunter
NLM – Mr S Moules

Appearances

For the claimant: In person
For the respondent: Mrs H Winstone, Counsel

RESERVED JUDGMENT AND REASONS ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 2010 ("the ERA")) was not well-founded and fails.
2. The claimant's claims of direct discrimination because of the protected characteristic of race (contrary to section 13 of the Equality Act 2010) are determined as follows:
 - 2.1. The claim that the claimant was constructively dismissed was not well-founded. There was not an act of direct race discrimination, and the claim fails.
 - 2.2. The act of demoting the claimant as the outcome of a disciplinary procedure was not an act of direct discrimination and fails.
 - 2.3. The claim that on 18 December 2019, Saif Alani said to the claimant, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer." was not well-founded, and fails.

3. The claimant's claims of harassment related to the protected characteristic of race (contrary to section 26 of the Equality Act 2010 ("the EqA")) are determined as follows:
 - 3.1. The allegation that Anna Mieloch requested and then 'chased' the claimant for evidence related to holiday he intended to take in November/December 2019 for a reason related to the claimant's race was not well-founded and fails.
 - 3.2. The allegation that Saif Alani acted in a threatening manner toward the claimant in conversations on 17 and 18 December 2019 for a reason related to the claimant's race was not well-founded and fails.
 - 3.3. The allegation that Ms Mieloch took a photograph of the claimant's home when he was said to have been on holiday in November 2019 for a reason related to the claimant's race was not well-founded and fails.

4. In respect of the allegations of victimisation (contrary to section 27 of the EqA), the Tribunal finds that the claimant did a protected act on 17 December 2019 when discussing Miss Mieloch's conduct with Saif Alani. In respect of the individual acts of victimisation alleged, the Tribunal makes the following findings:
 - 4.1. No warning of the meeting or about poor performance or any issue the respondent had with the claimant's performance – we find that he was not treated unfavourably because he did a protected act. This claim fails.
 - 4.2. Being suspended on the spot, with no explanation, and no further explanation of what gross misconduct was being referred to - we find that the claimant was treated unfavourably because he did a protected act. This claim succeeds.
 - 4.3. Making a false accusation of fraud (being the reason for saying it was gross misconduct) - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
 - 4.4. Delay in the disciplinary process (intended to mean the claimant would miss the 3-month window for pursuing a Tribunal claim) - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
 - 4.5. Demoting the claimant as the outcome of the disciplinary process - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
 - 4.6. During a conversation between the claimant and Saif Alani on 18 December 2019, Mr Alani saying, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer" - we find that Mr Alani did not use the words alleged and that the claimant was not treated unfavourably because he did a protected act. This claim fails.
 - 4.7. The conversation between the claimant and Saif Alani in which Mr Alani acted in a threatening manner on 17 and 18 December 2019 -

we find that the claimant was treated unfavourably because he did a protected act. This claim succeeds.

5. The Tribunal will consider remedy at a hearing with a time estimate of three hours on a date to be advised. A Notice of Hearing and Case Management Order will be sent to the parties under separate cover.

REASONS

Introduction

1. The claimant was employed latterly as an Area Manager by the respondent, which is a company that operates 74 Domino's pizza delivery franchises, from 10 September 2013 until 31 May 2020, which was the effective date of termination of his employment on his resignation. The claimant started early conciliation with ACAS on 18 March 2020 and obtained a conciliation certificate on 2 May 2020. The claimant's ET1 was presented on 31 May 2020. The respondent has approximately 2,000 employees.
2. The claimant presented claims of:
 - 2.1. Constructive unfair dismissal;
 - 2.2. Direct race discrimination;
 - 2.3. Harassment related to race; and
 - 2.4. Victimisation.
3. The claims were case managed by Employment Judge Sweeney on 26 August 2020, who made case management orders. Employment Judge Arullendran held a preliminary hearing on 5 December 2020 that dealt with some disputes and confusion about the case, documents and issues. Provision was made for the final hearing to be conducted by remote video hearing. Neither party objected to this method of hearing.

Issues

4. The case management order of EJ Arullendran dated 5 December 2020 required the parties to produce an agreed list of the legal issues. A list was included in the bundle [99-103]. It set out the issues as follows:

Jurisdiction

Direct Race Discrimination, Harassment and Victimisation

1. In relation to any incident alleged to have occurred more than 3 months (plus the extension under s140B Equality Act 2010 for ACAS Early Conciliation) prior to

presentation of the ET1 to the Tribunal on 31 May 2020, do those incidents form part of an act extending over a period ending within the relevant time limit?

2. If not, in relation to out of time incidents, is it just and equitable for the Tribunal to hear the claimant's complaint?

Constructive Unfair Dismissal

3. The claimant relies upon the respondent's breach of the implied term of trust and confidence.
4. What treatment does the claimant say formed the breach?
 - 4.1. No warning of the meeting or about poor performance or any issue the respondent had with the claimant's performance;
 - 4.2. Being suspended on the spot, with no explanation, and no further explanation of what gross misconduct was being referred to;
 - 4.3. Making a false accusation of fraud (being the reason for saying it was gross misconduct);
 - 4.4. Being harassed about reason for holiday, and that coming through his line manager and not via HR, when the claimant had previously provided in proof to Glen Okoli in June 2019;
 - 4.5. Delay in the disciplinary process (intended to mean the claimant would miss the 3-month window for pursuing a Tribunal claim);
5. Did the claimant resign in response to any such breach?
6. Did the claimant delay in resigning? Did the claimant affirm any such breach?
7. If amounting to a dismissal, was the claimant dismissed for a potentially fair reason pursuant to s.98 (1)(b) Employment Rights Act 1996, namely either gross misconduct or some other substantial reason to justify the dismissal of the claimant?
8. If so, did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant pursuant to s.98(4) Employment Rights Act 1996?
9. Was the dismissal of the claimant fair in all the circumstances (having regard to equity and the substantial merits of the case)?

Race

10. The claimant's race is Iranian.

Direct Race Discrimination (contrary to s13 Equality Act 2010)

11. What conduct, if any, from the particulars of claim does the claimant say amounted to discrimination?

- 11.1. Constructively dismissing the claimant (the claimant asserts he was "forced out of the organisation");
 - 11.2. Demoting the claimant as the outcome of the disciplinary process;
 - 11.3. During a conversation between the claimant and Saif Alani on 18 December 2019, Mr Alani saying, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer".
12. Did that treatment of the claimant amount to less favourable treatment than the respondent afforded to non-Iranian comparators in materially the same circumstances as the claimant? The claimant relies upon the following comparators (the parts in brackets are descriptions given by the claimant which are not necessarily accepted by the Respondent):
- 12.1. Mr Stuart Hewitt-Thirlwall (disciplined by the claimant and demoted on the advice of Anna Mieloch and Glen Okoli);
 - 12.2. Mr Peter Owens (Disciplined by Anna Mieloch and moved to the claimant's store);
 - 12.3. Mr Shaun Young (left 3 years ago from the Ashington store. Disciplined by Anna Mieloch); and
 - 12.4. Mr Christopher Thirlwall (not disciplined by the claimant - disciplined by either Anna Mieloch or HR).
13. If so, was the less favourable treatment because of the claimant's race?

Harassment related to Race (s.26 Equality Act 2010)

14. Did the respondent engage in conduct amounting to harassment related to race by:
- 14.1. Being requested to provide, and chased for, evidence in relation to holiday in November/December 2019, by Anna Mieloch, when it should have been HR rather than Ms Mieloch (this occurring shortly before the start of the holiday in November 2019 and continuing until the claimant's suspension);
 - 14.2. The conversation between the Claimant and Mr Saif Alani in which Mr Alani acted in a threatening manner on 17 and 18 December 2019; and
 - 14.3. Ms Mieloch taking a picture of the claimant's house when he was said to be on holiday in November 2019.
15. Was such conduct unwanted by the claimant?
16. Did such conduct have the purpose or effect of (i) violating the claimant's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
17. Was any such conduct related to race?

Victimisation (contrary to s.27 Equality Act 2010)

18. Did the claimant do a protected act? The claimant relies upon the following:

18.1. During a conversation with Saif Alani on 17 December 2019, the claimant "attempting to speak about issues in regards to Anna to Saif" (see paragraph 62E of the claimant's amended grounds of claim) and saying, "Like I said I'm not sure what to class the actions as you can call it either mind game, bullying, set to fail, racism, you can call it so many things but I don't want to misjudge as this is about someone higher than me, who is Anna" (as set out at paragraph 7 of the claimant's amended grounds of claim);

18.2. What does the claimant say is the treatment be received because of protected acts?

The Claimant relies upon the same acts as for the constructive unfair dismissal, race discrimination and harassment claims that occurred after 17 December 2019 namely:

18.2.1. No warning of the meeting or about poor performance or any issue the respondent had with the claimant's performance;

18.2.2. Being suspended on the spot, with no explanation, and no further explanation of what gross misconduct was being referred to;

18.2.3. Making a false accusation of fraud (being the reason for saying it was gross misconduct);

18.2.4. Delay in the disciplinary process (intended to mean the claimant would miss the 3-month window for pursuing a Tribunal claim);

18.2.5. Demoting the claimant as the outcome of the disciplinary process;

18.2.6. During a conversation between the claimant and Saif Alani on 18 December 2019, Mr Alani saying, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer".

18.2.7. The conversation between the claimant and Mr Saif Alani in which Mr Alani acted in a threatening manner on 17 and 18 December 2019.

19. If so, does such treatment amount to a detriment? (and thereby did the respondent act contrary to s39(4)(c) and/or s39(4)(d) EqA 2010?)

20. If so, did the respondent subject the claimant to that detriment because he had done one or more of the protected acts as specified in paragraph 16 above?

Compensation

21 . If found to be unfairly dismissed, what compensation is the claimant entitled to? In particular:

21.1. What if any reduction should be made by reason of the claimant's conduct and/or in accordance with principles set out in **Polkey v AE Dayton Services Limited** [1987] UKHL 8?

21.2. Was there an unreasonable failure by the claimant to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and if so, should any reduction up to 25% be made to any compensation awarded to the Claimant?

21.3. Has the Claimant failed to mitigate his loss?

22. If it is found that the claimant was discriminated against, harassed or victimised what compensation is he entitled to?

Law

14. The statutory law relating to the claimant's claims of discrimination was set out in full in the Annex to the case management order of Employment Judge Sweeney dated 9 September 2020. The relevant sections of the Equality Act 2010 (EqA) were sections 13 (direct discrimination); 23 (comparison by reference to circumstances); 26 (harassment); 27 (victimisation); 39 and 40 (employees and applicants) and 136 (burden of proof). It is neither necessary or proportionate to set out these lengthy provisions in these reasons when the parties have already been given them.

15. For the purposes of the unfair dismissal claim, the relevant sections of the Employment Rights Act 1996 are ss.95(1) and 98.

“Section 95: Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

“Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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.”

16. The House of Lords established that there is an implied term of trust and confidence between employer and employee in **Malik v Bank of Credit and Commerce International SA** [1997] ICR 606. The term (often referred to as 'the T & C 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.”

17. The test was refined by the EAT in **Leeds Dental Team Ltd v Rose** [2014] IRLR 8. As Judge Burke put it:

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..."

Housekeeping

18. The parties produced a joint bundle of 611 pages. If we refer to pages in the bundle, the page number(s) will be in square brackets []. The respondent made an application to add an email dated 1 May 2021 from someone who purported to be an immigration law specialist in Cyprus. The email carried no details of the individual or the firm he worked for and carried no corporate heading. The claimant had no objection to the respondent producing the document, so it was added to the bundle at pages 612 to 614 inclusive.
19. The claimant also requested permission to add a text message trail dated 23 November 2019 between him and Anna Mieloch, his line manager, to the bundle. The application was unopposed and the document was given page number 615 in the bundle.
20. The respondent also helpfully produced:
- 20.1. A witness statement bundle;
 - 20.2. A chronology;
 - 20.3. A cast list; and
 - 20.4. A document titled "Opening Note" from Mrs Winstone.
21. We had not finished reading the bundle when the hearing started at 10:00am on the first morning, so we adjourned the hearing until 12:35pm to complete our reading.
22. The claimant gave evidence in person and produced a witness statement that ran to 80 paragraphs. He was cross-examined in some detail by Mrs Winstone.
23. Evidence was given in person on behalf of the respondent by:
- 14.1. Mr Saif Alani, who is a director and shareholder of the respondent. During 2019, he was the respondent's Director of Operations. His witness statement dated 23 April 2021 consisted of 21 paragraphs.
 - 14.2. Ms Anna Mieloch, who is the Regional Operations Manager for the respondent. She was the claimant's line manager at all material times with the job title "Regional Operations Consultant". Her witness statement dated 23 April 2021 consisted of 56 paragraphs.

- 14.3. Mr Glen Okoli, who is the Regional Operations Director for the respondent. He was Ms Mieloch's line manager at all material times with the job title "Regional Operations Manager". His witness statement dated 23 April 2021 consisted of 54 paragraphs.
 - 14.4. Ms Gemma Lane, who is an HR Co-ordinator with the respondent and conducted the claimant's grievance hearing. Her witness statement dated 23 April 2021 consisted of 47 paragraphs.
 - 14.5. Ms Siobhan Murray, who is the respondent's HR Manager. Her witness statement dated 23 April 2021 consisted of 48 paragraphs.
 - 14.6. Mr Ahmed Alani, who is a Director of the respondent and conducted the claimant's disciplinary hearing on 30 April 2020. His witness statement dated 23 April 2021 consisted of 65 paragraphs.
15. All the respondent's witnesses were cross-examined by the claimant after he had initially indicated he would have no questions when we dealt with housekeeping issues at the start of the hearing. We advised him that evidence that was unchallenged was likely to be accepted as credible by the Tribunal and the claimant then prepared a list of questions for each of the respondent's witnesses. Mrs Winstone cross-examined the claimant.
 16. The Tribunal asked some questions of most of the witnesses. Mrs Winstone was offered the opportunity to ask re-examination questions of the respondent's witnesses. At the end of his evidence, Mr Sarmadi was given the opportunity to clarify or expand upon any of the answers he had given to questions he had been asked.
 17. At the end of the evidence, on the afternoon of the fourth and final scheduled day of the hearing, we heard closing submissions from Mrs Winstone (who relied on her Opening Note) and Mr Sarmadi. There was no time left to make a decision, deliver it or deal with remedy, if required. We agreed that we would meet again on 14 May, consider our decision and give an oral judgment and reasons. Both parties indicated that they could attend. We anticipated inviting the parties to join the hearing at 2:00pm on 14 May to hear the decision and deal with remedy, if required. Unfortunately, our discussions took much longer than we had anticipated. Mid-way through the morning of 14 May, we had to advise the parties that we did not have time to put our findings into a meaningful and cogent judgment and reasons and would, instead, reserve our decision.
 18. As we have found for the claimant on part of his claim, a remedy hearing will be listed and case management orders will be sent to the parties. However, we would urge the parties to discuss the issue of remedy in the hope that a settlement can be reached without the time and expense of a further hearing.
 19. The hearing was conducted by video on the CVP application and ran reasonably well, with some IT issues. We are grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

20. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

Background

21. We should record as a preliminary finding that a number of relevant facts were not disputed:

- 21.1. The respondent is a company that holds 74 franchises to operate Domino's pizza takeaway and delivery stores. Approximately 5 of the stores have facilities for customers to eat indoors. The takeout element of the business was open for business at all times during Lockdown in 2020.
- 21.2. The respondent divides its operations into six key regions, divided between the North and South of England. Mr Okoli runs the Northern Region.
- 21.3. The respondent's individual stores are run by a Store Manager. Area Managers run between 3 and 5 stores each. They reported to a Regional Operations Consultant at the time of the events with which we are concerned. The claimant was employed as an Area Manager at this time and Ms Mieloch was his Regional Operations Consultant with approximately 13 Area Managers under her control.
- 21.4. Mr Okoli reported to Saif Alani, who was Director of Operations for the respondent's entire business. Saif Alani described his role as being responsible for the customer-facing side of the business. Mr Alani took annual leave from 19 December 2019 and stepped away from the business in January 2020, although he remains as a director of the respondent at Companies House.
- 21.5. Ahmed Alani was in charge of the back-office side of the business, which included legal and IT matters.
- 21.6. The claimant is Iranian. He relocated to Cyprus with his family when he was a child. He has refugee status in Cyprus and leave to remain in the United Kingdom. He had made an application for citizenship of Cyprus that was refused. The reason given in a letter to the claimant (which everyone agreed was from the government of Cyprus) dated 28 March 2019 [140] was that he had only completed 4 years, 7 months and 29 days' residence in that country and that he had only spent 291 in Cyprus in the last year before his application for citizenship.

- 21.7. It was not disputed that the claimant had to return to Cyprus every three months to retain his refugee status there. It was not disputed that he maintains a home in both Cyprus and the United Kingdom. He attended this hearing by video link from his home in Cyprus.
- 21.8. The claimant's continuous service started on 10 September 2013, when he began as a delivery driver. He worked his way up through the business as a Shift Manager and Store Manager until he was made an Area Manager in August 2018. It was agreed that his effective date of termination was 31 May 2020, and that it followed a disciplinary hearing on 30 April 2020 and notification of the decision to sanction the claimant for misconduct on 23 May 2020. The claimant resigned.
- 21.9. At the date of the termination of his employment, the claimant was paid £2,538.00 per month and took home £1,885.00 per month. He was a member of the respondent's pension scheme.
- 21.10. It was not disputed that the respondent viewed the claimant as an effective store manager and Area Manager until late 2019. The exact date of when it became dissatisfied with the claimant's performance was a matter that remained in issue.
- 21.11. The claimant resigned by email timed at 22:51pm on 31 May 2020 [537]. He gave four weeks' notice, but Ahmed Alani's response timed at 6:50am on 1 June 2020 [538] accepted the resignation and invoked the respondent's contractual right to pay in lieu of notice. The parties agreed that the effective date of termination was 31 May 2020.
- 21.12. The claimant makes no allegation of racist behaviour against Ms Mieloch that is a head of claim in this case. We clarify that issue because the claimant made allegation that she had committed historical acts of race discrimination, but insisted that he made no claim in respect of those alleged acts.
22. We note that there was a significant amount of written and oral evidence and documents that we did not find relevant to the issues that we had to determine. For example, much time and effort was spent on the question of whether the claimant had acted dishonestly in redacting a letter concerning his application for citizenship of Cyprus and the general circumstances of the application, which we will not spend much time on in these reasons because of our finding that the claimant was not constructively dismissed.
23. We also note that, despite producing six witnesses, the respondent's evidence in chief did not deal with a number of important parts of the case, which resulted in the evidence being produced in oral evidence through supplementary questions from Mrs Winstone, cross-examination, or questions from the panel. The most obvious example was the lack of evidence about the nature of the contact between Saif Alani and the respondent following his telephone call with the claimant on 18 December 2019, although there were several other examples. We will highlight some relevant ones in these reasons.

Points of Dispute

Claimant's Performance

24. The claimant's claims arise from a meeting he had with Saif Alani on 18 December 2019 and a conversation between them the following day. The thrust of the respondent's evidence was that prior to the two conversations, Ms Mieloch started to have reservations about the claimant's performance of his duties as Area Manager from "the middle of September [2019]" (paragraph 27 of her witness statement).
25. The claimant's evidence in chief on the issue of his performance was that he was performing in his role, but that Ms Mieloch's treatment and management of him had changed. He said he had raised it with Mr Okoli (Ms Mieloch's line manager) "more than 6 times" but nothing had been done. We find that the evidence did not show on the balance of probabilities that he had mentioned Ms Mieloch's treatment of him on more than 6 occasions. We make that finding because:
 - 25.1. It is unlikely that the claimant would have mentioned a matter six times to Mr Okoli without taking the matter further before the time that he did. He said that the issue had been ongoing for "quite some time";
 - 25.2. The evidence of Mr Okoli and Ms Mieloch was that the only issue that the claimant had raised with Mr Okoli about Ms Mieloch had been in April or May 2019 about mileage bonus at the Ashington store. Their evidence on the point was credible and corroborated by documents [208];
 - 25.3. We find that the respondent had *some* concerns about the claimant's performance, but these were overplayed at this hearing.
26. The claimant made allegations about Ms Mieloch's conduct in these proceedings, but was specific in his grievance hearing on 18 February 2020 [355] that he was raising nothing about Ms Mieloch's conduct towards him in his grievance. However, later in the hearing [357], the claimant said her conversation was "harsh and rude" and she used the phrase "white people are lazy" and "paki".
27. We find that the claimant's evidence did not show on the balance of probabilities that Ms Mieloch had used the racist language alleged because:
 - 27.1. If she had used the language that the claimant alleged she had, he would have raised it in his conversations with Saif Alani on 17 and 18 December 2019;
 - 27.2. The claimant did not mention the allegation in his telephone conversation with Ms Murray on 18 December 2019 [311]; and
 - 27.3. He specifically confirmed that he was not making any misconduct allegations against Ms Mieloch in his grievance hearing (see above), before making a very generalised allegation later in the meeting.
28. We had serious concerns about the way that the respondent approached and dealt with the allegations against Ms Mieloch. Our main concern was the failure of the respondent to allow Ms Mieloch the opportunity to rebut the allegations made

against her (per its own policy) and we found that this was an example of the respondent paying lip service to the investigation of claimant's grievance.

29. In section 27 cases, all that is required is that the allegation relied on by the claimant has to assert facts capable of amounting in law to an act of discrimination by an employer within the terms of the EqA, which we have found that it did.
30. 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 but given our finding that the respondent failed to conduct a reasonable investigation into Ms Mieloch's conduct, we cannot make a finding that the claimant acted in bad faith. We reminded ourselves that the claimant specifically made no allegations against Ms Mieloch personally in these proceedings.
31. We find that the respondent's concerns about the claimant's performance were overstated in these proceedings. We also find that the claimant's assertions that there were no problems with his performance were overstated. We make those findings because:
 - 31.1. The evidence of Ms Mieloch and Mr Okoli on the issue of performance was credible and was corroborated by a summary of the claimant's failures to produce reports on time, and visit stores regularly, and the documents upon which the summary was based;
 - 31.2. We find that Mr Okoli intended to meet with the claimant on 10 December 2019 to discuss his performance, but was unable to do so because the claimant was absent due to ill health;
 - 31.3. We find that there was no opportunity for another meeting before 17 December 2019 because Mr Okoli was based in Manchester and was responsible for the whole of the North of England;
 - 31.4. Whilst the respondent may have had concerns about the claimant, it still gave him responsibility for a fourth store in September 2019; and
 - 31.5. The claimant's rebuttal of the respondent's position was not supported by the documents or any independent evidence.
32. Our conclusion is that the claimant's performance had raised some concerns with the respondent, but not to the extent that disciplinary proceedings were contemplated. Paragraph 5 of Saif Alani's statement is supportive of our position, as he said that he had spoken to Ms Mieloch and Mr Okoli about the claimant's performance, but "...was keen to understand what support we needed to give him...".
33. We also note the oral evidence of Mr Okoli, who spoke of the claimant in terms of 'needing an arm around his shoulder' and the oral evidence of Ms Mieloch, who gave us the impression that she had been surprised that the claimant had been suspended pending disciplinary action. She also gave us the impression that she felt that the claimant's conduct had not warranted a suspension at the time.

Holiday Request

34. The issue of the claimant's conduct in respect of requests he had made for leave to return to Cyprus in June and November 2019 is of limited weight in this case because of our findings on other matters.
35. However, we would record that we found the respondent's policies and practice relating to holidays was not at all clearly expressed or explained. The respondent did not explain to our satisfaction how it dealt with applications for "emergency leave" or what the criteria for granting such requests were.
36. We also record that the claimant's reluctance to reveal details of his court case in relation to his request for leave in November 2019 was at polar opposites to his attitude in June 2019. In the earlier application for leave, he had no problem disclosing the entirety of the letter dated 28 March 2019 from the Government of Cyprus to Mr Okoli, but cited privacy issues for delaying the production of the same letter later in the year and, when it was produced, he redacted large portions of the letter that we do not find contained information that needed to be redacted.
37. We find that the respondent had cause to be suspicious about the claimant's conduct relating to the request for leave in November 2019.
38. The importance of the issue is only in respect of:
 - 38.1. The allegation that "Being harassed about reason for holiday, and that coming through his line manager and not via HR, when the Claimant had previously provided in proof to Glen Okoli in June 2019" was one of the acts by the respondent that led the claimant to resign (paragraph 4.4 of the list of issues above);
 - 38.2. The allegation that "Being requested to provide, and chased for, evidence in relation to holiday in November/December 2019, by Anna Mieloch, when it should have been HR rather than Ms Mieloch (this occurring shortly before the start of the holiday in November 2019 and continuing until the Claimant's suspension)" was an act of harassment related to the protected characteristic of race (paragraph 14.1 of the list of issues above); and
 - 38.3. The allegation that "Ms Mieloch taking a picture of the Claimant's house when he was said to be on holiday in November 2019" was an act of harassment related to the protected characteristic of race (paragraph 14.1 of the list of issues above).
39. We find that the claimant was not harassed about the reason for his holiday. We find that he never mentioned to the respondent during his grievance or disciplinary process that he had disclosed the full letter to Mr Okoli. We find that there was nothing about the request from Ms Mieloch that was harassment of any description in asking to see a letter that the claimant had produced before and had promised to produce again. It may have been conduct that was unwanted by the claimant, but we find that it was not related to his race and that it was not reasonable for the conduct alleged to have the effect alleged.
40. Whilst we were a little puzzled as to why Ms Mieloch took a picture of the claimant's home in November 2019 (she actually admitted to taking the two photographs that

were in the bundle [246 and 247]), we do not find that this was harassment of him related to his race because it related to a suspicion that he had not been honest when he had said he needed holiday at a time of year that the respondent's terms and conditions stated would not usually be given.

Meeting on 17 December 2019

41. There was no dispute between the parties that on 17 December 2019, Saif Alani visited Newcastle and offered to take staff out to lunch, including the claimant. Ms Mieloch and Mr Okoli. Neither was there any dispute that the claimant asked Saif Alani if they could have a word in private, which Mr Alani agreed to do. The accounts of Messrs Alani and Sarmadi then differ. Saif Alani said that he claimant accused Ms Mieloch of bullying him and only provided the example of her requesting information about his holiday request. The claimant said that he told Mr Alani that he wanted to raise serious issues. Mr Alani then asked what actions he was talking about and who had done them. The claimant said he replied as follows (paragraph 7 of his witness statement):

"Like I said I'm not sure what to class the actions as you call it either mind game, bullying, set to fail, racism, you can call it so many things but I don't want to misjudge as this is about someone higher than me, who is Anna [Mieloch]."

The importance of what the claimant alleges he said is that use of the word "racism". The claimant says that his words were a protected act within the meaning of section 27 of the Equality Act 2010. There is no other act that he says was a protected act.

42. We prefer the claimant's account of this discreet point to that of Saif Alani on the balance of probabilities and find that the claimant's mention of "racism" on 17 December was a protected act, as it was an allegation that the respondent, through Ms Mieloch, had contravened the provisions of the Equality Act 2010. We make that finding for the following reasons:
- 42.1. None of the Tribunal made a note that Mrs Winstone actually put it to the claimant directly in cross-examination that he had not said the words;
 - 42.2. We find it unlikely that Saif Alani would have reacted in the way that we find that he did on 17 and 18 December unless the word "racism" had been used because if one takes that word out of the claimant's account, it becomes a complaint about management style that would be relatively easy to brush off. The use of the word "racism" ups the ante and takes the matter to a different level of seriousness for the respondent;
 - 42.3. Despite the fact that Mr Alani spoke to Ms Murray of the respondent's HR department on 18 December and again after the claimant had filed a grievance; and that there was a full grievance investigation and hearing and disciplinary investigation and hearing, there was no written record from Mr Alani setting out what he says the claimant said until his witness statement was filed in these proceedings;

- 42.4. The respondent's ET3 (paragraph 20 of its Grounds of Response [45]) said only that "The respondent does not accept the claimant's account of the conversations...";
- 42.5. Whilst the note of the claimant's conversation with HR of 18 December 2019 is silent on the words the claimant alleged he said about "racism", his grievance of 6 February 2020 [334] set out the words as they appear in his witness statement;
- 42.6. We find it highly unlikely that Ms Murray spoke to Mr Alani and obtained a rebuttal of what the claimant said as part of the grievance investigation because:
 - 42.6.1. There is no mention of any such conversation in either her witness statement or that of Saif Alani;
 - 42.6.2. Before giving the account of her conversation with Mr Alani, Ms Murray had said she had taken no part in the grievance investigation, as she had been designated to hear any appeal; and
 - 42.6.3. Ms Murray, as an experienced HR professional made no written note of the conversation and failed to take a witness statement from Mr Alani.
43. The accounts of Mr Alani and the claimant as to the remainder of the meeting on 17 December are more closely aligned, but still contain discrepancies. The claimant said that Saif Alani used profane language to tell him that Ms Mieloch was "going nowhere". We find that this was likely, as the respondent appeared to value Ms Mieloch very highly and the comment attributed to Saif Alani that she "was going nowhere" is one we find was likely to have been said by him.
44. We also find that claimant's account of Saif Alani's conduct being threatening to be credible. We find that the threatening behaviour was a detriment and that it arose because the claimant had accused Ms Mieloch of racism, albeit in a very oblique way with no specific instances.
45. However, we do not find that Saif Alani's threatening manner toward the claimant on 17 December was because of race: we find it was because of the claimant's raising of allegations about Ms Mieloch.
46. We find that there was then a heated discussion between Mr Alani and the claimant during which Mr Alani put issues of the claimant's performance to him. We find that Mr Alani was likely to have lost his temper and was venting his annoyance at the claimant.
47. We find that Saif Alani ended the discussion by putting 3 options to the claimant as follows:
 - 47.1. The claimant could reconsider his position with the respondent (i.e. resign);
 - 47.2. The claimant could be suspended on full pay whilst his performance was investigated; or
 - 47.3. He could step down to a Store Manager role at Gateshead.

48. We prefer Saif Alani's evidence to the claimant's on the point of what was offered because, although both witnesses said three options were put, only Mr Alani's made logical sense in the circumstances of the other evidence.
49. We find that the claimant gave an indication that he would agree to a demotion to Gateshead Store Manager at the meeting. We make that finding because the evidence of Ms Mieloch and Mr Okoli corroborated Mr Alani's evidence on the point and the claimant's evidence was that he accepted the post (although he suggested it was under duress).

18 December 2019

50. We repeat our findings above concerning the paucity of the respondent's written evidence and corroboratory documents of the events of 18 December 2019. We also find discrepancies in the claimant's account of the day.
51. We find that the most likely chronology of the day was:
 - 51.1. The claimant rang Saif Alani on the morning of 18 December 2019 and advised him that he did not want to take a demotion;
 - 51.2. Mr Alani reacted aggressively, but did not use the words "...you are nothing but a foreign refugee..." or "...fucking refugee...". We make that finding because we find it highly unlikely that the claimant would not have repeated the words to Siobhan Murray when they spoke later in the day;
 - 51.3. Mr Alani suspended the claimant with immediate effect. We make that finding because it was agreed by Mr Alani and the claimant that that is what he did;
 - 51.4. Mr Alani then rang Ms Murray and relayed the conversation he had had with the claimant. We make that finding because the oral evidence of Mr Alani and Ms Murray on the point is consistent part of paragraph 47 of the claimant's statement in which he said that Ms Murray had rung him and talked about the suspension;
 - 51.5. We find Ms Lane's note of the telephone discussion on 18 December [311-313] to be an accurate summary of the discussion, but it is not a verbatim account. We make this finding because the transcript was not challenged by the claimant; and
 - 51.6. However, we find that the claimant only spoke to Ms Murray on one occasion on 18 December, as his account of two conversations is inconsistent with all the other evidence.

52. The claimant's suspension was confirmed by letter dated 19 December 2019 [321]. We are highly critical of the suspension letter because it is the only disciplinary suspension letter this Tribunal has ever seen in our combined experience in employment-related occupations that cites allegations of bullying by the accused against another colleague as a reason for the accuser's suspension. We gave little weight or credence to Ms Murray's oral evidence that the wording was a slip, as we find that anyone who read the letter back to themselves would have realised exactly what it said and how it would be perceived by its recipient.

53. We find that two findings drop out of the telephone call and subsequent actions of the respondent on 18 December 2019:
- 53.1. Saif Alani's act of suspending the claimant, with no explanation, and no further explanation of what gross misconduct was being referred to was unfavourable treatment because the claimant had done a protected act; and
 - 53.2. Saif Alani's threatening manner toward the claimant on 18 December was because of the claimant's raising of allegations about Ms Mieloch on 17 December.
54. We make the finding above because we have found that the respondent's concerns about the claimant's performance were not as strong or serious as it made out in this hearing; we have found that Mr Alani reacted angrily to the claimant raising concerns about the conduct of Ms Mieloch; and the allegations in the suspension letter were entirely generic and were not satisfactorily explained to the claimant or to the Tribunal.
55. A highly important finding that also emerges from the telephone conversation between the claimant and Ms Murray on 18 December 2019 is the claimant's oral evidence in answer to a question from the Tribunal about when he ran out of trust and confidence in the respondent. We should firstly say that whilst the concept of the implied term of trust and confidence is a legal construct, it is one that the claimant clearly understood.
56. His response to the question was that his trust and confidence in the respondent ran out on 18 December 2019 in his telephone conversation with Ms Murray. When he was asked to expand on that evidence, the claimant said that he could tell Ms Murray was stressed on the phone. Her attitude was totally different. He lost all hope from then onwards. This raises the issue of whether the claimant waived the alleged breach of contract by the respondent or affirmed his contract by remaining in employment until his resignation on 31 May 2020. We shall return to the issue in our consideration of the unfair discrimination claim.

Grievance

57. The claimant raised a grievance about his treatment on 6 February 2020 [334]. We found the respondent's investigation of the claimant's grievance to fall way below the standard we would have expected of an organisation of the size and resources of the respondent or the standard required by the ACAS Code of Conduct because:
- 57.1. Gemma Lane was given the task of investigating the claimant's grievance, but her witness statement was silent on what steps she took in her investigation between 6 February 2020 and the grievance meeting on 18 February 2020 (notes at [350-386], other than sending the claimant an email on 7 February 2020 to confirm she was investigating the grievance [341] and inviting him to the meeting by an email dated 12 February 2020);

57.2. Whilst the claimant only asked Ms Lane one question in cross examination, the Tribunal asked for more detail about the investigation and we were told that:

57.2.1. Ms Lane had not seen any note of the telephone conversation between Ms Murray and Mr Alani on 18 December 2019;

57.2.2. She had no contact with Mr Alani during the investigation and specifically did not ask him if he had told the claimant that one of the options open to him was to “fuck off”;

57.2.3. Ms Murray had allegedly spoken to Mr Alani during the investigation (despite there being no written evidence from either of them of such a conversation), rather than Ms Lane as the investigating officer;

57.2.4. The evidence of Mr Alani allegedly received by Ms Lane that contradicted the claimant’s version of events was Ms Murray’s supposed conversation with Mr Alani after the grievance had been received (despite Ms Murray saying in evidence that she took no part in the grievance);

57.2.5. Ms Lane accepted that she did not put Mr Alani’s position on the claimant’s allegation that he had been given the option to “fuck off” in the grievance hearing; and

57.2.6. No witness statement was taken from Mr Alani, which was contrary to the respondent’s own procedure in its Handbook.

57.3. Ms Lane’s witness statement was critical of the claimant for failing to give further details of the conduct of Ms Mieloch, but he was clear that he was not raising a complaint about her: his complaint was about the actions of Saif Alani [355]. It is therefore most surprising that the investigating officer did not speak to Mr Alani, or obtain a witness statement from him commenting on the claimant’s allegations. We find that it is unlikely that Ms Murray spoke to Mr Alani as asserted because, if she had done, she would surely have made some note of what he had said. The fact that Ms Alani’s alleged rebuttal was not put to the claimant leads us to the conclusion that there was no such rebuttal at the time.

58. The way that the claimant’s grievance was dealt with in the first instance left us with the firm impression that it was being ‘swept under the carpet’ by the respondent. We find that it never properly engaged with the matters raised by the claimant.

59. There was some delay in producing a grievance outcome due to correspondence between the parties about the notes of the hearing. The outcome letter was sent on 10 April 2020 [426-429]. We find that the finding that “I have been unable to obtain any evidence confirming the allegations surrounding your conversation with Mr Alani” [426] to be supportive of our finding that there was no conversation between Mr Alani and Ms Murray. We are critical of this finding because Ms Lane had the evidence of the claimant in his grievance and in the grievance meeting. We acknowledge that the grievance was dated 6 February 2020, which was about

six weeks after the incidents complained of, but his note was the only piece of written evidence available at the time. No written rebuttal from Mr Alani came until his witness statements was produced for this hearing.

60. Ahmad Alani wrote to the claimant on 17 April 2020 inviting the claimant to a disciplinary hearing on 24 April 2020 [431-432]. We will return to this letter.
61. The claimant emailed Ms Lane on 20 April 2020 to appeal the grievance outcome. We note that he started ACAS early conciliation on 18 March 2020 and obtained an early conciliation certificate on 2 May 2020.
62. After some correspondence between the parties about the format of the hearing, Ms Murray wrote to the claimant on 27 April 2020 [448] saying that the claimant had only provided details of his allegations against Saif Alani, which had not been “upheld due to there being no evidence”. He was asked to provide details of other allegations of direct and indirect discrimination. This email again undermines the respondent’s case before us that Saif Alani had provided a full and compelling rebuttal of the claimant’s allegations and gave those allegations no weight for no good reason that we can find.
63. However, the claimant did not provide further information that he had said he would and the appeal against the grievance outcome never proceeded to a hearing.

Disciplinary Process

64. The disciplinary invite letter of 24 April 2020 [431-432] Listed the following allegations (which are quoted verbatim):
 - 64.1. Unauthorised Holiday - evidence required for the authorisation of emergency holiday not provided. The Company also have reason to believe you were not in Cyrus when you stated you would be.
 - 64.2. Gross negligence - smaller, consistent, repeated instances of negligence amounting to gross negligence.
 - 64.3. Dishonesty - you claimed inability to do work was caused by the flu but subsequently provided a medical certificate for gastroenteritis.
 - 64.4. Failure to observe due care and attention - not carrying out required checks within stores you are responsible for and not carrying out training or coaching for staff.
 - 64.5. Significant failure to meet standards - not doing required reports and visits to store, not carrying out checks in store and getting the staff to remotely do this for you, not supporting stores during rushes.
 - 64.6. Fraud - asking an employee to add items that were missing using his savings to offset hidden loss.
65. As the outcome of the disciplinary hearing was a final written warning, not dismissal, and the claimant’s claim is of constructive unfair dismissal, we will concentrate on the allegation of the fundamental breach of the duty of trust and confidence. However, we find that the evidence of the disciplinary investigation by the respondent showed a level of diligence that fell below the standard set out in the case of **Sainsbury’s Supermarkets Limited v Hitt**.

66. Ahmed Alani heard the disciplinary on 30 April 2020 and produced notes [462-496]. During the hearing, the claimant indicated that he had additional evidence he wished to produce, After the hearing, Mr Alani invited the claimant to produce such evidence before 8 May 2020 [497].
67. The claimant produced an email with 6 photographs of flight tickets on 8 May 2020 [498-504]. On the same date, he produced another email with additional documents [505-519] and an explanatory email [520-521].
68. Mr Alani produced his decision [528-535], which was sent to the claimant by email on 23 May 2020 [527]. His findings are summarised as follows (using the order of the allegations set out in the outcome letter, not the invite letter):
 - 68.1. Unauthorised Holiday – the claimant was found to have “misrepresented the situation” with regard to the December holiday and the position was not clear in respect of the June holiday, so the claimant was given the benefit of the doubt.
 - 68.2. Dishonesty – there was insufficient evidence to prove the allegation, so it was not upheld.
 - 68.3. Gross negligence – the outcome was not precisely worded, but Mr Alani appears to have upheld the allegation that the claimant was grossly negligent by his failure to submit written reports on time or at all.
 - 68.4. Failure to observe due care and attention – the allegation of not carrying out required checks within stores that the claimant was responsible for and not carrying out training or coaching for staff was upheld.
 - 68.5. Significant failure to meet standards – the allegations that the claimant had failed to complete required reports and visits to store; had not carried out checks in store; had asked the staff to do the work for him; and had not supported stores during rushes were upheld.
 - 68.6. Fraud – this allegation was not upheld.
69. It is not our task to re-hear the disciplinary hearing, so we will not do so. However, we find that the procedure was not of the standard that we would have expected to see, but was not so poor as to be one that no reasonable employer would have used.
70. Mr Alani imposed a final written warning as a sanction and imposed a demotion, which we do not find to be outside the range of reasonable responses.

Time Points

71. There were no submissions made by Mrs Winstone that any part of the claimant’s claim had been presented out of time or that, if any claims were late, it was not just and equitable to extend time. As Early Conciliation began on 18 March 2020, only acts complained of prior to 19 December 2019 would be out of time. The only acts complained of were the issues raised around the meeting between the claimant and Saif Alani on 17 December 2019 and the telephone conversations on 18 December. It is clear to us and we find that the allegations arising from the events

of 17 and 18 December 2019 were the start of an alleged series of connected acts that ended with the decision to sanction the claimant for misconduct on 23 May 2020.

Constructive Dismissal

72. We find that the claimant was not constructively dismissed. We make that finding because the evidence from the claimant on the whole issue of constructive dismissal showed that he had waived any fundamental breach of contract and/or had affirmed his contract of employment by delaying his resignation to 31 May 2020. We make that finding because:

72.1. Unauthorised holiday – the purpose of the process and the claimant’s assertions were truthful and legitimate, but he deliberately misrepresented critical information to Mr Okoli in making the application for June leave that was repeated to Mr Alani in the disciplinary hearing.

72.2. Dishonesty – the allegation was not proven.

72.3. Gross negligence – the claimant’s explanation of his failures to produce his reports was not credible.

72.4. Failure to observe due care and attention – was proven.

72.5. Significant failure to meet standards – not upheld.

72.6. Fraud – not upheld.

73. Mr Alani found that:

“These are actions and behaviours that the Company cannot tolerate from any employee but particularly from an employee in the senior and trusted role of Area Manager. This whole situation is also disappointing and frustrating considering your previous positive performance as a store manager. You have clearly fallen below acceptable standards of performance and conduct and whilst dismissal is certainly a potential outcome of this process, after considering all of the circumstances I have reached the decision to instead offer you the opportunity of accepting a Final Written Warning, in conjunction with a move back to the role of Store Manager (with an associated reduction in salary). I am of the opinion that this is both reasonable and appropriate due to the lack of trust that the Company now has in your ability to carry out the critical functions of an Area Manager - most specifically with respect to reporting and performance monitoring, and store visits.”

74. The letter offered the claimant the opportunity to appeal the decision. He replied on 31 May 2020 as follows:

“Hi Ahmed,

I disagree with the way you have handled the disciplinary and your decision.

You have given me 5 days to appeal but you are aware very well this exceeds the time I have to raise my matter to tribunal.

I believe you are abusing my rights and as well abusing the power you and Saif have in the company to forcefully demote me and treat me in the way you have so far.

And to make it more stressful you have decided if any more incident occurs my position will result to dismissal which has made me lose all my trust and confidence in the company and you and Saif as business owners.

At this point unfortunately, you have left me no option but to resign as I do strongly believe you did miss treat me and pushed me out of the company.

As I always followed company's procedure, I believe I require to give 4 weeks' notice for my resignation.

Please accept this notice as my resignation as you have left me no choice but to regretfully take this action and allow an external body to make a fair judgment of this situation.

At the same time, I would like to request all my occurred holidays to be paid with current month payment.

Please advise HR that I'm still expecting my Subject Access Request."

75. The claimant did not exercise his right of appeal. The respondent exercised its contractual right to pay the claimant in lieu of notice.
76. We find that the respondent did not constructively dismiss the claimant. We make that finding because:
 - 76.1. There were a number of egregious acts committed by the respondent that taken together could have constituted a breach of the implied duty of trust and confidence on our findings as set out above.
 - 76.2. We particularly find the actions of Saif Alani on 17 and 18 December in acting in a threatening and aggressive manner towards the claimant and his act of suspending the claimant in response to his allegations about Ms Mieloch, which we have found to be acts of victimisation, to be breaches of the implied duty.
 - 76.3. The central issue for the Tribunal, however, was that the claimant was adamant that he completely lost trust and confidence following his telephone conversation with Ms Murray on 18 December 2019.
 - 76.4. Following his total loss of trust and confidence, the claimant remained suspended on full pay until 31 May 2020, when he resigned giving a further four weeks' notice.
 - 76.5. We considered that a claimant may take some time to consider their position before taking the very difficult to resign and may even wait until they had another job lined up, but the claimant in this case waited five and a half months to resign and gave a further four weeks' notice, which we find to be a waiver of any breach an affirmation of the contract of employment.

- 76.6. We also took into account the claimant's failure to press the issue of the grievance appeal, which supports our conclusion that he had no trust or confidence in the respondent in April 2020.
- 76.7. We find the missteps taken by the respondent in the grievance and disciplinary procedures that we have detailed above to be serious, but not a breach of trust and confidence of themselves, although they come close. However, the claimant waived any breach and affirmed the contract by his continued employment.

Direct Race Discrimination

77. We make the following findings on the claimant's claims of direct discrimination because of the protected characteristic of race:
- 77.1. The claim that the claimant's constructive dismissal was an act of direct race discrimination fails. We make this finding principally because we have found that the claimant was not constructively dismissed by the respondent. We found that the respondent had concerns about the claimant's performance of his role before 17 December 2019 and we find that it would have addressed those concerns at some stage. We find that the way that the claimant dealt with his requests for leave in June and December 2019 was not open or transparent. We find that Ahmed Alani appeared to try and keep the claimant in the organisation, rather than force him out, as alleged.
- 77.2. We find that the act of demoting the claimant as the outcome of a disciplinary procedure was an act of direct discrimination fails. We make that finding because:
- 77.2.1. We find that the respondent's concerns about the claimant had some merit to them;
- 77.2.2. The demotion was a genuine attempt to give the claimant the opportunity to rectify the issues around his performance and regain his status as Area Manager; and
- 77.2.3. We heard unchallenged evidence that the respondent had previously used the tool of demotion as an alternative to dismissal, so it was unlikely to have been used against the claimant as an act of race discrimination.
- 77.3. We have already set out our finding that Saif Alani did not say to the claimant "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer" on 18 December 2019. That claim fails.

Applying the Findings of Fact to the Law and Issues

78. Using the list of issues above, we make the following findings:

Jurisdiction

Direct Race Discrimination, Harassment and Victimisation

79. There were no submissions made by Mrs Winstone that any part of the claimant's claim had been presented out of time or that, if any claims were late, it was not just and equitable to extend time. As Early Conciliation began on 18 March 2020, only acts complained of prior to 19 December 2019 would be out of time. The only acts complained of were the issues raised around the meeting between the claimant and Saif Alani on 17 December 2019 and the telephone conversations on 18 December. It is clear to us and we find that the allegations arising from the events of 17 and 18 December 2019 were the start of an alleged series of connected acts that ended with the decision to sanction the claimant for misconduct on 23 May 2020.

Constructive Unfair Dismissal

80. The Claimant relied upon the Respondent's breach of the implied term of trust and confidence.

81. The treatment that the Claimant said formed the breach are set out together with our findings:

81.1. No warning of the meeting or about poor performance or any issue the Respondent had with the Claimant's performance – we find that the claimant's performance was raising some concern before 19 December 2019 and that Mr Okoli planned to address this with him. He would have done so before 19 December if the claimant had not been absent due to ill health;

81.2. Being suspended on the spot, with no explanation, and no further explanation of what gross misconduct was being referred to – we found this to be an act of victimisation;

81.3. Making a false accusation of fraud (being the reason for saying it was gross misconduct) – we find that the allegation of fraud was not the sole reason that the disciplinary hearing considered the claimant's conduct as potential gross misconduct. He was found not to have committed the disciplinary offence;

81.4. Being harassed about reason for holiday, and that coming through his line manager and not via HR, when the Claimant had previously provided in proof to Glen Okoli in June 2019 – we disagree with the claimant's basis of his assertion and find that the respondent's concerns and investigation were legitimate; and

75.5. Delay in the disciplinary process (intended to mean the Claimant would miss the 3-month window for pursuing a Tribunal claim) – we again disagree with the claimant's rationale and find that any delay was the fault of both parties.

82. We find that the Claimant resigned in response to the breach set out in paragraph 75.2 above, but that he perceived the other four matters in paragraphs 74.1 and 74.3-5 inclusive to be breaches, which the Tribunal do not consider to be breaches?

83. We find that the claimant delayed in resigning for the reasons set out above. We find that the claimant affirmed any breach.
84. We are not required to make any further findings on the question of unfair dismissal, including remedy.

Direct Race Discrimination (contrary to s13 Equality Act 2010)

85. The conduct the claimant said amounted to discrimination was as follows.
 - 85.1. Constructively dismissing the Claimant (the Claimant asserts he was "forced out of the organisation") – we find that the claimant was not constructively dismissed;
 - 85.2. Demoting the Claimant as the outcome of the disciplinary process – we find that the claimant was demoted as a result of the disciplinary process; and
 - 85.3. During a conversation between the Claimant and Mr Saif Alani on 18 December 2019, Mr Alani saying, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer" – we find that Saif Alani did not use the words alleged.
86. Did that treatment of the Claimant amount to less favourable treatment than the respondent afforded to non-Iranian comparators in materially the same circumstances as the Claimant? The Claimant relies upon the following comparators (the parts in brackets are descriptions given by the Claimant which are not necessarily accepted by the Respondent):
 - 86.1. Mr Stuart Hewitt-Thirlwall (disciplined by the claimant and demoted on the advice of Anna Mieloch and Glen Okoli);
 - 86.2. Mr Peter Owens (Disciplined by Anna Mieloch and moved to the claimant's store);
 - 86.3. Mr Shaun Young (left 3 years ago from the Ashington store. Disciplined by Anna Mieloch); and
 - 86.4. Mr Christopher Thirlwall (not disciplined by the claimant - disciplined by either Anna Mieloch or HR).

87. We find that the comparators cited by the claimant were not in materially the same circumstances as the claimant. They were in different positions and their circumstances were different to the claimant. In the alternative, the different treatment was not because of the protected characteristic of race.

Harassment related to Race (s.26 Equality Act 2010)

88. We find that the respondent did not engage in conduct amounting to harassment related to race by:
 - 88.1. Requesting the claimant to provide, and chasing him for, evidence in relation to holiday in November/December 2019, by Anna Mieloch, when it should have been HR rather than Ms Mieloch (this occurring shortly before the start of the holiday in November 2019 and continuing until the Claimant's suspension) – see our findings above;

- 88.2. The conversation between the Claimant and 'Mr Saif Alani in which Mr Alani acted in a threatening manner on 17 and 18 December 2019 – see our findings above; and
- 88.3. Ms Mieloch taking a picture of the Claimant's house when he was said to be on holiday in November 2019 – see our findings above.

89. We do not need to make any further findings on this head of claim.

Victimisation (contrary to s.27 Equality Act 2010)

90. The claimant did a protected act on 17 December 2019.

91. We make the following findings on the treatment the claimant says he received because of the protected act:

- 91.1. No warning of the meeting or about poor performance or any issue the Respondent had with the Claimant's performance – we find that he was not treated unfavourably because he did a protected act by the respondent's action. This claim fails.
- 91.2. Being suspended on the spot, with no explanation, and no further explanation of what gross misconduct was being referred to - we find that the claimant was treated unfavourably because he did a protected act. This claim succeeds.
- 91.3. Making a false accusation of fraud (being the reason for saying it was gross misconduct) - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
- 91.4. Delay in the disciplinary process (intended to mean the Claimant would miss the 3-month window for pursuing a Tribunal claim) - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
- 91.5. Demoting the Claimant as the outcome of the disciplinary process - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
- 91.6. During a conversation between the Claimant and Mr Saif Alani on 18 December 2019, Mr Alani saying, "You are nothing but a fucking refugee. You think you have rights but you don't. You will regret not taking my offer" - we find that the claimant was not treated unfavourably because he did a protected act. This claim fails.
- 91.7. The conversation between the Claimant and Mr Saif Alani in which Mr Alani acted in a threatening manner on 17 and 18 December 2019 - we find that the claimant was treated unfavourably because he did a protected act. This claim succeeds.

92. The treatment in paragraphs 85.2 and 85.7 above amounts to a detriment. The respondent thereby acted contrary to s39(4)(c) and/or s39(4)(d) of the Equality Act 2010.

93. The respondent subjected the claimant to that detriment because he had done the protected act as specified above.
94. We have not dealt with the issue of compensation, but will issue case management orders for the listing of a remedy hearing. However, given that we have made very specific findings on two discreet victimisation claims, we would expect the parties to make every effort to come to an agreement on compensation without the additional time and expense to themselves and the public purse of a further hearing.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
8 June 2021