EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr M Mweemba	Clydesdale Bank plc (trading as Virgin Money)

Heard at: **By CVP** **On: 26, 27, 28, 29, 30 April and (deliberations) 4 May 2021**

Before: **Employment Judge Davies**
Mr L Priestley
Mr W Roberts

Appearances
For the Claimant: **In person**
For the Respondent: **Mr T Sadiq (counsel)**

CORRECTED JUDGMENT

1. The complaint of harassment related to race is not well-founded and is dismissed.

2. The complaints of direct race discrimination are not well-founded and are dismissed.

CORRECTED REASONS

Technology

1. This hearing was conducted by CVP (V - video). A face to face hearing was not held because it was not consistent with the overriding objective or practicable and all the issues could be dealt with by CVP.

Introduction

2. These were complaints of direct race discrimination and harassment related to race brought by the Claimant, Mr M Mweemba, against his employer, Clydesdale Bank plc trading as Virgin Money. The Claimant represented himself, and the Respondent was represented by Mr T Sadiq (counsel).

3. There was an agreed file of more than 1300 documents and everybody had a copy. We admitted a small number of additional documents during the course of the hearing. Before the hearing the Claimant was asking for a substantial number of documents to be unredacted/disclosed/included in the hearing file. This culminated in EJ Shepherd directing that the Claimant should indicate whether he accepted the responses given by the Respondent about those documents in a detailed schedule. The Claimant did not give any indication that he disagreed with any of the responses, until the start of the hearing when he asked that documents be unredacted/disclosed/included in the file. The Tribunal explained that it would potentially take most of a day to deal with these issues, which would give rise to a risk of the hearing having to be postponed. The Claimant subsequently narrowed down his request to a small number of unredacted documents and the Respondent agreed to provide those.

4. The Tribunal explained that if the Claimant wanted to refer to any other disputed document, he should say so during the hearing when it became relevant and the Tribunal would determine its relevance at that stage. The Tribunal subsequently refused the Claimant's request for two documents to be disclosed. Those were a grievance raised by a female Muslim employee, and the outcome to that grievance. The Respondent provided copies of those documents to the Claimant and the Tribunal so that the application could be determined, on the understanding that Tribunal would not place weight on those documents if its decision was that they should not be disclosed. The Claimant understood that they could only be used for the purposes of these proceedings and agreed to destroy the documents if the Tribunal decided that they should not be disclosed. The request for disclosure was refused because the documents did not say what the Claimant had understood they said from his conversations with the complainant. He thought they included a complaint that Mr Butler discriminated against her, but they did not. They included matters of some peripheral relevance, e.g. the complainant complained about the training she received, but it was not necessary for them to be disclosed on that basis. The colleague was questioned as part of the Claimant's subsequent grievance and she gave information about the relevant issues during the course of that investigation meeting, notes of which were already included in the hearing file. The Tribunal told the Claimant that if later in the hearing he wanted to refer to a page or passage from the excluded grievance and its outcome, he would need to make another application. He did not do so.

5. The Claimant also made an application at the start of the second day to amend his claim to advance all but two of his complaints of direct race discrimination as complaints of harassment related to race in the alternative. At a preliminary hearing EJ Cox had clearly and carefully identified twelve complaints of direct race discrimination, one of which was also a complaint of harassment related to race. Those complaints were confirmed by EJ Buckley (who allowed an amendment to add one of the complaints) at a subsequent preliminary hearing. EJ Buckley ordered the parties to write to the Tribunal within 14 days if they disagreed with the identified complaints and issues. The Claimant did not. The orders made by EJ Cox and EJ Buckley were clear and simple. The Tribunal refused the Claimant's amendment application against that background. The Claimant did not identify any good reason for making the application so late in the day. Different evidence from the Respondent might be required, to deal with the purpose or effect of particular alleged conduct.

This and the risk of the hearing being postponed or not finishing, would cause prejudice to the Respondent. The prejudice to the Claimant was less because he would still be able to advance the same allegations as complaints of direct discrimination. Further, on the face of the allegations, they appeared to be more appropriately identified as complaints of direct discrimination in any event. The balance lay in favour of refusing the amendment application.

6. The Claimant also identified a further complaint about Mr Butler, but he confirmed at the start of the second day that he did not wish to add it as a new complaint of discrimination, rather he wanted to rely on it in relation to allegation 3. The Tribunal agreed to deal with it on that basis.

7. The Tribunal heard evidence from the Claimant on his own behalf. For the Respondent we heard evidence from Mr C Butler, Mr L Blainey, Mr C Hastings, Ms J Campbell and Ms R Whorlton.

The Claims and Issues

8. The issues to be determined by the Tribunal were recorded by EJ Buckley following a preliminary hearing on 9 December 2020. The list of factual allegations was set out in the Annex to EJ Cox's case management order dated 18 August 2020. EJ Buckley's list of issues did not include the question whether the claims were brought within the time limit in the Equality Act 2010. That had been raised in the Respondent's ET3 response. It relates to the jurisdiction of the Tribunal to deal with the complaints and it was agreed that it should be included in the list of issues. The Tribunal gave the Claimant the opportunity to provide further written evidence about why he said it was just and equitable for the time limit to be extended, if required, and we asked him questions about that at the start of his evidence.

9. The issues were therefore:
   9.1 Did the Respondent do the following things:
      1. In January 2019 Mr C Butler (then the Claimant's line manager) and Ms V Harrison (team leader of another team) told the Claimant's colleagues Mr R McFarlane, Mr S Burke and Mr S Lythgow that the Claimant is a heroin addict with financial difficulties, knowing this to be untrue.
      2. From January to March 2019 AW, the Claimant's colleague, repeated these untruths to other colleagues in the Claimant's team, knowing them to be untrue.
      3. From May or June 2019 until the Claimant began his sick leave on 26 May 2020, Mr Butler and Mr Lee Blainey, credit coach, failed to give the Claimant the support and training he needed to meet the required work standard.
      4. On 30 July 2019, Ms Harrison promoted Mr Burke, who is white, to a team manager role and did not give the Claimant an opportunity to apply for the role, even though the Claimant is more experienced than Mr Burke and had been working for the Respondent for the same length of time.
      5. In November 2019 Mr Butler put the Claimant on a performance plan, with the aim of dismissing him.

6. On 1 December 2019 and 29 and 30 January 2020 Mr Butler reported to the Respondent's HR department that the Claimant is brain damaged, aggressive and intimidating, likely to strike out at any moment and a professional ex-boxer, knowing all of these things to be untrue.
7. On 31 January 2020 Mr B McMullen, a colleague of the Claimant's and a close friend of Mr Butler, reported to the HR department that the Claimant had marched him down the corridor, rudely asked him to go into a room with him and threatened him: "You don't know what my parents would do to you", knowing all of these things to be untrue.
8. From December 2019 to March 2020 Mr Butler denied the Claimant the opportunity to work commercial cases because he did not want him to progress into the role of commercial Relationship Manager.
9. On 22 March 2020 Mr C Hastings posted a 20-second video to a WhatsApp group, set up to arrange a work Christmas party and of which the Claimant was a member, that ended with: "You Paki bastard".
10. In an email dated 8 April 2020 to Mr Butler, Ms Harrison alleged that the Claimant had been unhelpful, knowing this to be untrue.
11. In an email dated 8 April 2020 to the Claimant, Mr Butler reprimanded the Claimant for being unhelpful, knowing this to be untrue.
12. In around December 2019 Ms Harrison and/or Mr D Baillie decided to give Mr Burke the job of Operations Manager without giving the Claimant the opportunity to apply.

9.2 If so was it less favourable treatment?
9.3 If so, was it because of race?
9.4 In the alternative, in the case of complaint 9 was it unwanted conduct?
9.5 Did it relate to race?
9.6 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
9.7 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The Facts

The parties

10. The Claimant is Mr M Mweemba, who is employed as a Relationship Manager ("RM") 2 by the Respondent, the well-known high street and online bank. At the time of the events in this claim the Claimant was based at the Leeds office. The Claimant is also a professional boxer.

11. The Claimant is educated to degree level. He is clearly able and good at his job. He told the Tribunal something of his career history. Most recently before working for the Respondent, he worked for four years at Lombard Asset Finance as a RM. Although not mentioned in his witness statement, the Claimant raised a grievance when working for Lombard. It appears he raised a formal grievance in late 2016, which was not upheld. Issues remained ongoing and he produced a further detailed grievance statement in April 2018. That included complaints of illegal access to and

sharing of his personal banking details; attempts to manage him out after he complained about that; being held back from performing at his potential; exclusion from work events; and attempts to "smear" his reputation. Notes of an investigation meeting in November 2018 also included complaints from the Claimant that colleagues at Lombard were spreading rumours that his phone had been hacked and that he was tracked to brothels; and that a performance plan had been implemented with the aim of dismissing him. None of his complaints were upheld and his appeal against that outcome was dismissed.

12. The Tribunal found it striking that none of this was mentioned in the Claimant's witness statement. The introductory section of the statement portrays a successful period at Lombard during which the Claimant thrived. There was a passing reference later in his witness statement, when dealing with the grievance he made while at the Respondent, to "false allegations made in my previous employment at Lombard plc…". The hearing documents did include the Lombard grievance and notes of the investigation meeting. Nonetheless, anybody reading the Claimant's witness statement would not have understood that for more than half of his employment at Lombard he was identifying serious issues and raising very similar concerns to those raised in his grievance at the Respondent.

13. The Claimant says that it is no coincidence that he raised similar issues with both employers (see below), because Ms Harrison and another colleague on Project Ladder had also previously worked at Lombard. His evidence was that Ms Harrison and the other colleague had spread information about the Claimant from Lombard at the Respondent. There was no evidence before the Tribunal to support that contention. On the contrary, at the grievance interview conducted with Ms Harrison, there is no indication that she was even aware of the Claimant from her previous employment with Lombard. Ms Harrison made no mention of any rumours from Lombard and said that she was not aware of any rumours about the Claimant at the Respondent. The whole tone of her grievance interview was wholly inconsistent with the suggestion that she was spreading rumours about the Claimant, whether information from his previous employment at Lombard or otherwise.

Project Ladder

14. During 2018 the Respondent started a project called Project Ladder, which involved persuading new business customers to switch accounts to the Respondent. Mr Baillie was Head of Project. There were two MSB1s (Manager of Small Business 1), Ms Harrison and Mr Butler. There were two teams: the small business team dealt with applications up to £250k and the commercial team dealt with applications over that amount. Mr Butler was the manager of the small business team. There was also an administrative support team, which was at least partly outsourced to Capita. Mr Blainey was the Credit Coach (except during May to October 2019 when he was seconded elsewhere). In July 2019 Ms Harrison was promoted to MSB2 and from then she split her time between management of a team and the wider project. She became Mr Butler's line manager at that stage.

15. Under the MSB1s was a team of around 20 RMs, who were recruited in three tranches. The first tranche of eight RMs started in July 2018, along with Mr Butler and Mr Blainey. Ms Harrison joined shortly after that, coming from the Lombard group. The second tranche of seven RMs, including the Claimant, started in January

2019. The third tranche of five RMs joined between May and September 2019. Each tranche was a mix of internal and external candidates.

16. Each tranche of RMs had initial induction training lasting 5 to 6 weeks. That involved technical training delivered as a mix of online study and group face-to-face sessions. It was plainly a structured and comprehensive induction programme. After that, the RMs received on-the-job training and shadowing, support from Mr Blainey and the MSB1s, and were involved in a buddy system. Each RM in tranche two had an RM buddy from tranche one and a Credit buddy. They worked in an open plan office. It was clear that anybody could ask Mr Blainey or Mr Butler, among others, for help or advice about any specific issue at any point. On the evidence before the Tribunal there was, in general terms, a comprehensive and well-structured system of support, supplemented by comprehensive written work books and other materials.

17. The Claimant had two RM buddies from tranche one, colleagues we refer to as SW and AW. His credit buddy was Mr Hepworth-Brown. The Claimant had regular one-to-one sessions with Mr Butler, at least some of which were documented in the Respondent's "Our Performance" system. That was a system used to capture feedback, document one-to-one's and set goals and actions. Mr Butler used a skills matrix to help assess the Claimant's progress.

Diversity

18. The Tribunal heard evidence about diversity within the Respondent. As of February 2021, just over 3% of employees who provided information were from an ethnic minority; fewer than 0.5% of employees who provided information were black. Those percentages decreased at middle management and senior management levels, and there was little if any representation of black colleagues at middle and senior management level. The Tribunal assumed the figures were broadly similar at the time of the events in this claim.

19. The Tribunal heard evidence from Ms Whorlton about the steps and initiatives being taken to improve diversity at all levels. We were glad to hear that such steps were being taken and hope they bring about the intended improvements in diversity for the future. However, this does not assist the Tribunal in determining the issues in this case. We approached matters on the basis that the Claimant was one of very few black employees, let alone managers.

20. Ms Harrison was interviewed as part of the investigation into the Claimant's grievance (see below). During that interview, Ms Harrison raised concerns about the culture in business banking at the Respondent generally. She compared it unfavourably with her previous employer. The focus of her complaints was on gender equality, but she also made reference to concerns about diversity more generally. She described the culture as "toxic."

21. The Claimant's Muslim colleague, FP, was also interviewed when his grievance was investigated. We have referred to that in the introduction above. During that interview, FP referred back to her own grievance, which included a number of complaints about racist comments and discriminatory behaviour. Some of those were upheld. The Tribunal understood that some of the people involved no longer work for the Respondent. During the interview (for the Claimant's grievance) FP

accused Mr Butler of being involved in discriminatory behaviour. She did not make such a complaint in her own grievance. The Tribunal did not hear detailed evidence about the matters of which FP complained, but we note that some of her complaints of racist or discriminatory comments and behaviour were upheld at the time.

22. Another part of the background relied on by the Claimant is an allegation that on 17 December 2019 Mr Blainey said to a colleague as the Claimant was walking past, "Don't do that you'll get a call from HR talking about bloody diversity." Mr Blainey and the colleague laughed. The Claimant did not say anything to Mr Blainey, but there is no dispute that he complained to Mr Butler the same day that Mr Blainey had made such a comment. At the time, the Claimant told Mr Butler that he did not want to take this further, but Mr Butler took advice from HR in any event. Their advice was that he could not pursue a complaint if the Claimant did not agree. Mr Butler emailed the Claimant and told him this. He encouraged the Claimant to speak to him or HR if he had concerns. The Claimant responded with, "That's right not something I'm wanting to pursue."

23. The Claimant raised this allegation again in his grievance in May 2020. It was investigated by Ms Campbell. She asked Mr Blainey about it, and he denied making any such comment. He also said that Mr Butler had never spoken to him about it at the time. When Ms Campbell interviewed Mr Butler, he told her that he had raised this with Mr Blainey at the time and that Mr Blainey had told him it was an "off the cuff comment." Mr Blainey was asked about this allegation in cross-examination. He said that he did not make the comment and pointed out inconsistencies in the Claimant's version of events. He said that he was surprised when this allegation was raised during the grievance investigation meeting. If it had been raised at the time he would have wanted it investigating. In his witness statement, Mr Butler did not mention speaking to Mr Blainey about the comment at the time. He said that after receiving the Claimant's confirmation that he did not want to pursue the matter, he still wanted to take some action, so he sent round the Respecting Dignity and Diversity at Work policy to the team, including Mr Blainey, on 19 December 2020 and asked them to take time to read it. The Tribunal saw that email.

24. The Tribunal found that Mr Butler did not speak to Mr Blainey about the Claimant's complaint in December 2019. That was not said in Mr Butler's witness statement, only in his interview with Ms Campbell. We accepted Mr Blainey's clear evidence about this. Mr Butler appeared to be an inexperienced manager, who rightly sought advice from HR if he was in doubt. He also deferred to Mr Blainey on the technical credit side of the team's work. It seemed most likely that in the light of the HR advice and the Claimant's reply, he simply circulated the general policy rather than tackling Mr Blainey directly.

25. However, the Tribunal found on the balance of probabilities that Mr Blainey did make the comment. The Claimant raised it with Mr Butler at the time and we accept his evidence that it was said. We note, however, that on the Claimant's account Mr Blainey was not simply moaning about diversity; he was telling a colleague (in an inappropriate way) not to take a particular action *because of* diversity. Given that this was not raised with Mr Blainey at the time, it may well be that he simply does not remember saying it.

26. The Claimant also relied, by way of background, on conduct by SW and AW in summer 2019. They had exchanged inappropriate comments about an Asian female colleague, referencing race and gender. Disciplinary proceedings were brought against them when this came to light and AW asked the Claimant to accompany him to his disciplinary hearing. He showed the Claimant the messages concerned and the Claimant was disgusted by them. AW left the business in August 2019. The Claimant was not cross-examined about this evidence and the Tribunal found that these messages were exchanged. They are an example of the type of cultural issues that evidently existed among at least some team members.

27. The Claimant submitted a grievance in May 2020. It included complaints that Mr Butler was spreading rumours about the Claimant being a recovering drug addict, as part of a "smear campaign"; lack of support from Mr Blainey, Mr Butler and Mr Haigh; that the Claimant's personal bank account had been accessed; that the Claimant had been excluded from work and non-work social occasions; that management intended to discredit the Claimant to manage him out of the business; and that there was structural racism, racism within the team, Mr Blainey was racist and the Claimant had been discriminated against in specific respects. The grievance was handled by Ms Campbell, who interviewed the Claimant and a number of colleagues before writing to him with an outcome on 10 August 2020. Ms Campbell did not uphold most of the specific complaints. She did not find that rumours were being spread about the Claimant, but she thought that drugs was an inappropriate subject of discussion in the office; she believed that prior to November 2019 the way the Credit Coach model worked was that support was only given when colleagues actively requested it and she considered this was entirely unsatisfactory; she made criticisms of the way that Mr Butler handled certain matters but she did not find that he had singled the Claimant out or was trying to discredit him. Ms Campbell expressed concern about some of the issues raised. She believed that the culture in the team was unprofessional and unacceptable and she could understand why that had led the Claimant and others to feel excluded, under-supported and undervalued. She said that she had not been able to rule out that the Claimant's poor experience in the team was because of his race.

28. Ms Campbell was asked about this in cross-examination. She said she empathised with the Claimant because she thought there were cultural issues that needed calling out. Those were: the WhatsApp clip, the sausage roll comment, a couple of colleagues described the culture as toxic, Mr Blainey's diversity comment and Mr Butler's email about politics and terrorism. We deal with those matters in more detail below. Ms Campbell explained that she thought the sausage roll comment was inappropriate in an office, not that it was directed at the Claimant. She thought that Mr Butler's email was sent because there had been discussion of politics and terrorism, she did not realise Mr Butler said he sent it to address a concern about the comments relating to drugs; she did not find any evidence that the Claimant had been treated the way he had because of his race; the Claimant told her that he was treated differently but when she explored that and from the evidence she could not find anything to support what he told her.

29. Drawing all these threads together, it was clear to the Tribunal that between at least some of the RMs there was the use of racist or discriminatory language. The Claimant was shown the specific messages by AW for the purposes of the

disciplinary process and he was subjected to one highly offensive WhatsApp message (see below). Apart from those two occasions, the Claimant did not give evidence that he was subject to racist or discriminatory comments, nor that he overheard such language. Ms Campbell had concerns about the culture in the team and she did not rule out that the Claimant had been treated the way he was because of his race.

30. That brings us to the specific complaints made by the Claimant. The Tribunal file ran to almost 1400 pages and we heard detailed evidence from the Claimant and the witnesses. We do not repeat it all here, but we considered carefully the material to which we were referred. Against that background we make the following specific findings about the Claimant's complaints.

Allegation one

31. Mr Butler and Ms Harrison did not tell anybody that the Claimant was a heroin addict with financial difficulties. There were no such rumours about the Claimant, whether spread by Mr Butler and Ms Harrison or anybody else.

32. The Claimant's own evidence to the Tribunal was that he had no direct evidence about this. Nobody ever said to him that there were such rumours, nor that Mr Butler or Ms Harrison were saying such things. He did not overhear any such comments. Rather, he relies on the fact that more general comments were made about drug taking in the office in early 2019 and subsequently. He drew the inference that they were directed at him, and that they arose because false rumours had been spread by Mr Butler and Ms Harrison.

33. The Claimant said that he kept a "diary" of the comments made. The Tribunal did not see a diary; the Claimant had produced a word document with dates and comments on it, presumably taken from his phone or other record. The comments primarily date from January and February 2019. There were five comments from AW about drugs at that time. They start with AW saying, "What are you doing tonight, heroin?" And another colleague laughing and saying, "Friday night is smack night." AW is then recorded as himself saying that he was going to take heroin. Subsequently, AW is recorded as asking, "How was heroin Friday?" and the Claimant is recorded as asking AW why he is always talking about heroin. On a subsequent occasion, AW is recorded as saying he has been doing loads of drugs. There is also a record of one colleague referring to gambling and telling another that it is like sitting next to a heroin addict when he is trying to get off it.

34. The Claimant did not make any complaint about these comments at the time, but he did subsequently refer to them in December 2019 when a different colleague, MM, made a further comment referencing drug taking. The comment made by MM was that he could not pass a Greggs without buying a sausage roll, even though he never enjoyed them as much as the first one; it was like heroin, you were always chasing your first hit. The RMs laughed, but the Claimant was unsettled by the comment. He asked MM why he was talking about taking heroin.

35. MM subsequently approached Mr Butler and told him that he felt intimidated by the Claimant. Mr Butler met the Claimant to hear his side of the story. During their conversation, the Claimant reported the comments he said AW had made earlier in

the year and said that he "could have felt accused" by AW. Mr Butler made brief notes of their conversation and emailed them to the Claimant on 13 December 2019. Mr Butler recorded that he had asked the Claimant not to confront staff directly but to come to him if he had any issues or concerns. He offered the Claimant a desk move if he wanted one. He asked him to think about how he approached people because a member of staff had said he was intimidating in how he came across. He said that he did not accept any kind of behaviour relating to the content in the email and wanted to take action with the individuals involved regarding the drug conversations. However, the Claimant said he could not remember who said what and did not provide any names. Therefore, Mr Butler said that the only thing he could do was circulate an email about professional standards in the workplace and what should not be discussed.

36. The Claimant replied to the email on 17 December 2019 thanking Mr Butler and saying that he had told Mr Butler that AW had asked him previously if he was taking heroin. He wrote, "To be precise, this was at the end of my first month here in January 2019. He asked me what I was doing tonight, and I responded not much to which he then asked are you taking heroin tonight. Another member of staff laughed and said heroin Fridays. AW responded exactly, heroin Fridays." Mr Butler replied within the hour to say that he had noted this and apologised for not noting it down in his book. He reiterated that if the Claimant let him know who the staff members were, he could take action. He said that he was waiting for a professional standards email from HR before he circulated to the team.

37. Mr Butler had extended leave over Christmas to include paternity leave, and was absent from 20 December 2019 to 10 January 2020. On 21 January 2020 he circulated an email to the whole small business team entitled "Professional Standards – Conversations within the office." He said that he was reminding staff that topics such as politics and terrorism should not be discussed in the office. There was no mention of drug taking. Mr Butler's evidence was that this was the professional standards email he had promised he would send. With hindsight, he accepted that he should have referred to drug taking specifically.

38. The Claimant's case on allegation one is that Mr Butler deliberately omitted from his note of their discussion in December 2019 specific comments the Claimant had reported; that he delayed sending the minutes; and that he falsely pretended the email of 21 January 2020 was the professional standards email he had promised. This shows that he had been spreading the rumours alleged by the Claimant, and was trying to cover it up.

39. The Tribunal did not accept that Mr Butler deliberately left things out of the email. His prompt response was to note the additional comment and to apologise for its omission. His email notes of the discussion were not unduly delayed. Plainly, the professional standards email circulated in January 2020 was inadequate to address a concern about the discussion of drugs specifically in the workplace. Mr Butler accepted that in his evidence to the Tribunal. But equally plainly, none of these matters can possibly give rise to the suggestion that there were the rumours the Claimant refers to, i.e. that he was a heroin addict with financial difficulties, let alone that Mr Butler spread such rumours. The Claimant did not identify any evidence whatsoever in support of the contention that Ms Harrison was spreading such

rumours. Allegation one is misconceived and wholly implausible. There was simply no evidence of such rumours existing, whether spread by Mr Butler, Ms Harrison, or anybody else. These are very serious allegations of spreading false rumours because the Claimant is black, put forward with no possible foundation. That causes the Tribunal to view the Claimant's other allegations with a degree of caution.

Allegation two

40. As set out in allegation one, there were no rumours that the Claimant was a heroin addict with financial difficulties, being spread by AW or anybody. Even on the Claimant's own case, none of the comments he recorded in his "diary" as being made by AW was a rumour or accusation about the Claimant. The high point, as recorded by the Claimant, was a question not an accusation, and the thrust of the comments seems much more to be about AW's own conduct.

41. It is important to note at this stage that AW did not give evidence to the Tribunal. Assuming the comments were made by him as recorded, that does not mean that they reflect any wrong doing by AW. There is any number of reasons, such as humour or bravado, for making such comments.

Allegation three

42. Allegation three is a very broad general allegation about a failure to give training and support over a period of about a year. Before the Tribunal hearing the Claimant had not identified specific training or support that he said he should have been given but was not, or that was given to others but not to him. The background is the comprehensive induction programme and ongoing provision of support and buddying set out above.

43. During the Claimant's evidence and his questioning of the Respondent's witnesses, the Tribunal had to remind him more than once that his complaint was one of less favourable treatment: his evidence and questions often seemed designed to show that the training programme *as a whole* was not good enough as demonstrated by the fact that he sometimes got things wrong. At other times, his evidence and questions seemed designed to show that he was a good performer and (by inference) did not need training or support. He was encouraged by the Tribunal to identify and ask questions about training and support that he said should have been but was not provided to him specifically, because of his race. Ultimately, the Claimant identified two particular complaints relating to Mr Blainey. He did not identify clearly training or support that Mr Butler should have given him but did not; rather his complaints relating to Mr Butler seemed to be linked to occasions on which the Claimant's own performance was criticised. Frequently, it appeared to the Tribunal that the Claimant's reasoning was that if his own performance had been criticised, that must be because he had not been properly trained or supported.

44. The Tribunal carefully reviewed the evidence and examples to which we were referred. We were quite satisfied that there was no failure by Mr Butler or Mr Blainey to give the Claimant any support or training he needed to meet the required work standard, nor that they provided more training or support to others. The context for the Claimant's complaints is that he started in January 2019, there was a 5-6 week induction programme ending around mid-February, and Mr Blainey was on

secondment from May to October 2019. Our findings in respect of particular areas are as follows.

45. Mr Blainey's evidence generally, which the Tribunal accepted, was that after the induction programme he would regularly walk round the team and ask how they were getting on. Some colleagues would ask for more support than others. The Claimant probably asked for help about once a week. Others asked far more often, nearly every day. Whenever people asked for help, he never said no and tried to be as responsive as he could. His goal was to try to provide colleagues with the tools and knowledge to achieve and progress on their own. Some were more proactive than others. He wanted to empower them and make them self-sufficient for when he was not available. The Tribunal noted Ms Campbell's views about Mr Blainey's approach as Credit Coach. It was not clear to what extent she noted that Mr Blainey was seconded to a different team from May to October 2019. Nor was it clear how she had weighed the account Mr Blainey gave her about how training was provided with the evidence from others, and how she had reached the conclusion that there was a culture of favouritism. She does not appear to have asked Mr Blainey about whether there was such a culture, or told him about the comments to that effect so that he could respond.

46. When cases were assigned to RMs, they had to progress the case to achieve credit approval and then follow various steps to complete and "drawdown" the case. As Credit Coach, Mr Blainey received a weekly report from the Credit Team detailing cases that had been declined credit approval or deferred back to the RM. He would review those reports and the credit applications concerned and check whether anyone's name was cropping up regularly and whether any training or support was required individually or collectively. His view was that the Claimant was reasonably competent in getting cases approved by the credit team overall. He had some challenges in the second part of the process, i.e. with his drawdown. Cases would be approved by the Credit Team, but would get stuck in his pipeline. Mr Blainey's focus was on the first part of the process, Mr Butler's was on the second.

47. Mr Blainey said that he issued email reminders and updates at least once a week to the whole small business team. One of the key issues in those emails was the importance of ongoing monitoring and management of irregular accounts, i.e. accounts that are overdrawn with no agreed overdraft limit or in excess of the agreed limit (sometimes called "excesses"), and ongoing monitoring and management of the annual review of overdraft limits and associated facilities ("renewals") to avoid overdraft facilities expiring and causing an irregular position. RMs were responsible for checking the relevant systems and monitoring the excesses and renewals on their own cases. By way of example, the Tribunal saw emails sent to the team about such issues in March, October and November 2019. Excesses were also covered in the induction programme. In theory, customers switching borrowing facilities to the Respondent as part of Project Ladder would have their borrowing approved for a 12-month period initially, so renewals would only become more common as the Project progressed and the 12-month milestone was reached. Among the variety of regular reports produced by different systems, were the "Ace Reports." These highlighted where customer overdraft limits had expired or interest margins had not been correctly set. The reports were sent to the MSBs weekly, but were delegated to Mr Blainey to review.

48. The Claimant's first complaint about Mr Blainey as regards training and support was that he was sending reminders to others in the team about their excesses and renewals, but was not sending them to him. This appears to have been prompted by a particular case the Claimant was progressing in November and December 2019.

49. Mr Blainey's evidence was that on 12 December 2019, when checking the Ace Report, he noticed an entry for an expired overdraft limit on one of the Claimant's cases. This indicated that the Claimant had not reviewed his weekly irregular reports, as this limit would have been on the report for two weeks. Mr Blainey's evidence was that he spoke to the Claimant and found that he did not know how to review his weekly irregular reports, even though it formed part of the induction training and should have been routine by that stage. He gave the Claimant guidance on the process at his desk and walked through a refresh of the actions required. He flagged this to Mr Butler at the time. He spotted a similar issue on the same case in January 2020 and emailed the Claimant on 8 January 2020 to check that everything was in hand and ask if he needed any assistance. He followed up on this in a one-to-one on 16 January 2020 with the Claimant and emailed him summing up what they had discussed on 20 January 2020.

50. The Tribunal saw the documents from the time. There was an exchange of direct messages on 12 December 2019 about the expired limit. It was constructive and supportive. The Claimant thought that the limit had not yet expired because it had been extended for 14 days. Mr Blainey explained that the extension needed to be reported on the relevant system and directed the Claimant to SW or Mr McMullen to show him how to do so. He asked the Claimant whether the account had appeared on his weekly excess report and the Claimant said that he had not seen it. Mr Blainey forwarded the exchange to Mr Butler, explaining that he had identified knowledge gaps and summarising the steps he had taken, including reminding the Claimant to check his weekly excess reports. Mr Blainey's email of 8 January 2020 was again supportive and constructive. His email of 20 January 2020 summarised what they had discussed including excesses, how to obtain relevant reports and what reviews were necessary. Mr Blainey told the Claimant to "just shout up" if he was unsure, provided a link to some relevant material, and scheduled another catch up for a few days' time.

51. Far from withholding training or support, the written evidence from the time demonstrates Mr Blainey actively identifying areas of need and then providing the necessary training and support to meet that need.

52. The Claimant said that Mr Blainey would email colleagues Mr Smith and Mr McMullen in advance to warm them if one of their limits was going to expire. Mr Blainey said in cross-examination that he would generally send reminders to everybody, but if he came across a specific example he would email the individual, just as he had done with the Claimant in the example above. The Claimant relied on what Mr Smith and Mr McMullen told Ms Campbell during the grievance investigation. Mr McMullen told Ms Campbell that it was "on the RMs" to manage their excess reports and expiries. On the Business Lending Platform there were various reports the RMs could run. Mr McMullen ran it once a month for the next month to highlight all the limits due to expire, so he could plan his month accordingly.

Mr Blainey also ran a report but it was a lot harder for him, so they all had to make sure they had their own limits. If Mr Blainey saw one that was due to drop off he would give you a nudge to make sure you actioned it. He would do that by sending an email. It seemed to the Tribunal that Mr McMullen's account to Ms Campbell was clear: it was his responsibility to check whether his limits were due to expire, he had been shown how to do it, but if Mr Blainey saw one he would send an email. Mr Smith told Ms Campbell about the reports the RMs needed to check to see when customer limits were due to expire or drop off. He too emphasised that it was the responsibility of the RMs to manage their excesses and renewals. He said that Mr Blainey would also email them to remind them of limits that were due to expire but it was their responsibility. The RMs had their own codes to search, which would produce the information relevant to their own cases. When Mr Blainey did searches he would need to pull everything off the system. Mr Smith thought Mr Blainey might have a managers' report that would highlight excesses due to drop off and he thought he would send a weekly email. He had regular emails from Mr Blainey reminding them. These emails were sent to the whole team email list.

53. The Tribunal saw some examples of emails. On 20 and 29 November 2019 Mr Blainey emailed the whole team to remind them about checking for expiries and renewals. There were no doubt occasions when he emailed individuals in advance if he spotted an issue. However, there was simply no evidence to support the contention that Mr Blainey would warn other colleagues in advance about issues with expiries or renewals, but not the Claimant. The accounts given by Mr Smith and Mr McMullen during the grievance investigation do not support that contention. Both made clear that this was a responsibility of the RMs, and that Mr Blainey's role was limited to sending general reminder emails, or an individual "nudge", if he happened to spot an issue. The Claimant went as far as suggesting that, for the December case, Mr Blainey had seen in the weekly reports that the limit was due to expire in one of the Claimant's cases and had deliberately chosen not to tell him. Mr Blainey denied that. The Tribunal had no hesitation in accepting Mr Blainey's evidence. The steps he took to support the Claimant and ensure he knew what to do after the limit had expired are incompatible with the suggestion that he had deliberately and knowingly allowed the limit to expire without telling the Claimant.

54. The Claimant's other complaint about training and support provided by Mr Blainey related to a particular deal the Claimant was pursuing in December 2019. The Claimant's evidence was that he began a new business enquiry for a business acquisition deal on 12 December 2019 and asked Mr Blainey for support. Mr Blainey asked him to email details of the case, which he did on 13 December 2019. Mr Blainey asked for more information then suggested a catch up later in the day, which they did. However, Mr Blainey did not provide any conclusive answer to the question whether there was a deal here. The customer was seeking a decision imminently. "Days went by" and the Claimant still did not receive answers to his queries from Mr Blainey. He therefore sought further advice from his credit buddy on 17 December 2019. His credit buddy had doubts about the deal and referred the Claimant to the team specialising in business acquisitions. The Claimant contacted a member of that team the same day, and received a reply the following day, 18 December 2019, to say that the deal should not be pursued. The Claimant's complaint was that Mr Blainey had deliberately sat on the enquiry for six days.

55. In cross-examination, the Claimant accepted that 13 December 2019 was a Friday and that he was on annual leave on Monday, 16 December 2019. He spoke to his credit buddy the next day, Tuesday, 17 December 2019 and received a response from the business acquisition specialist the following day.

56. Mr Blainey's evidence was that the Claimant emailed him on 13 December 2019 about a case he was working on a lending proposal for, and emailed him his debt servicing calculations. This relatively complex proposal sat outside the Project work. Mr Blainey had concerns about the nature of the transaction and was trying to establish whether serviceability of the proposed and existing facilities could be demonstrated. He recalled speaking to the Claimant about the case and outlining his concerns. He believed he recommended the Claimant discuss it with his credit buddy. He did not think the Claimant was happy with his advice, as he appeared under pressure from the customer to provide a quick decision. It was not Mr Blainey's decision whether to approve the deal, that rested with the Credit Team.

57. Mr Blainey's evidence in cross-examination was consistent with this. He said they spoke more than once and that it was left that the Claimant would discuss the deal with his credit buddy. The Tribunal saw the relevant emails. The Claimant sent the debt servicing calculations on the morning of 13 December 2019 and Mr Blainey replied at lunchtime, suggesting they catch up that afternoon and have a further discussion. The Claimant replied agreeing. There is no dispute they did speak that afternoon.

58. The Tribunal did not accept that Mr Blainey was "stringing the Claimant along" when he could have provided a quick and simple answer. Even on the Claimant's own account, he provided the calculations to Mr Blainey on the Friday and the matter was definitively resolved on the Claimant's second working day after that. In any event, we accepted Mr Blainey's evidence that he was not stringing the Claimant along and that he spoke to the Claimant, told him that he had concerns and suggested he speak to his credit buddy rather than putting in an application. Mr Blainey gave a clear account, supported by the documents that did exist. It was not his decision whether to support the deal, that was a matter for the Credit Team. We accepted that his general practice was to seek to empower the RMs. Further, the Claimant knew that he had a credit buddy and he could have spoken to him at any time, but did not do so until after his discussions with Mr Blainey. The Tribunal found that Mr Blainey did not fail to give the Claimant support in respect of this deal; he acted promptly and appropriately. There was nothing to suggest he treated the Claimant less favourably then he treated or would have treated anybody else in this situation.

59. There was substantial documentary evidence showing Mr Blainey's involvement with the small business team at the time. None of it suggested he gave preferential treatment to certain team members or failed to provide any training or support to anyone who needed it. On the contrary, it pointed to a detailed and thorough approach to ensure that the whole team performed to the correct standard. Mr Blainey undoubtedly waited for colleagues to ask him for help in some respects. This may have meant that those who asked more got more of Mr Blainey's time. But that is not the same as Mr Blainey giving preferential treatment to some. The Claimant had the same opportunities as the other RMs to ask for help and there was no

evidence before the Tribunal that the Claimant ever asked Mr Blainey for help and was refused.

60. As far as Mr Butler was concerned, the Claimant's principal concerns appeared to relate to issues he had in two cases in which he received lending standards breaches in October 2019. The breaches happened in June and July 2019, but were not detected until October 2019. The breach was that he had drawn down customer funds without all of the conditions precedent to the loans being satisfied. The Claimant gave evidence about this. He had complaints about delays in the process. He said that he did not know how to record completion of the deal on the Business Lending Platform and that he was not given support in marking the deals as completed. That is why it took until October for the deals to be completed. However, those aspects did not appear to relate to the matter for which he was given the lending standards breaches, which was drawing down the funds without the conditions precedent being met. The Respondent's written Lending Standards of Conduct state expressly that conditions of approval must be completed prior to a loan being drawn down. In cross-examination Mr Butler said that the solicitors would send an email to the RM 7 to 14 days before drawdown. The email would set out any conditions to be met before drawdown. It was for the RM and the post-approvals team to deal with those conditions. The RMs would update SharePoint to show where a deal had reached. Mr Butler would not know from that whether the conditions precedent had been met prior to drawdown. He only discovered in this case that the conditions had not been met when the Credit Team highlighted it in October 2019. The Claimant did not identify training or support that should have been given in this respect but was not.

61. In his cross-examination of Mr Butler, the Claimant referred to various emails, documents and matters of concern. The Tribunal was not satisfied that in any case the Claimant identified evidence to suggest that Mr Butler was failing to provide training or support that was required. Much of the evidence the Claimant identified related to instances where something had gone wrong on one of his cases. That does not of itself demonstrate that there was a training need or lack of support. The evidence indicated that Mr Butler was providing appropriate training and support. By way of example, the Claimant said that Mr Butler did not give him help to assist with drawdowns when his pipeline was getting blocked. Mr Butler said that he gave direct support when the Claimant told him that he was struggling with this. The Claimant gave him a long list of his pipeline and he took it over for a period. He contacted banks, solicitors, customer solicitors and so on, and he spoke to Mr Burke. The Claimant said that did not happen. The emails sent at the time confirmed Mr Butler's account and the Tribunal accepted it. The Claimant emailed him with concerns about drawdowns and pipeline on 9 December 2019. He was concerned about delays, particularly with the solicitors. He said that he had a big workload and this was affecting the quality of his work. He asked to step away from the onboarding calls temporarily and whether anybody had the capacity to help with some of his post-approval work. Mr Butler replied within 20 minutes to say that the Claimant had been removed from the allocation list the previous week so no new deals would come to him. He asked for the most recent communication on every case that was in INCA, and said that he would take those up on the Claimant's behalf. He asked for an up to date position on the Claimant's onboarding so he could help with that. The Tribunal accepted that he took those actions. This was one example, but overall the Tribunal

was quite satisfied that there was no failure to provide the Claimant with training or support. Further, the Claimant did not identify any evidence to suggest that others were treated differently or better by Mr Butler.

62. The additional matter the Claimant identified at the start of the second day of the hearing related to an exchange of emails in April 2020. The Claimant wanted to study for an accountancy qualification. Mr Butler had agreed that he could have a morning per week off work to study. The Claimant did not dispute Mr Butler's evidence that nobody else in the team got that treatment. In April, the Claimant had missed one morning. He emailed Mr Butler on 6 April 2020 to say that he had not taken any time the previous week and asking for that time this week. He said that the exam date had been moved because of COVID, so he had more time to prepare. Mr Butler replied ten minutes later to say that the Claimant could only do one session because of the current volumes of work and the short week [Friday 10 April 2020 was Good Friday]. He said that he hoped this would fit with the exam being moved. The Claimant replied to say that he was disappointed with the answer. The context was that the team had all been put at risk of redundancy at that time. The Claimant suggested that he was not going to get married and was not going to be able to pay his two mortgages and said that the qualification was a key to resolving his long-term problems. They obviously spoke by phone and the Claimant sent a further email again expressing his disappointment. He said that he wanted to support "the bank's agenda" but that his personal agenda was more important. In cross-examination he accepted that the Respondent was running a business. Mr Butler said that he spoke to Mr Baillie by phone before responding to the Claimant's request. Mr Baillie did not agree to it. Mr Butler wanted to help the Claimant but they were massively over-committed. The Tribunal accepted Mr Butler's evidence about why the request was refused, which was consistent with the emails sent at the time. It seemed to the Tribunal that overall this was, again, an example of Mr Butler supporting the Claimant with substantial time off work to study for an accountancy qualification. There was a business context for not allowing him to take a full day off during the week of 6 April 2020. The Claimant did not identify any evidence that could support the suggestion that he was being treated differently or less favourably by having this specific request refused.

Allegation four

63. On 30 July 2019 Ms Harrison sent an email to the Project Ladder team to say that she had recently advertised for a new leader to join her and Mr Butler in the small business team. Mr Haigh had been appointed but would not start until the end of September. Mr Baillie had asked her to step out of her role for six months to support the wider operation and she had therefore asked Mr Burke from her team to step up into her MSB1 role for three months. Mr Butler explained in his witness statement that he found out about Mr Burke stepping up on 17 July 2019. The decision was made by Ms Harrison and Mr Baillie. Mr Butler questioned them about it because he thought others within the team should have been given the opportunity to be considered. Ms Harrison told him that because it was a temporary deputising arrangement no advert or interview was required. She said that Mr Burke was chosen because he had already been deputising for her. Mr Butler said that nobody in the team was given the opportunity to apply for this role. A number of RM2s in the team, including the Claimant, were unhappy about this. He spoke to the Claimant about it with Ms Harrison at the time.

64. The Claimant did not dispute this version of events. He acknowledged that nobody was given the chance to apply for the role that was given to Mr Burke. This affected the white RMs just as much as him. This method of appointing Mr Burke is not best practice, but the Claimant was not singled out in being excluded from the chance to apply for the role. There was nothing to suggest that race played any part in these events.

Allegation five

65. The Claimant was put on an Early Intervention Plan on 15 October 2019. On 10 October 2019 Mr Butler recorded on "Our Performance" that a few issues had come to light during the Claimant's absence on annual leave. Those were: no handover of customer deals to the RM looking after his portfolio when he left for holiday two weeks ago; concerns about pipeline management, in particular the database not being updated; attitude in the office – a few occasions of frustration with process in the office, including one when the Claimant stood up and swore in front of the team and Mr Butler sent him out to cool down; a CRE case in the pipeline that should not have been included; issues with customer choice letters; conditions precedent not met on a loan before drawdown (the lending standards breach referred to above); and some other minor issues. Mr Butler recorded that he had discussed these issues with the Claimant and would have a further meeting on 15 October 2019 to set actions and discuss possible early intervention.

66. Mr Butler took advice from HR about these on 4 October, 9 October and 15 October 2019. In his initial email he set out the concerns broadly as subsequently recorded on Our Performance and said that he was looking for advice on how to proceed. He knew he would have to log a lending standards breach but did not know if the Claimant needed to have an amber gateway or they should be looking at the early stages of Getting Back On Track ("GBOT", the performance management process). In a conversation on 8 October 2019, HR advised Mr Butler that the issues identified felt within both performance and conduct. The performance issues should be dealt with by the early intervention stage of GBOT and for a short period of time. The conduct issues such as swearing in the open office and slamming his headset down should be dealt with by a strong word and the Claimant should be told that any further examples of such behaviours would lead to disciplinary action being taken. There was a further conversation on 15 October 2019, because a second instance of drawing down loans without applying the conditions had been identified, along with a further outburst or outbursts of frustration. HR advised that because the breaches occurred at the same time they should still be dealt with by early intervention. Mr Butler was to speak to the Claimant that day about the further breaches and outbursts, find out if there was any mitigation and identify any knowledge gaps, training or support required. HR advised four weeks might not be sufficient time if further training was required to demonstrate improvement.

67. Mr Butler then met the Claimant on 15 October 2019 and agreed an Early Intervention Plan with an eight-week monitoring period. He was to have:
    67.1 100% overview of next five cases before sending to credit;
    67.2 100% overview of next five cases before drawdown;
    67.3 No more lending standards breaches;
    67.4 Business Lending Platform and SharePoint to be accurate; and

67.5 Positive attitude around the office and control frustration as a senior member of the team.

68. An Early Intervention Plan is the first stage of the GBOT process. The Claimant did not dispute being put on the plan at the time and there was no evidence before the Tribunal that he disputed the underlying concerns at the time either. He accepted in his evidence to the Tribunal that on one occasion he had sworn in the open plan office and been asked by Mr Butler to go and cool down. The Claimant worked through the plan. It was extended slightly beyond eight weeks until 4 February 2020 so that the actions could be completed. At the end of that period the Claimant was removed from the plan with no need for a monitoring period.

69. In his evidence to the Tribunal Mr Butler said that the Claimant not placed on the Early Intervention Plan with the aim of dismissing him or because of his race, but as a supportive measure. There had been a dip in his performance and HR had advised that the performance issues should be dealt with through the Early Intervention Policy. The plan was discussed, implemented and completed. At the end Mr Butler was pleased with his progress and removed him from the Plan. Mr Butler said that if he had wanted to dismiss the Claimant he would have invoked the formal performance management aspects of the process, but he did not. The Claimant did not identify any evidence to suggest that a white colleague in the equivalent position would have been treated differently.

70. The Tribunal accepted Mr Butler's evidence, which was consistent with the documentary evidence from the time. Nothing in the HR notes supports the suggestion that Mr Butler was trying to steer HR towards dismissal or a formal process. As his email said, he was "looking for advice on how to proceed." Fundamentally, there were some issues with the Claimant's performance, they were identified and addressed through the plan and he was then removed from it. This is wholly inconsistent with Mr Butler trying to get rid of the Claimant. He was trying to support an improvement in the Claimant's performance and the Claimant's race had nothing to do with it.

Allegation six

71. The background to allegation six is the events following the "sausage roll" conversation in December 2019, when MM told Mr Butler that he felt intimidated by the Claimant, and two further events, which took place in January 2020.

72. The first happened on 29 January 2020. MM was in the office looking at his LinkedIn profile. He commented that a customer had viewed his profile but then had not added him on LinkedIn. He went on to say that he was cleansing his Facebook friends because he had a lot that he did not know or speak to regularly. Colleagues laughed. The Claimant approached him and asked why it was funny. Later in the day SW approached Mr Butler and told him what had happened and that MM was shaken after the Claimant confronted him. When Mr Butler spoke to MM he explained the conversation and said that he found the Claimant intimidating. The Claimant would not drop the matter and kept asking why it was funny. Mr Butler's evidence to the Tribunal was that three other named colleagues approached him separately to report what had happened and said that the Claimant had been out of order.

73. Mr Butler spoke to both MM and the Claimant on the day. He was going to arrange an informal meeting with them both to try and resolve the issue, but was called into an emergency meeting that afternoon and could not do so.

74. Before he could take action, the second incident happened. On 30 January 2020 the Claimant asked to speak to Mr McMullen privately. They went into a meeting room and the Claimant asked Mr McMullen about the previous day's joke. Afterwards, Mr McMullen emailed Mr Butler and Ms Harrison raising concerns about the Claimant's conduct. Mr McMullen said that the Claimant had checked Mr McMullen's phone when they went into the meeting room; had asked him if he knew what a "smear campaign" was and said that it was usually run by "smart where's Wally motherfuckers" "a bit like you"; and had referred to what "he and his family would do" if they knew there was a smear campaign against the Claimant. Mr McMullen set out copies of messages he had then exchanged with the Claimant on the instant messenger system. In those messages, Mr McMullen asked why the Claimant had checked his phone and whether he was insinuating that the "Where's Wally mother fucker" was him. The Claimant replied, "OMG No! Ben, I'm confused. You've just helped me out." Mr McMullen then said that he did not understand it and asked what the Claimant meant when he "what he and his family would do". The Claimant said that he was confused too. Then he said that he "never said that." They discussed having a chat to clear the air. Mr McMullen suggested Mr Butler or Ms Harrison should be present too.

75. In his witness statement dealing with these events, the Claimant said that the comment MM made was not funny. He therefore wanted to find out the real reason everybody laughed. He said that his own social media posts to promote his boxing had slowed down at that time and he inferred that the joke was directed at him. He referred to evidence showing that he had made 2 posts per day on 20, 22, 23 and 24 January but only 1 post per day on 25, 28 and 31 January, as evidence that the frequency of his posts had slowed down. He said that the following day he wanted to ask Mr McMullen if he knew what was funny. They went into a meeting room. Mr McMullen explained that the comment was in relation to MM updating his LinkedIn. The Claimant said that after a couple of minutes they stood up and he thanked Mr McMullen for clearing the issue up. They left the meeting room joking and then suddenly Mr McMullen stormed away from him. They then exchanged instant messages in which Mr McMullen made bizarre allegations. The Claimant said that these were racially motivated.

76. The Claimant's evidence to the Tribunal about this was different and contradictory. For example, he accepted for the first time that he *had* touched Mr McMullen's phone when they went into the meeting room; he suggested that he thought it was his own phone. He said that after Mr McMullen explained the joke he "settled with it" but then volunteered that he asked Mr McMullen "do you know what a smear campaign is?" The Claimant could not explain why this key point – that he had indeed asked Mr McMullen about a smear campaign – was not included in his witness statement. The Claimant said that as they left the room he "could sense weirdness" so started joking about their respective pets, not that they joked because the air had been cleared.

77. The Tribunal does not need to resolve what happened on 29 and 30 January 2020 for the purposes of this allegation. We have noted these inconsistencies and contradictions because they indicate that the complaints and allegations made by the Claimant's colleagues at the time were not wholly without foundation. However, the substance of allegation six is about what Mr Butler said to HR when he sought advice about these events.

78. It is important to note, first, that the HR notes were not made by Mr Butler but by the HR colleague. Mr Butler was not responsible for the precise words used and the HR notes are clearly a summary not a verbatim account. Secondly, these are private notes of Mr Butler seeking advice from HR. They were not intended for wider circulation. The notes were not grammatically correct, but, apart from removing people's first names, we have recorded them as written below.

79. On 29 January 2020 the HR notes record:

> "… [Mr Butler] advised there has been some incidents in the office, whereby [the Claimant's] behaviours have been intimidating and aggressive towards other members of staff. [The Claimant] was a professional boxer and [Mr Butler] understands he failed a brain scan last year due to damage from fighting. However [Mr Butler] advised he must have had another scan to clear him as he is allowed to fight again. [Mr Butler] is concerned as his behaviour towards staff can be aggressive. This results from when he misunderstands something, like a joke or believes people are talking about him when they are not. A number of colleagues have approached [Mr Butler] to advise they are concerned he will react physically one day. Further, [Mr Butler] was previously advised to document a conversation about his behaviours and aggression, therefore have asked for a copy of this. I have also asked [Mr Butler] to speak to [the Claimant] again today to address the behaviour concerns, advising that they are inappropriate and cannot be tolerated. However equally, have asked [Mr Butler] to lightly probe [the Claimant] to ascertain details on his health and whether he had another scan, whether the doctors have advised anything further, or provided him with medication to take. As explained, we may have to refer [the Claimant] to AXA for medical guidance or request access to his GP records to understand why he is reacting aggressively and if there is in fact a link between his previous brain injury and behaviours.

80. On 30 January 2020, the notes record:

> "Background - conversation was taking place between 2 colleagues that sit beside [the Claimant] ([MM], Mark) around social media and how many followers they had on LinkedIn and Facebook, a comment was made by [MM] & Mark that they were going start cleansing their social media and delete people, which they both then laughed at. [The Claimant] then became very defensive and asked "why is that funny - I don't get why that is funny tell me why you find that funny" This escalated to arguing to which either [MM] or Mark asked to speak with [Mr Butler] to say they wanted moved desk, which [Mr Butler] advised he could make that happen as things can't go on the way they are. [Mr Butler] word were its like working in a playground."
>
> And
>
> "[The Claimant] rudely asked him to go into a room by 'marching him' to the room and asking him questions about what happened yesterday.
>
> [The Claimant] advised this was incorrect and then began talking about a 'Smear Campaign', which [Mr McMullen] did not know what he was talking about.

[The Claimant] advised his family have money and said 'you don't know what they would do to the head of the 'Smear Campaign'. [The Claimant] advised this stands for 'Smart, wears wolly mother f*ckers'.

[The Claimant] then went onto to advise [Mr McMullen] that he believes people are making things up to get him into trouble. Therefore, [Mr McMullen] asked [the Claimant] if he thought he was the head of the a 'Smear Campaign', [the Claimant] advised no.

[The Claimant] then stood up over [Mr McMullen], not saying very much however [Mr McMullen] felt intimidated and very uncomfortable."

81. All of these notes record conversations between Mr Butler and HR. Although the last entry describes Mr McMullen's account, that was based on what Mr Butler told HR. Mr Butler's evidence to the Tribunal was that he told HR that the Claimant's behaviour had been intimidating and aggressive towards other members of staff because of what had been reported to him about the "sausage roll" incident and these two incidents in January. He said that he told HR the Claimant was a professional boxer, not an ex-boxer. He knew full well the Claimant was a professional boxer and spoke to him about that and was supportive of it. He did not say that the Claimant was "brain-damaged" but he did believe that the Claimant had failed a brain scan the previous year because of damage from fighting. There is no dispute the Claimant had told him a change to his brain had been identified in a brain scan after one of his matches was cancelled. Mr Butler and other team members had been planning to go to the match. The reason Mr Butler mentioned this to HR was to provide full background. He did not know if there was anything he needed to do as a manager believing that the Claimant had failed a brain scan. He did mention that a number of colleagues had approached him to suggest that they were concerned that the Claimant would react physically one day. This was because colleagues had said that to him. None of his comments were made because of the Claimant's race. He was passing on factual information based on his own knowledge and what others had said. He was concerned for the Claimant and concerned about the Claimant's behaviour upsetting colleagues.

82. The Tribunal accepted Mr Butler's evidence, which was consistent with the HR notes and with the evidence surrounding the incidents in question. The entries referring to the failed brain scan are entirely consistent with this being a concern about the Claimant's well-being, and whether aspects of his behaviour might be linked with this. The notes are plainly not grammatically correct and they are not perfected notes. They do say that the Claimant "was" a boxer but equally they make clear that he "is" allowed to fight again. The Claimant places irrational emphasis on the word "was" in suggesting that Mr Butler told HR he was an "ex-boxer." The content of the notes does suggest that Mr Butler has accepted what the Claimant's colleagues said about him being aggressive and intimidating. Mr Butler confirmed that he had had a number of reports from different people and had also seen some incidents himself. He did believe that the Claimant had been aggressive and intimidating.

83. Mr Butler did not make a report to HR in the precise terms alleged by the Claimant. The Tribunal accepted his evidence that he was confidentially providing information based on what he had seen and been told, so as to obtain advice. This was nothing to do with the Claimant's race. The Claimant did not identify any evidence to suggest that a white colleague in his position would have been treated any differently.

Allegation seven

84. Allegation seven cannot succeed because Mr McMullen did not make any report to HR, Mr Butler did. As far as Mr Butler is concerned, the Tribunal accepted that he reported what Mr McMullen told him. That is consistent with Mr McMullen's email on 30 January 2020 and his instant messenger conversation with the Claimant. As we have already noted, the Claimant's inconsistent and contradictory evidence to the Tribunal about these events indicates that Mr McMullen's complaints were not wholly without foundation. The Tribunal accepted Mr Butler's evidence that his report to HR was simply based on what Mr McMullen told him and had nothing to do with the Claimant's race. We accepted his evidence that he also told HR that the Claimant said Mr McMullen's account was incorrect, but this was not recorded by HR. The Claimant has not identified any evidence to suggest that Mr Butler would have acted differently if the Claimant had been white.

Allegation eight

85. Allegation eight concerns the allocation of some commercial cases. The Commercial Team in Glasgow was very busy during mid-2019 and an "overflow" team was created to work on "mid-value" cases up to £500k. Mr Blainey was working on that during the time he was seconded away from Project Ladder. By October 2019, the busy spell had died down and there were about 20 outstanding "mid-value" cases. A decision was made that Project Ladder would take the cases on.

86. Three RMs were chosen to take on the work. The Claimant was not one of them. Mr Butler said that this was not his decision it was taken by Mr Burke and Ms Harrison. Mr Blainey confirmed that Mr Burke took the decision. The Tribunal accepted that this was not Mr Butler's decision. The fact that Mr Butler may have told the Claimant at the start of Project Ladder that he allocated cases generally is not inconsistent with that. These were not ordinary Project Ladder cases, they were specific, mid-value cases being brought in at the end of 2019.

87. Mr Butler said that he spoke to Ms Harrison about the cases. She told him the Claimant had not been selected because he had one of the biggest pipelines. That is consistent with the evidence in the file. Mr Butler spoke to the Claimant about the cases when he returned from his extended leave in January 2020. He told the Claimant that if he could progress his pipeline he might be able to pick up some of the cases. The Claimant emailed him on 23 January 2020 to say that he kept being allocated further cases, which meant he would not have the opportunity to get to the 20 deals to "jump onto some of the commercial stuff." Mr Butler said that everyone would be allocated new cases because there were increasing numbers coming through. He said that he had been speaking to Mr Burke about the commercial cases that morning. At the minute it seemed that most of them were dead anyway. He would have more information the following week. Mr Butler said that in the event no further commercial cases arose.

88. Mr Butler said that not being allocated these commercial cases had nothing to do with the Claimant's race and the Tribunal accepted that. There was no evidence to suggest that a white person would have been treated any differently. The underlying evidence was entirely consistent with there being issues with the Claimant's pipeline at that time. Indeed, he was on the Improvement Plan at that time.

89. Mr Butler also drew the Tribunal's attention to the fact that he had supported the Claimant in his ambition to progress into the role of Commercial RM, by arranging for him to spend a day shadowing a Commercial RM in June 2019. Nobody else in the team received that opportunity. The Claimant told him that it had been a great day and was really useful.

90. Therefore, Mr Butler did not deny the Claimant the chance to work on commercial cases. The Claimant was not allocated any of the 20 cases at the end of 2019/beginning of 2020, but that was a decision taken by Mr Burke and Ms Harrison. The Claimant was not one of the 3 RMs selected because there were issues with his pipeline. Mr Butler had gone out of his way to support the Claimant in his ambition to progress to Commercial RM.

Allegation nine

91. Some of the RMs on Project Ladder, including the Claimant, were in a WhatsApp group. It was not an official work group it was a social group, but the only people in it were RMs. Mr Blainey and Mr Butler were not in the group.

92. Mid-morning on Sunday 22 March 2020 Mr Hastings, one member of the group, shared a 20 second video. It was at the start of the pandemic, when there was widespread coverage of people panic buying items such as toilet rolls. The video was about panic buying. It showed a child going into a shop to buy cigarettes and alcohol and being refused. The highly offensive racial slur "You Paki bastard" was then used towards the shop keeper.

93. The Claimant viewed the video about 6 hours later. He immediately posted in the WhatsApp group "Completely inappropriate". He provided evidence that 10 of his colleagues had viewed his comment, 9 of them within an hour or two. He did not provide any evidence that they had viewed the video itself. Nobody commented about the video before the Claimant's post. There was no evidence before the Tribunal about whether anybody else had viewed the video before the Claimant did.

94. After Mr Hastings saw the Claimant's post, he left the WhatsApp group and messaged the Claimant directly to apologise. He saw two ticks to show that the Claimant had read his message but the Claimant did not respond to him.

95. Mr Hastings gave evidence that he had not viewed the video to the end before he shared it. He had just had a new baby and was not "firing on all cylinders". He did not understand why the Claimant had taken offence when he saw his message, so he watched the video to the end. When he saw the end he felt panicked and ashamed and left the group. He did not condone such language and would not have shared it if he had seen it beforehand. The Tribunal believed Mr Hastings. His explanation has been the same throughout. The child was panic buying cigarettes and alcohol and he thought it was a humorous take on people panic buying toilet roll. Mr Hastings's evidence was consistent with the immediate apology he sent. There was no evidence of any other behaviour like this from Mr Hastings.

96. The Claimant was offended by the racial slur. Although he is not of Asian or Pakistani origin, he had himself been regularly subjected to that slur as a child. Apart from posting that the video was totally inappropriate, the Claimant did not take any

other action at the time until he mentioned it in his grievance on 28 May 2020. He did not respond to Mr Hastings's apology. Mr Hastings repeated his apology to the Claimant in his evidence to the Tribunal and the Claimant was gracious in thanking him.

97. The Respondent made clear through Mr Sadiq that it regarded the use of this language as totally unacceptable. Mr Hastings was disciplined when this came to light as part of the Claimant's grievance. He received a Written Warning and an amber gateway.

Allegations ten and eleven

98. Allegations ten and eleven concern an exchange of emails on 8 April 2020. At this stage, the Respondent was dealing with customers who had financial issues because of the pandemic. It had a triage system in place. An RM from Glasgow who was involved in the triage emailed the Claimant about a case, "I believe this is allocated to you on the share point, can you please give the customer an update asap." She forwarded an email chain indicating that the customer was having cashflow problems and would not have enough for the next seven days.

99. The Claimant responded to the RM, copying in Ms Harrison, shortly afterwards. He wrote:

> I have contacted the customer. This wasn't helpful for me. I have another two urgent cases to be worked this morning and this additional last-minute request has added further pressure.
> In future, please could I ask that you manage the expectation of the customers.

100. Ms Harrison responded to say that all customers' expectations were set on the triage call but there would be some instances where a customer needed urgent help i.e. cash flow would run out in seven days. This was one of those cases. Out of 39 calls made the previous day only three needed urgent assistance. Ms Harrison also forwarded the exchange to Mr Butler saying, "FYI this really isn't helpful right now. I'll leave with you."

101. Mr Butler emailed the Claimant. He said that everybody was under pressure at the moment and trying their best. He knew that the request was not going to help with the Claimant's cases but they needed to prioritise some cases. Everyone was feeling the same pressure. Then he wrote, "in future I don't expect a response like this one. As I said on yesterday's call, if you need a chat about anything to ease the pain let me know. Take regular breaks to help with pressure. If you would contact this customer by the end of the week that would be great. Thank you."

102. The Claimant emailed Mr Butler and Ms Harrison to say that what was not helpful was placing some sort of blame on him. He said that he was not even made aware that the matter was urgent. Ms Harrison responded to say that the email trail had said the matter was urgent. She said that no blame had been mentioned in any email traffic. They were all trying to work together to help customers. They needed to remember sometimes things would not go to plan. It was expected that everyone would remain patient, calm and professional.

103. The Claimant sent a further response saying that it was at the point Ms Harrison emailed Mr Butler to let him know that the Claimant was not being helpful that she was "throwing shade" on him, which is why Mr Butler sent him a "stiff email" in response. He said this was after he had explained that he was unaware this was an urgent case. Had he known, his response would have been different. He concluded by saying that he was "going to take a walk." The emails continued. Mr Butler said that this was not about blame or telling the Claimant off. His goal was to ensure they worked professionally and with respect. They were all in it together as one united team against Covid, trying to get money to customers who needed it. Everybody was feeling the pressure. This had been blown out of proportion. The Claimant should take a break, pick up the phone if he wanted to chat or blow off steam, then move on. His number one priority was the Claimant's wellbeing, so if the pressure was getting too much the Claimant should let him know. The Claimant came back again. He said that the issue was he was not aware it was urgent but somehow he was cited as unhelpful. He said that he had a concern about the "deeper underlying issue of reputational damage."

104. The Tribunal noted that both Ms Harrison's email to Mr Butler saying that the Claimant's email was "really not helpful", and Mr Butler's email to the Claimant saying that he did not "expect a response like this in future" were sent *before* the Claimant asserted that he had not been made aware that the case was urgent. Further, it was clear from the short email chain that was originally forwarded to the Claimant that this was an urgent case i.e. a customer who would run out of cash within 7 days. It seemed to the Tribunal that the Claimant's email to the RM in Glasgow suggesting that customers' expectations should be managed in future was inapt and curt. In the context of the pressured situation trying to get money to customers facing unexpected cashflow difficulties as a result of the pandemic, Ms Harrison might well regard it as unhelpful. There is nothing to suggest that she suggested the Claimant was being unhelpful knowing that was untrue, nor that she would have treated a white colleague any differently. Mr Butler told the Tribunal that he understood Ms Harrison to be saying that the Claimant's response was abrupt and unhelpful when everybody was under pressure and that he agreed. That is why he sent his email to the Claimant, but he was also trying to be supportive. That is entirely consistent with the content of his original email and the subsequent emails. Mr Butler said that he would have made the same comments to a white RM who had reacted as the Claimant had, and indeed he said that he had had similar conversations with a white RM2 about that person's tone and how to respond in a professional manner. The Tribunal accepted Mr Butler's evidence. On the face of it, the Claimant's response to the original request *was* an unhelpful response to somebody doing their job and passing on a case that plainly fell within the urgent category. There was an obvious reason for Ms Harrison to raise that with Mr Butler and for Mr Butler to make clear to the Claimant that he should not respond in that way.

Allegation twelve

105. As noted above, Mr Haigh was appointed to Ms Harrison's MSB1 role, but did not start until September 2019. Mr Burke was appointed to cover the role in the interim. After September 2019, the role of Commercial Operations Manager became available. Mr Burke was appointed to that role, again without it being advertised and without anybody else having the opportunity to apply. Mr Butler said that this was Mr

Baillie's decision, and the documents from the time support that: on 15 November 2019 Mr Baillie emailed HR to say that he had approval to extend the Operations Manager Medium Banking Project Ladder role until September 2020 and the current post holder would leave in December. He was looking to appoint Mr Burke into the role, i.e. he did not want to advertise the role given it was (a) critical for the project and (b) the last time the role was advertised they had to go externally, which was not feasible given time constraints. HR replied, following a conversation, to confirm that Mr Baillie could make the move directly.

106. Mr Butler himself found out what had happened when Mr Burke emailed on 19 November 2019 to say that his role was going to be changing and that Mr Baillie had asked for him to be seconded into the role of Operations Manager for commercial lending. Mr Butler said that again other colleagues were unhappy that Mr Burke was appointed in this way. Indeed, Mr Butler himself would have applied if he'd had the chance. Mr Baillie sent an email confirming the appointment on 26 November 2019. He described Mr Burke's background working for seven years as a Commercial Broker and, before that, as an Operations Manager. In his evidence, Mr Butler said that the role sat above the MSB1s, and he did not think that the Claimant would have had the skills for the role at that point.

107. This was plainly Mr Baillie's decision. Again, it was not good practice and the complaints and suspicions that have arisen about Mr Burke's appointment are precisely why open and fair processes are necessary. However, nobody else had the opportunity to apply for the role, regardless of race. The decision affected white colleagues just as it did the Claimant. As a relatively new RM, he was not on the face of it an obvious candidate for the role. There was no less favourable treatment of him.

Legal principles

108. Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that race is a protected characteristic. Section 39 of the Equality Act 2010 makes it unlawful for an employer to discriminate against an employee by subjecting the employee to detriment and s 40 makes it unlawful for an employer to harass an employee. Direct discrimination and harassment are governed by s 13 and s 26 of the Equality Act 2010, which provides, so far as material:

> **13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> …
>
> **26 Harassment**
> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …

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

109. The time limits for bringing claims of discrimination are governed by s 123. Under s 123(3)(a), conduct extending over a period is treated as being done at the end of the period.

110. The burden of proof is dealt with by s 136 of the Equality Act 2010, which provides, so far as material:

136 Burden of proof
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…

111. The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave authoritative guidance as to the application of the burden of proof provisions. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913.
111.1 It is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant. These are referred to below as “such facts”.
111.2 If the Claimant does not prove such facts he will fail.
111.3 It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
111.4 In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.
111.5 It is important to note the word 'could' in s 136(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
111.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

111.7 These inferences can include, in appropriate cases, any inferences drawn in accordance with s 138 of the Equality Act 2010 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 138.
111.8 Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
111.9 Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on a prohibited ground, then the burden of proof moves to the Respondent.
111.10 It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.
111.11 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the ground of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
111.12 That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.
111.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

112. In essence, the guidance outlines a two-stage process. First, the complainant must prove facts from which the Tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable Tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that he did not commit the unlawful act.

113. The guidance in *Igen* and *Madarassy* was expressly approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054. However, as the Supreme Court made clear in *Hewage*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage* at para 32.

114. Under s 13, direct discrimination arises where (1) an employer treats a person less favourably than it treats or would treat others and (2) the difference in treatment is because of a protected characteristic. In answering the first question the Tribunal must consider whether the employee was treated less favourably than an actual or hypothetical comparator whose circumstances were not materially different. That means that all the characteristics of the employee that are relevant to the way the

claim was dealt with must also be found in the comparator: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL. Where there are material differences in circumstances between the employee and the proposed actual comparator, the proposed comparator may still provide evidence that assists in determining how a hypothetical comparator would have been treated: *Shamoon*.

115. The second question entails asking why the employee received less favourable treatment. Was it because of a protected characteristic or was it for some other reason: see *Nagarajan v London Regional Transport* [1999] ICR 877, HL. In some cases, where the factual criteria applied by the employer as the basis for the treatment are inherently discriminatory, it will be clear why the employee received the less favourable treatment. In other cases, where the reason for the less favourable treatment is not inherently discriminatory, it is necessary to explore the mental processes of the employer, to discover what facts operated on his or her mind: see *R (E) v Governing Body of the Jewish Free School* [2010] IRLR 136, SC ("*JFS*"). It is important to note that the employer's motive is irrelevant: see e.g. the *JFS* case. It is not necessary for the protected characteristic to be the only or even the main cause of the less favourable treatment; it must be an effective cause: see e.g. *London Borough of Islington v Ladele* [2009] IRLR 154, EAT.

116. It is not always necessary to answer the first and second questions in that order. In many cases, particularly where there is not an actual comparator, it is preferable to answer the second question, the "reason why" question, first. If the answer to that question is that the less favourable treatment was on a proscribed ground, then there will usually be no difficulty in deciding whether the employee was treated less favourably than others would have been: *Shamoon* (above); *JFS*.

117. Under s 26, there are three elements to the definition of harassment: (1) unwanted conduct; (2) the specified purpose *or* effect; and (3) that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, noting the slightly different definition that now applies under s 26.

118. The conduct must be "unwanted", which means "unwelcome" or "uninvited", and it must be unwanted by the employee: see *English v Thomas Sanderson Blinds Ltd* [2009] ICR 543. The EHRC Employment Code (chapter 7) advises, consistently with the case law, that the conduct need not be directed at the employee, nor is there any requirement that the employee should have the particular protected characteristic at issue: a white worker who is offended by the racial abuse of a black colleague can complain of harassment on the ground of race.

119. The conduct must have the purpose or effect of violating the person's dignity, or creating the proscribed environment. The word "violating" is a strong word (as are the other elements of the definition), and connotes more than offending or causing hurt. It looks for effects that are serious and marked. A one-off act can violate dignity, if it is of sufficient seriousness: see *Dhaliwal* and *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT 0179_13_2802. Looking at the other limb of the definition, the word "environment" must not be overlooked. The conduct must create the specified environment, which means a state of affairs. A one-off act may do that, but only if it has effects of longer duration: see *Weeks v Newham College of Further Education* [2012] UKEAT 0630_11_0405. If the conduct has the relevant purpose,

that is the end of the matter. However, for it to have the relevant effect, the Tribunal must consider both, subjectively, whether the individual perceived it as having that effect and, objectively, whether that was reasonable: see *Dhaliwal*. The Tribunal must also take into account all the relevant circumstances. They may include whether the individual complained at the time and whether the conduct was directed at the individual. A genuine and timely apology given to the employee may negate the creation of the proscribed environment: see *Forbes v LHR Airport Ltd* [2019] IRLR 890.

Application of the Law to the Facts

120. Applying those principles to the detailed findings of fact, the Tribunal's conclusions on the issues were as follows.

121. The Claimant's complaints were on the face of it complaints of discriminatory conduct over a period. Even if there was not conduct over a period, the Tribunal considered that it would have been just and equitable to extend time for bringing all the complaints. Fundamentally, there was very little prejudice to the Respondent, which was able to call cogent evidence in respect of all the complaints. The prejudice to the Claimant in excluding complaints would have been greater and, from both parties' perspective, given that the evidence had been fully explored, it would have been in the interests of justice to extend time and determine the complaints on their merits.

122. We turn therefore to the complaints of direct discrimination. We have made detailed findings of fact, which to a significant extent determine the complaints, either because the events did not happen as the Claimant alleges, or because we have found on the evidence that the reason was not race. We have borne in mind throughout that there is rarely overt evidence of discrimination. It is often much more intangible. We have taken care to think carefully about the burden of proof and whether, with that in mind, there were facts from which discrimination could be inferred. We have also taken into account that there were some concerns about the culture in the team; that some former team members had been found to have used discriminatory language; that FP's complaints of discrimination had in some respects been upheld; the under-representation of black colleagues, particularly at management level; the offensive WhatsApp message; and Ms Campbell's stated view that she could not rule out that race had played a part in the Claimant's treatment. However, even taking into account those matters and applying the careful scrutiny required, we found that there were no facts from which direct discrimination could be inferred. The Claimant did not shift the burden of proof in respect of any allegation of direct discrimination and, for the most part, in any event we made clear findings of fact on the evidence about the reasons for people's decisions and actions.

123. The numbered complaints of direct discrimination therefore do not succeed as follows:

    123.1 Neither Mr Butler nor Ms Harrison spread any such rumours. There were no such rumours spread about the Claimant. The treatment complained of did not happen.

123.2 AW did not repeat any such rumours. There were no such rumours. The treatment complained of did not happen.

123.3 Mr Blainey and Mr Butler did not fail to give the Claimant the support and training he needed to meet the required work standard. The treatment complained of did not happen. In any event, the Tribunal was quite satisfied that Mr Blainey and Mr Butler did not treat the Claimant any differently from the way they treated or would have treated his white colleagues. The Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.4 Mr Burke was promoted by Ms Harrison and Mr Baillie. The Claimant was not given an opportunity to apply for the role. However, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment. The Claimant was not more experienced than Mr Burke. Nobody else had the opportunity to apply for the role. This applied equally to the Claimant and his white RM colleagues. A number of people were unhappy.

123.5 Mr Butler did put the Claimant on a performance plan. This was not with the aim of dismissing him but with the aim of supporting him to improve his performance. The Tribunal found on the facts that this had nothing to do with the Claimant's race. In any event, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.6 Mr Butler did make reports to HR in January 2020. They were not in the terms alleged by the Claimant but as set out above. Mr Butler did not believe any of the matters he reported to be untrue. On the contrary, he was reporting what he had been told by the Claimant and others and what he had himself observed. He did so because he was seeking advice about how to handle matters of concern. The Tribunal found on the facts that this had nothing to do with the Claimant's race. In any event, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.7 Mr McMullen did not make a report to HR. Mr Butler reported to HR what Mr McMullen had told him. He did so because he was seeking advice about how to handle matters of concern. The Tribunal found on the facts that this had nothing to do with the Claimant's race. In any event, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.8 Mr Butler did not deny the Claimant the opportunity to work on commercial cases. He was supportive of the Claimant's aspiration. Mr Burke decided on the three people to whom the 20 overflow cases should be allocated in December 2019/January 2020. He did not choose the Claimant because the Claimant had the biggest pipeline. This had nothing to do with his race. The Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.9 Mr Hastings did post the offensive video to the WhatsApp group. He did so unaware that it contained the racially offensive slur at the end. Posting the video had nothing to do with the Claimant's race. It was posted, mistakenly, to the entire WhatsApp group. We deal with this as a complaint of harassment below.

123.10 Ms Harrison did describe the Claimant as unhelpful. There is nothing to suggest that she did not believe this to be true. On the face of it his email

was unhelpful. The Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.11 Mr Butler did not reprimand the Claimant for being unhelpful but he did tell the Claimant not to send such an email again. He did so because he considered the Claimant's email had been abrupt and unhelpful and he wanted to ensure a professional standard of communication in future. The Tribunal found on the facts that had nothing to do with the Claimant's race. In any event, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment.

123.12 Mr Burke was promoted again by Mr Baillie. The Claimant was not given an opportunity to apply for the role. However, the Claimant did not prove facts from which the Tribunal could infer less favourable treatment. The Claimant was not an obvious candidate for the role. Nobody else had the opportunity to apply for the role. This applied equally to the Claimant and his white RM colleagues. A number of people were unhappy.

124. That brings us to the complaint of harassment related to race. The Tribunal had no hesitation in finding that viewing the WhatsApp video posted by Mr Hastings was unwanted conduct on the Claimant's part. It is irrelevant that he is not of Asian or Pakistani ethnicity. As it happens, he has been subjected to the very same slur himself, but that was not necessary to our conclusion that the conduct was unwanted. We accepted his evidence that it was.

125. The conduct related to race: the slur is a racial one.

126. For the reasons explained above, the Tribunal accepted Mr Hastings's evidence that he had not viewed the video when he posted it and was unaware of the racial slur at the end. We are satisfied in those circumstances that the conduct did not have the *purpose* of violating the Claimant's dignity or creating the proscribed environment.

127. The issue for the Tribunal was therefore whether the posting of the video had the *effect* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

128. The Tribunal found that it did not. The Claimant was clearly and rightly offended and upset by the video. However, we found that this did not meet the higher threshold of violating his dignity. He did not explain the impact on him in his witness statement. In his oral evidence he said that he was "upset". He referred to being subjected to the slur himself at school and said that he took issue because the slur was offensive to all minority ethnic people. The Tribunal noted that he left the WhatsApp group at the time but did not take any further action until he submitted his grievance. All of the evidence pointed to the Claimant being offended and upset, but not to the more serious and marked effect of having his dignity violated by the video.

129. We therefore considered whether the video had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We found that it did not. The Claimant was rightly upset by the video and he was concerned that none of his colleagues who were in the WhatsApp

group had called it out before he did so about 6 hours after it was posted. However, the Claimant and the Tribunal did not have any evidence about whether any of them had watched it during that period. We noted that it was a Sunday. The Claimant had a screenshot showing that his colleagues had seen his comment, but nothing about whether they saw the video itself. However, while the Claimant was upset for those reasons, it did not seem to us that he considered that the offensive video posted to the WhatsApp group created an intimidating, hostile, degrading, humiliating or offensive environment for him overall. He was upset by the one-off incident and his assumption that his colleagues had seen it and not called it out, but he did not suggest a more long-lasting impact. In any event, the Tribunal considered that it was not reasonable for it to have that effect. We did not underestimate the offensiveness of the video. It is highly offensive. However, the question is whether the one-off posting of this highly offensive video in a social WhatsApp group of RMs had more long-lasting effects, so as to give rise to a hostile or offensive environment. Nobody criticised the video (we do not know if they viewed it) but certainly nobody liked or commented on it, or showed any approval of it. The Claimant identified it as “totally inappropriate.” As soon as Mr Hastings realised what he had done he sent the Claimant a personal apology and removed himself from the WhatsApp group. The Claimant did not suggest that he had been subject to any other racist or discriminatory language (apart from seeing the exchange the subject of AW’s disciplinary proceedings). The Claimant did not raise any immediate complaint or concern, but he did include this in his subsequent grievance. Taking all those matters into account, the Tribunal did not consider that it was objectively reasonable to regard this conduct as creating a hostile or offensive environment. It caused offence, but it did not cause an offensive environment.

_____

Employment Judge Davies
27 May 2021