EMPLOYMENT TRIBUNALS

Claimant: **Mr E Mbanacele**

Respondent: **Amazon UK Services Ltd**

Heard at: **Cardiff and by CVP** **On: 12, 13, 15, 16, 19, 20, 21 and 22 July 2021**

Before: **Employment Judge S Jenkins**
Members: **Mr A Fryer**
Mrs M Humphries

Representation:
Claimant: In person
Respondent: Mr M Salter (Counsel)

JUDGMENT having been sent to the parties on 24 July 2021, and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's claims of constructive unfair dismissal, direct discrimination on the ground of race, and harassment on the ground of race. The Claimant had in fact also brought a claim of disability discrimination, but that had been dismissed at an earlier hearing due to having been brought outside the required time limit.

2. The hearing took place on a hybrid basis, with the Judge, the Claimant and the Respondent's representative being present in the hearing room, and the non-legal members participating by video. All the Respondent's witnesses, except one, gave their evidence in the hearing room, the other gave evidence by video.

3. We heard evidence from the Claimant on his own behalf, and from Neil Stanley, Team Lead; Kareem Edwards, formerly Pathways Operations Manager and now Senior Operations Manager; Ian Whalley, Senior Operations Manager; Christopher Bailey, formerly Area Manager and now Operations Manager; Scott Pickin, formerly Area Manager and now Operations Manager; Shara Wood, Associate; Brian Cottle, Associate; Paphetsorn Cottle, Associate; and Joshua Nash, formerly Area Manager; on behalf of the Respondent.

4. The hearing had originally been listed for nine days, with the first day due to be spent reading, the Claimant then due to be cross-examined for two days, a gap of a day, and then three to three and a half days for cross-examination of the Respondent's witnesses. In the event, following the reading day it became clear that we did not need to spend that long on cross-examination, but unfortunately not all the Respondent's witnesses could be brought forward. The Claimant was therefore cross-examined over one day, and after a gap of one day, the Respondent's witnesses were cross-examined over parts of the subsequent three and a half days, and not in the originally planned order. We then received the parties' submissions, deliberated, and were in a position to deliver our Judgment on the eighth day.

5. In terms of documentation, we considered the documents in the hearing bundle, containing 418 pages, to which our attention was drawn. We also took into account the parties written representations.

Issues

6. The issues had been previously clarified and agreed at a Preliminary Hearing, coincidentally before the Judge in this case, on 20 August 2020. They were as follows;

Harassment

1. *Did any of the following alleged events/conduct take place:*

1.1 *on 27 February 2017, Neil Stanley reported the Claimant for poor productivity whilst others (including Luke Squibb and himself) who were misusing IT equipment were not reported in February 2017, and whilst Garry Davies failed to take action against Stuart Davies who was witnessed romancing a woman on CCTV;*

1.2 *in February 2017, Christopher Bailey failed to ask Jude Welgamage Don and Hassan Bangura about people misusing IT equipment when interviewing them in connection with the Claimant's grievance;*

1.3 *in February 2017, Christopher Bailey failed to ask Jidette Okundji about Neil Stanley showing her the Claimant's personal information namely a photograph*

of his car to other employees when interviewing her in connection with his grievance;

1.4 *in February 2017, Christopher Bailey failed to discipline Neil Stanley for failing in his duties when he chose to report the Claimant for productivity when others who were breaking company policy regarding misusing IT equipment were not reported;*

1.5 *Deliberately left blank;*

1.6 *on 2 August 2017, Joshua Nash failed to accept the Claimant's mitigation in relation to two no call no show allegations at investigation stage, but the same point was accepted when made by a colleague Sarah Edwards (1st allegation) and Edgar Smets/Chris Bailey (2nd allegation);*

1.7 *on 30 July 2017, Shara Wood and Brian Cottle made malicious allegations of sexual harassment against the Claimant;*

1.8 *on or around 30 July 2017, Shara Wood and Brian Cottle made malicious allegations of violent and threatening behaviour against the Claimant; and*

1.9 *in the 3rd week of December 2017, Scot Pickin failed to interview Hassan Bangura regarding his knowledge of the allegations of sexual harassment against the Claimant.*

2. *If so, was the conduct unwanted?*

3. *If so, was the conduct related to the Claimant's race?*

4. *If so, did the conduct have the purpose or effect of: violating the Claimant's dignity; or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.*

Direct discrimination (s.13 Equality Act 2010)

5. *Did the Respondent treat the Claimant less favourably than a comparator as described in paragraphs 1.1 to 1.9 above?*

6. *If so, was the less favourable treatment because of his race?*

Constructive dismissal

7. *What was the effective date of termination 10 or 20 December 2017?*

8. *Did the Respondent fundamentally breach the Claimant's contract so as to entitle him to resign and claim constructive dismissal?*

9. *Implied term relied upon: mutual trust and confidence, namely:*

9.1 *on 27 February 2017, Neil Stanley reported the Claimant for poor productivity whilst others (including Luke Squibb and himself) who were misusing IT equipment were not reported;*

9.2 *on 27 February 2017, Neil Stanley told the Claimant he could not get a job in the learning and development department because of his disability;*

9.3 *in February 2017 Neil Stanley shared the Claimant's personal information, namely a photograph of his car with other employees;*

9.4 *in February 2017, Christopher Bailey failed to discipline Neil Stanley for showing other employees the Claimant's personal information namely photographs of the car;*

9.5 *on February 2017 Christopher Bailey stopped the Claimant working overtime;*

9.6 *in March 2017 Shara Wood showed the Claimant's personal data namely the contents of his appeal against the grievance to her friends;*

9.7 *on 29 March 2017, Christopher Bailey dealt with the grievance in a biased, unfair and unjust way as an academic exercise;*

9.8 *between February and December 2017 the Respondent failed to provide a conducive working environment for the Claimant where he could give his full time and attention to his job;*

9.9 *between February and December 2017 the Respondent failed to maintain an accurate record of the Claimant's Productivity Points, which resulted in him losing employment opportunities for higher job titles;*

9.10 *between February and December 2017 the Claimant's profile was dented making him to lose career prospects, which the Pathways Operations Manager, Kareem Edwards and Human Resources Sara Hill acknowledged and rectified by removing all sanctions, restrictions and points that were placed on the Claimant due to productivity issues;*

9.11 *on June/July 2017 the Respondent failed to see the malicious agenda of the group of five including Shara Wood and Brian Cottle;*

9.12 *on 2 August 2017, Joshua Nash failed to accept the Claimant's mitigation in relation to two no call no show allegations at investigation stage and proceeded to disciplinary;*

9.13 *on 14 November 2017 Ian Whalley failed to acknowledge that Joshua Nash failed in his duties in investigating the no call no show allegations;*

9.14 *on 29 March 2017 Christopher Bailey, on 14 November 2017 Ian Whalley, and on 20 December 2017 Scott Pickin, failed to acknowledge that Shara Wood had showed the Claimant's personal data namely the contents of his appeal against the grievance to her friends;*

9.15 *on 26 September 2017 Kareem Edwards and on 14 November 2017 Ian Whalley failed to acknowledge that Christopher Bailey and Joshua Nash were friends with Shara Wood and Brian Cottle;*

9.16 *on 26 September 2017 Kareem Edwards, on 14 November 2017 Ian Whalley, and on 20 December 2017 Scott Pickin, failed to see acknowledge the Claimant had been subjected to racial and disability discrimination;*

9.17 *on 14 November 2017, Ian Whalley dealt with the grievance in a biased, unfair and unjust way, as an academic exercise; and*

9.18 *on 20 December 2017, Scot Pickin dealt with the grievance in a biased, unfair and unjust way, as an academic exercise.*

10. *Did the Claimant resign in response to the above breaches?*

11. *Did the Claimant delay too long in resigning?*

Jurisdiction

12. *When did the acts/omissions by the Respondent about which the Claimant complains occur?*

13. *Were any of the acts/omissions conduct extending over a period? If so, when did that period end?*

14. *If any of the acts/omissions took place or the period of conduct ended three months or more before the Tribunal claim was presented, why is it just and equitable for the Tribunal to extend the time limit for presenting the claim?*

Remedy

Basic award

15. *When was the effective date of termination?*

16. *What was the length of the Claimant's period of continuous service at the effective date of termination?*

17. *What was a week's pay for the Claimant?*

18. *Was the conduct of the Claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?*

Compensatory award

19. *What loss has the Claimant sustained in consequence of the dismissal, so far as that loss is attributable to the Respondent? This gives rise to the following sub-issues:*

19.1.1 *Has the Claimant taken reasonable steps to mitigate his loss?*

19.1.2 *What is the chance that the Claimant would have been fairly dismissed in any event had a different procedure been followed?*

20. *Did the Claimant cause or contribute to his dismissal? If so, to what extent should the compensatory award be reduced?*

21. *What was 52 weeks' pay for the Claimant?*

Compensation for discrimination

22. *What financial loss did any discrimination cause the Claimant to suffer?*

What award if any should be made for injury to feelings?

Although those issues included matters relating to remedy, it had been agreed at the Preliminary Hearing that this hearing would deal with liability only, with a subsequent Remedy Hearing being listed if the Claimant's claims succeeded.

The Law

7. The Claimant's discrimination claims involved the same acts or omissions being contended to amount both to direct race discrimination and to harassment relating to race. Direct discrimination is dealt with under Section 13 of the Equality Act 2010 ("Act"), which provides that a person discriminates against another if, because of a protected characteristic, in this case race, they treat the other person less favourably than they treat or would treat others. That therefore involves a comparison between the person claiming that they have been treated less favourably and an actual or hypothetical comparator. In that regard, Section 23 of the Act notes that, for the purposes of the comparison, there must be no material difference between the circumstances relating to each case. In this case the Claimant did not cite any named comparators, but relied on comparisons with hypothetical white employees, the Claimant being a black person with African ethnic or national origins.

8. Harassment claims are dealt with under Section 26 of the Act. That provides that a person harasses another where they engage in unwanted conduct related to a relevant protected characteristic i.e. in this case race, and that conduct has the purpose or effect of violating the other person's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Section 26(4) then provides that, in deciding whether any unwanted conduct has the required effect, each of the following must be taken into account; the Claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have had that effect.

9. With regard to the Claimant's discrimination claims, the burden of proof was also relevant. Section 136 of the Act provided that we would first need to consider whether there were any facts from which we could conclude, in the absence of a non-discriminatory explanation from the Respondent, that acts of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation. In that regard, the appellate courts have regularly made clear, for example the Court of Appeal in Khan -v- The Home Office [2018] EWCA Civ 578, and the Employment Appeal Tribunal in Chief Constable of Kent Constabulary -v- Bowler (UKEAT/0214/16), that Tribunals should avoid a mechanistic approach to the drawing of inferences.

10. We were also conscious that the Court of Appeal, in Madarassy -v- Nomura International PLC [2007] ICR 867, had noted that the bare facts of a difference in status or a difference in treatment only indicate a possibility of discrimination, and are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, a respondent has committed an act of unlawful discrimination.

11. With regard to whether the claims were brought within the required time period, Section 123 of the Act provides that claims are to be brought, or, rather more practically, that contact with ACAS for the purposes of early conciliation must be made, within the period of three months starting with the date of the act complained of, or if we were satisfied that the conduct complained of extended over a period, within three months of the end of that period. As contact with ACAS was made on 20 February 2018, early conciliation ended on 20 March 2018, and the claim was brought on 26 April 2018, that meant that any act said to have taken place prior to 30 November 2017 may have been out of time. If we decided that it had been brought out of time, we would need to consider whether it would be just and equitable to extend time.

12. With regard to constructive dismissal, the leading case remains the Court of Appeal decision of Western Excavating ECC Limited -v- Sharp [1978] ICR 221, in which it was established that in order for there to have been a constructive dismissal there must have been a fundamental or repudiatory breach of contract on the part of the employer, the employee must have resigned in response to that breach, and the employee must not have delayed too long before resigning or otherwise have affirmed the contract. If we found that there had been a constructive dismissal we would need to consider whether such a dismissal had nevertheless been fair.

13. In this case the Claimant contended that there had been a breach of the implied term of mutual trust and confidence arising from a number of asserted acts or omissions on the part of the Respondent ranging from

February 2017 to November 2017. We observed that the last act listed in the List of Issues occurred on 20 December 2017, that is after the Claimant's resignation on 10 December 2017, such that he could not have resigned in response to it.

14. Another preliminary issue which we record is that the Claimant contended, initially verbally on two occasions and then in his written closing submissions, that the Respondent had acted fraudulently in redacting documents and therefore that its case should be struck out. Several documents in the bundle had been redacted to anonymise the names of certain individuals, including the Claimant's original grievance letter of 27 February 2017. The Claimant had had the bundle in his possession for some time and had indeed referred to documents within it in his written statement prepared in September 2020 and had raised no concerns about it. However, at the beginning of the fourth day of the hearing, the Claimant produced a clean copy of his grievance letter, and contended that the redactions showed serious fraudulent behaviour and therefore should be struck out.

15. The Judge at the time explained that whilst there probably had been little need for redactions to have been made, as the persons whose names had been redacted were involved in the events, and their identities were obvious from the content of the documents in any event, which was certainly the case with his grievance letter, that had in all probability involved only been over-zealous work by the Respondent's representative, did not involve anything fraudulent, and did not impact on the fairness of the hearing. That remained our view following our consideration of the Claimant's submissions.

Findings

16. Before setting out our findings of fact, we made a preliminary observation about the evidence put before us. In terms of the witnesses, we found the evidence of the Respondent's witnesses generally to have been delivered openly and straightforwardly, with much of it finding corroboration in the contemporaneous documentation, and we therefore largely preferred the evidence of those witnesses. Although we formed that opinion, that did not mean that we considered that the Claimant was untruthful in the way that he gave his evidence. We considered that he genuinely believed that matters had developed in the way he advanced them, and that he had been badly treated by his managers and colleagues. However, we found no basis for that belief, and felt that the Claimant was someone who was unwilling to accept that matters were not as he perceived them, even when it would have been apparent to a neutral observer that that was the case.

17. Having outlined that approach to our consideration of the evidence, our findings of fact were as follows.

18. The Claimant commenced employment with the Respondent, the well-known online retailer, in September 2013, as an Associate at its Fulfillment Centre in Swansea. The Claimant is black and is of African ethnic background. Whilst we were not provided with any specific figures, it was not disputed that the Respondent operates quite a diverse workforce at its Swansea site.

19. Relevant background to the Claimant's claims in terms of the Respondent's policies is that the Respondent had an Electronic Communications Policy which allowed its systems to be utilised for personal use in limited circumstances, provided that the use was minimal and took place outside normal working hours or during breaks, and provided that the use did not interfere with the persons work commitments.

20. The Respondent also operates a Performance Improvement Policy which manages the productivity of its hourly paid staff. This provides for a six-stage monitoring process where targets are not met, starting at informal discussion and informal counselling, before moving to a first formal performance meeting, following which a first formal warning would be issued. There would then be two further formal performance meetings, following which a second and then a final formal warning would be issued before the final stage, which would lead to dismissal. The policy also provides that any employee subject to a formal warning would not be eligible for a pay review or promotion until 90 days after the warning expired.

21. The Respondent's witnesses, specifically Mr Stanley and Mr Nash, confirmed that the Performance Improvement Policy would be regularly applied in relation to the Respondent's employees, with performance management meetings taking place very regularly, certainly every week, such that at all times there were people undergoing the various stages of the policy.

22. The Respondent also operated a system called "No Call No Show", or "NCNS", which related to individuals not attending work and not notifying the Respondent of their absence.

23. Prior to the events of 2017 which gave rise to the Claimant's claims, the only matter which we needed to record was that the Claimant had suffered with a knee problem which affected his mobility. That led to restrictions on his working hours being put in place, at his request, in October 2016, such that he only worked 32 hours per week. Whilst it was not mentioned in the evidence of any witness, there was, in the bundle, a note of a meeting on 3

April 2017, between the Claimant and Mr Nash, in which it was agreed, again at the Claimant's request, that he would revert to his core hours.

24. By the start of 2017, Mr Stanley had become the Team Lead of the team in which the Claimant worked. That was in the Outbound area of the business, with the Claimant being part of a team responsible for packing and sending goods to customers.

25. The events which gave rise to the Claimant's claims commenced at the end of February 2017, although one event to which we refer further below took place in January of that year.

26. The amount of work undertaken by Associates is tracked electronically and targets are in place, which vary depending on the average workflow at a particular time, and, on 27 February 2017, Mr Stanley had an informal conversation with the Claimant about his productivity. Mr Stanley confirmed that he has these conversations with Associates in his team on a very regular basis, and on this occasion Mr Stanley told the Claimant that if there was no improvement in his productivity then formal action would be taken, that is the third stage of the Respondent's Performance Improvement Policy.

27. The Claimant did not dispute that there were issues with his productivity, but reacted to his conversation with Mr Stanley by submitting a grievance that day. In this, the Claimant complained about bullying, discrimination and intimidation by Mr Stanley, and specifically that Mr Stanley had told him that he was not qualified to apply for an internal, learning and development, position because of his disability, that he was sidelined by Mr Stanley in favour of other employees, that Mr Stanley and others accessed football scores and betting websites during work hours, and that Mr Stanley had taken a photograph of the Claimant's car and had shown it to other employees.

28. Mr Bailey was appointed to consider the grievance, and he met the Claimant on 6 March 2017. The content of the Claimant's grievance letter was discussed. When the Claimant raised the issue about the photograph of his car, which he explained had arisen when Security had required the car to be moved, Mr Bailey explained that he had been informed by Security that the Claimant's car had been double-parked and needed to be moved, and that he had asked Mr Stanley to speak to the Claimant about it. When asked by Mr Bailey whether any other employees would have observed the incidents he had raised, the Claimant gave the names of four employees, two of whom were white, with the other two being of different minority ethnic backgrounds.

29. Mr Bailey then spoke to the two white colleagues identified as possible corroborative witnesses by the Claimant on 7 March 2017; both confirmed that they had not seen anything untoward, and had not seen any favouritism. Mr Bailey explained in his evidence, which was not challenged and which we therefore accepted, that the other two potential witnesses had been absent due to illness and annual leave and therefore he had not interviewed them.

30. Mr Bailey then met Mr Stanley on 8 March 2017. Mr Stanley denied treating the Claimant unfavourably, and noted that his productivity had been low and that he had spoken to him about that as he would anyone else. Mr Stanley denied telling the Claimant that he could not do the alternative learning and development role because of his disability, but accepted that he had said to the Claimant that the role would not be suitable for him due to the occupational health restrictions on his working hours. Mr Stanley accepted that he used his computer occasionally to check football scores but not for any other reason, and that he thought another employee had done that as well.

31. Following the meeting, Mr Bailey made a request of the Respondent's Information Security team to check Mr Stanley's computer, and that of the other employee he had named, and the response was that the usage was explicitly allowed by the Respondent's policies. Mr Bailey then wrote to the Claimant on 29 March 2017 with his decision on the grievance, which was that none of it was upheld. He concluded his letter by advising the Claimant of his right to appeal his decision, which the Claimant did by an email dated 3 April 2017. However, on 4 May 2017 the Claimant wrote to withdraw his appeal, stating that since he had launched his grievance he was being monitored and audited and that criminal allegations had been launched against him.

32. The Claimant's reference to being audited and monitored related to the application of the Respondent's Performance Improvement Policy. On 17 April 2017, Mr Nash had held an informal counselling meeting, i.e. stage 2 meeting, with the Claimant in relation to his performance not reaching the required target. Mr Nash then held the first formal performance meeting, i.e. stage 3, with the Claimant under the Policy on 4 May 2017, following which he issued a first formal warning.

33. The Claimant's reference to criminal allegations having been launched against him was, we presumed, related to the allegation that he had revved his car engine at Mrs Cottle when she was passing his car and had done the same to others. There was no documentary evidence before us about this other than an investigation report produced by Mr Nash on 30 July 2017, so it was not possible to be precise about the dates of the alleged revving incidents. Mr Nash's report did however refer to it having happened

on multiple occasions. He concluded that there was not enough evidence to support the claims, and that since the opening of the investigation no-one had made any further complaints about the Claimant. That suggested to us that the allegations were the ones referred to by the Claimant on 4 May 2017, particularly as the Claimant had been absent due to sickness between 1 June and 3 July.

34. On 2 August 2017, Mr Nash met with the Claimant to address two "No Call No Shows" that had arisen, one on 23 February 2017 and one on 16 July. With regard to the former, it was asserted that the Claimant had been put down for overtime but had not worked, and the Claimant explained that, at the time, he had been subject to the work restrictions on his hours and had been informed by Mr Bailey, his Area Manager at the time, not to do overtime. With regard to the latter, it was asserted by the Respondent, and was accepted by the Claimant, that he had been in work on Friday 14 July 2017 and had applied to take Sunday 16 July as a day off on the Respondent's electronic system. As no manager was present, the request was not approved in advance as it should have been, but the Claimant did not attend work on 16 July, assuming that it would be approved, and it was retrospectively approved the following week, although possibly by error. He was then paid, again possibly by error, for the shift a few weeks later.

35. Mr Nash prepared an investigative report on 13 August 2017. In that, he concluded that there were grounds to indicate that the Claimant had committed the two "No Call No Shows", and that matters should proceed to a disciplinary hearing. Ultimately however, the letter notifying the Claimant of the disciplinary hearing confirmed that only the second "No Call No Show" would be considered.

36. The disciplinary hearing took place on 31 August 2017, with one of the Respondent's HR Managers, Mr Smets, acting as the decision maker. In the meeting the Claimant's representative pointed out that the Claimant had been paid for the day in question, and that it would therefore be inconsistent to penalise him in respect of the day. Mr Smets concluded the meeting by noting that the Claimant should not have been paid for the day and that there should have been a "No Call No Show", but that he would not be taking any further action. He confirmed that in a letter of the same date, noting that he had decided not to take any further disciplinary action or issue a disciplinary warning as the Claimant had been paid for the day in question.

37. In the meantime, on 13 August 2017, Mr Nash had held a further meeting with the Claimant in relation to his productivity and a further first formal warning, i.e. stage 3 warning, was issued and confirmed in a letter the following day. Mr Nash, in his evidence, confirmed that he could have issued a second warning at that stage, but had not because the Claimant

had moved to a different area and he had thought it would be fairer to start again.

38. At around this time, there was no clarity as to precisely when as the only documentary reference to it arose retrospectively and none of the witnesses could recall the precise date, an incident arose where the Claimant allegedly made an inappropriate comment to a female employee. That employee reported it to Miss Wood who was, at the time temporarily undertaking the role of Operational Admin Assistant, but told her that she did not want to take the matter any further. The employee also told Mr Cottle about the incident, as he was, at that time, giving her a lift to and from work. Miss Wood moved the Claimant and the employee into different areas, and told her Manager, Mr Nash about the incident. He spoke to the employee, who repeated her wish that no action be taken, and he therefore did nothing further.

39. On 31 August 2017, the Claimant then sent a further email to various of the Respondent's managers with the heading "*Request to reopen my initial grievance and reporting my Area Manager for harassment/discrimination using Company protocol*". In this, he referred to being audited and monitored and to criminal allegations having been made against him.

40. As the focus of the Claimant's email was on Mr Nash and not Mr Stanley, the focus of his initial grievance, it was dealt with as a fresh grievance, and Mr Edwards was appointed to consider it. The Claimant was invited to a grievance meeting on 8 September 2017.

41. In the meeting, Mr Edwards confirmed that he would only look at the new allegations raised by the Claimant, as he had had the opportunity to appeal the outcome of the first grievance and had withdrawn it. In the meeting, the Claimant raised concerns about being warned about his under-performance, although he appeared to accept that he was in fact under-performing. He also raised concerns about being taken through disciplinary processes for the "No Call No Show" issues, and that he felt other employees had made allegations about him maliciously.

42. Mr Edwards carried out further investigations and then met with the Claimant again on 20 September 2017 to inform him of the outcome, which he confirmed in a letter dated 26 September. He confirmed that his view was that the performance monitoring actions taken were appropriate, as had been the decision to take the "No Call No Show" issues to a disciplinary stage, and that neither amounted to discrimination or harassment. He also confirmed that he felt that the investigation into issues raised by the employees, which led to no further action being taken, had not amounted to discrimination or harassment, and that the Claimant had not provided evidence to support his allegation that Mr Nash's underlying treatment of

him constituted discrimination or harassment. He suggested that an informal mediation between the Claimant and Mr Nash would help, but the Claimant ultimately did not pursue that. Mr Edwards concluded his letter by advising the Claimant of his ability to appeal his decision and that any appeal should be sent to Mr Whalley.

43. The Claimant did lodge an appeal with Mr Whalley by letter dated 2 October 2017. In that, the Claimant repeated his concern that Mr Nash had handled the "No Call No Shows" incidents, and the issues raised by other employees, inappropriately. In response Mr Whalley wrote to the Claimant on 5 October 2017, pointing out that the letter did not state grounds for appeal, and giving him the option of rewriting the appeal setting out the grounds, or of withdrawing the appeal and submitting another grievance, or withdrawing the appeal and making no further submission. That led to a further letter from the Claimant to Mr Whalley on 7 October 2017, which set out the Claimant's grounds of appeal in six bullet points.

44. The appeal hearing took place on 18 October 2017, and the Claimant and Mr Whalley discussed the appeal grounds. Following the meeting, Mr Whalley spoke to Mr Edwards to clarify the investigation he had undertaken and the decisions he had reached. Mr Whalley then wrote to the Claimant on 14 November 2017 with his decision. That was, in relation to the six grounds of appeal, that matters had been handled correctly and that there was no evidence to support any of the Claimant's contentions relating to discrimination and harassment. He therefore upheld Mr Edwards' decision.

45. Following that, the Claimant sent a letter to the Respondent dated 10 December 2017 with the heading "*Resignation Constructive Dismissal*", noting that he was resigning with immediate effect. He referred in three lettered sections to: (a) a fundamental breach of contract through having been unduly subjected to undue, disproportionate, harsh and unfair treatment; (b) breach of trust and confidence and (c) last straw doctrine, with the contents of the three sections covering the various matters that the Claimant had raised in his grievances. He also raised a concern that Miss Wood had shared his private and confidential information, and that he had been bullied.

46. The Respondent considered it appropriate to treat the Claimant's resignation letter as a formal grievance and to give him the opportunity to attend a formal grievance investigation meeting. Mr Pickin therefore wrote to him on 11 December 2017, inviting him to a meeting on 19 December, which was ultimately brought forward to 14 December. After the meeting Mr Pickin spoke with the employee who had claimed that the Claimant had made an inappropriate comment, and with Mr Cottle and Miss Wood, on 19 December, and then met the Claimant again on 20 December to inform him of his conclusions, which he confirmed in a letter dated 8 January 2018. Mr

Pickin's conclusions were that the points raised by the Claimant in his resignation letter had been investigated previously, and that the Claimant had not provided any further evidence or information of any additional allegations. He also concluded that there had been no collusion over the complaint raised about the inappropriate comment. None of the points raised by the Claimant were therefore upheld. Mr Pickin indicated that the Claimant had a right to appeal against his decision but the Claimant did not do so.

Conclusions

47. Applying our findings to the issues identified at the outset, and taking into account the relevant applicable law, our conclusions were as follows. For ease of reference we used the numbering from the List of Issues.

Issue 1.1

On 27 February 2017, Neil Stanley reported the Claimant for poor productivity whilst others (including Luke Squibb and himself) who were misusing IT equipment were not reported in February 2017, and whilst Garry Davies failed to take action against Stuart Davies who was witnessed romancing a woman on CCTV.

48. As a matter of fact Mr Stanley did report the Claimant for poor productivity on 27 February 2017, or, more accurately, informed the Claimant that if his performance did not improve by the following day then the formal performance management processes would be implemented. Also, as a matter of fact, the allegation that Mr Stanley and another employee had misused IT equipment was made by the Claimant himself on that day in the form of his grievance letter. With regard to the third element of this issue, the allegation that action had not been taken against another employee who was witnessed romancing a woman on CCTV, that was not actually mentioned by the Claimant in his grievance letter, although it was commented upon in his grievance meeting with Mr Bailey.

49. We saw nothing however which led us to conclude that any element of direct race discrimination or racial harassment had occurred in respect of these issues. Whilst the threat that formal performance management processes were to be implemented may have been viewed as unwanted conduct, there was nothing to indicate that it was related to the Claimant's race. The Respondent's witnesses were consistent in their confirmation that performance management processes were applied very regularly to all staff who were found not to be reaching the required standards, and the Claimant himself accepted that he had been underperforming. We considered that there was nothing inappropriate about the application of the Respondent's management processes and certainly nothing which amounted to unwanted conduct relating to the Claimant's race or to less

favourable treatment on the ground of his race in comparison with other employees.

50. With regard to the comparative element of this issue we were satisfied that the Respondent had investigated the Claimant's allegation of misuse of IT equipment and had reasonably concluded that no breach of its policy had arisen.

51. Very little evidence was put before us about the other matter, but Mr Stanley's evidence, which was not challenged, was that had there been an issue which had impacted on the relevant employee's performance against targets it would have been picked up and addressed, and we saw no reason to doubt that. Again therefore, we found nothing to lead us to a conclusion that any act of direct race discrimination or racial harassment had arisen.

Issue 1.2

In February 2017, Christopher Bailey failed to ask Jude Welgamage Don and Hassan Bangura about people misusing IT equipment when interviewing them in connection with the Claimant's grievance.

52. As a matter of fact, Mr Bailey did not ask the two named employees about the misuse of IT allegation. He explained, and was not challenged on it, that the two employees had been absent from work at the time of his investigation. He also explained that Mr Stanley had accepted that he occasionally used his work computer for non-work related matters, and that he had then proceeded to investigate that via the Respondent's Information Security Team. We were satisfied that Mr Bailey's actions were appropriate in the circumstances and did not involve any element of direct race discrimination or racial harassment.

Issue 1.3

In February 2017, Christopher Bailey failed to ask Jidette Okundji about Neil Stanley showing her the Claimant's personal information namely a photograph of his car to other employees when interviewing her in connection with his grievance.

53. Similarly, Mr Bailey accepted that he did not interview the named employee about Mr Stanley showing her a photograph of the Claimant's car. He explained that Mr Stanley denied ever taking a photo of the Claimant's car and that he had thought he had addressed the point with the Claimant during the grievance meeting. We also bore in mind the evidence, which we accepted, of Mr Stanley and Mr Bailey that the only reason to contact the Claimant about his car was because the Respondent's Security Team required it to be moved and that the owner of a car was identified by reference to a parking permit in the car and not by the number plate. Again

therefore we did not consider that there was any element of direct race discrimination or racial harassment in this regard.

Issue 1.4

In February 2017, Christopher Bailey failed to discipline Neil Stanley for failing in his duties when he chose to report the Claimant for productivity when others who were breaking company policy regarding misusing IT equipment were not reported.

54. We considered that this was really an extension of issue 1.1 and was dealt with above. Mr Bailey investigated the Claimant's allegation against Mr Stanley and concluded that there had been no breach of the Respondent's policies. There was therefore no reason for him to take disciplinary action against Mr Stanley. However, even if there had been a failure as asserted, it was difficult to see how it could have amounted to direct race discrimination or racial harassment in any event, as it would not have directly involved less favourable treatment of the Claimant or any unwanted conduct in relation to him. However, to repeat, in the particular circumstances we found nothing from which we could conclude that direct race discrimination or racial harassment had occurred.

Issue 1.6

On 2 August 2017, Joshua Nash failed to accept the Claimant's mitigation in relation to two no call no show allegations at investigation stage, but the same point was accepted when made by a colleague Sarah Edwards (1st allegation) and Edgar Smets/Chris Bailey (2nd allegation).

55. Again, as a matter of fact, Mr Nash did not accept the Claimant's replies to the two "No Call No Shows" allegations at the investigative stage, although the notes of Mr Nash's meeting with Mr Edwards in relation to the Claimant's appeal confirmed that he ultimately decided not to progress the first allegation to a disciplinary hearing. However, it was noteworthy that neither Mr Smets, at the disciplinary hearing, nor Mr Edwards, at the grievance hearing, concluded that Mr Nash had been wrong to progress the matter to a disciplinary hearing. Both concluded that there had in fact been a "No Call No Show" on 16 July 2017, and that it had been the Claimant's responsibility to confirm that he had permission to take leave before taking it. It was only the fact that the Claimant had subsequently in error received payment for the shift in question which prevented disciplinary action being taken.

56. In any event, we saw nothing from which we could conclude that Mr Nash had been motivated to progress the issue to the disciplinary stage by the Claimant's race. Mr Edwards himself accepted that, and he is himself a black person. We therefore did not consider that Mr Nash's actions, whilst unwanted from the Claimant's perspective, were related to the Claimant's

race or involved less favourable treatment of the Claimant on the ground of his race.

Issue 1.7

On 30 July 2017, Shara Wood and Brian Cottle made malicious allegations of sexual harassment against the Claimant.

57. As a matter of fact, Mr Cottle did not make any allegation, whether malicious or otherwise, of sexual harassment against the Claimant on 30 July 2017. He only referred to the incident in response to a specific question from Mr Pickin in December 2017. Miss Wood did raise the matter with Mr Nash at around 30 July 2017, but only out of concern for the employee involved, and to inform her manager at a time when she was only temporarily acting up in a junior managerial capacity. We considered that it was entirely appropriate for Miss Wood to raise the point with Mr Nash as she did, and we saw nothing malicious in her actions. She merely passed on what she had been told by the other employee, and the other employee had herself confirmed that when spoken to by Mr Pickin in December 2017. Again therefore, we saw nothing to lead us to conclude that any allegation of direct race discrimination or racial harassment had been made out.

Issue 1.8

On or around 30 July 2017, Shara Wood and Brian Cottle made malicious allegations of violent and threatening behaviour against the Claimant.

58. In relation to this issue, at no time did Miss Wood make any allegation, malicious or otherwise, of violent or threatening behaviour on the part of the Claimant. Mr Cottle did make an allegation, although it was not expressed as involving violent behaviour, but the Claimant had frightened his wife by revving his car engine at her. However, the fact that the matter was ultimately not taken forward to a disciplinary hearing did not mean, in our view, that Mr Cottle had been in any way malicious. His evidence, and that of Mrs Cottle, was clear that she had felt frightened as a result of the Claimant's actions. Mrs Cottle had reported it to Mr Cottle and he had reported it to Mr Nash. We saw nothing malicious in that, and certainly nothing which led us to conclude that direct race discrimination or racial harassment had occurred.

Issue 1.9

In the 3rd week of December 2017, Scot Pickin failed to interview Hassan Bangura regarding his knowledge of the allegations of sexual harassment against the Claimant.

59. As a matter of fact, Mr Pickin did not interview Mr Bangura, but he had no reason to do so. Mr Pickin was investigating what had happened about the allegation, as it was raised by the Claimant in his meeting with him in December 2017. He spoke to the employee involved, and to Miss Wood and Mr Cottle, and could therefore conclude that no action had been taken in relation to the incident at the employee's request, and he therefore had no need to look into matters further. There was therefore a clear and cogent reason why Mr Pickin had not interviewed Mr Bangura, and there was nothing to suggest that he had been motivated not to do so by the Claimant's race. Again, we saw nothing to suggest that direct race discrimination or racial harassment had occurred.

60. We therefore concluded that none of the Claimant's claims of direct race discrimination and racial harassment were made out, and they were therefore dismissed.

61. Turning to the Claimant's constructive unfair dismissal claim, and again using the numbering of the List of Issues our conclusions were as follows.

Issue 9.1

On 27 February 2017, Neil Stanley reported the Claimant for poor productivity whilst others (including Luke Squibb and himself) who were misusing IT equipment were not reported.

62. As we noted in relation to issue 1.1, we did not consider that there was anything inappropriate in the implementation of the performance management processes in relation to the Claimant, or in the fact that Mr Stanley and another employee were not disciplined for misusing IT equipment.

Issue 9.2

On 27 February 2017, Neil Stanley told the Claimant he could not get a job in the learning and development department because of his disability.

63. As a matter of fact, we were satisfied that Mr Stanley had not told the Claimant that he could not get the job in the learning and development department because of his disability, but we noted that he had accepted that he had told the Claimant that he did not think the role was suitable for him due to the health and safety restrictions on his work. At the time, the Claimant was indeed subject to restrictions to take account of the impact his work had on his knee condition, and we saw nothing untoward in Mr Stanley pointing out to the Claimant that restrictions could prevent him from undertaking the other role.

Issue 9.3

In February 2017 Neil Stanley shared the Claimant's personal information, namely a photograph of his car with other employees.

64. As we noted in relation to issue 1.3, we did not conclude that Mr Stanley had shared a photograph of the Claimant's car with other employees. Mr Stanley denied doing so, and there was no evidence brought by the Claimant to confirm or to indicate that he had.

Issue 9.4

In February 2017, Christopher Bailey failed to discipline Neil Stanley for showing other employees the Claimant's personal information namely photographs of the car.

65. Similarly, as we did not conclude that Mr Stanley had shared such a photograph, which was also Mr Bailey's view, there was no reason for Mr Bailey to discipline Mr Stanley, and therefore his not having done so did not amount to a failure.

Issue 9.5

On February 2017 Christopher Bailey stopped the Claimant working overtime.

66. The documentary evidence showed that it had been agreed with the Claimant, in October 2016, that his hours should be reduced to 32 per week, and whilst it was not explicitly stated in that agreement that the Claimant would not therefore work overtime, we felt that implicit within the 32 hour maximum would be the fact that the Claimant would not work overtime. That was done at his request to limit the impact of his work on his knee condition. Mr Bailey did not therefore, in any sense, stop the Claimant from working overtime; it arose from his requested adjustments. Indeed, we noted that that point was raised by the Claimant in his defence of the "No Call No Show" allegation in February 2017, as he stated that he could not have failed to work overtime as he was, at the time, not permitted to work overtime.

Issue 9.6

In March 2017 Shara Wood showed the Claimant's personal data namely the contents of his appeal against the grievance to her friends.

67. Miss Wood flatly denied passing on the contents of the Claimant's grievance appeal, which the Claimant contended that he had passed to her in an unsealed envelope. However, the Claimant produced no evidence that Miss Wood had passed on the contents of the grievance appeal, and his assertion involved only supposition. In the circumstances, we had no

reason to doubt Miss Wood's evidence and concluded that this allegation had not been made out.

Issue 9.7

On 29 March 2017, Christopher Bailey dealt with the grievance in a biased, unfair and unjust way as an academic exercise.

68. From the evidence we saw and heard, it appeared to us that Mr Bailey had investigated the Claimant's grievance in an appropriate manner. Whilst he had not interviewed all the employees suggested by the Claimant, he had a cogent, unbiased, reason for that, and had reasonable grounds for his conclusions based on the investigation he undertook. We saw and heard nothing to lead us to the conclusion that Mr Bailey had dealt with the grievance in a biased, unfair or unjust way, or as an academic exercise. He had simply not reached the conclusion the Claimant had wanted.

Issue 9.8

Between February and December 2017 the Respondent failed to provide a conducive working environment for the Claimant where he could give his full time and attention to his job.

69. We did not fully understand the basis of the Claimant's assertion in this regard, and it seemed to us that what the Claimant was concerned about were the performance management processes and the rejection of the Claimant's grievances and appeals, all of which we have addressed above. We saw nothing to lead us to a conclusion that there had been any failure by the Respondent to provide a conducive working environment for the Claimant.

Issue 9.9

Between February and December 2017 the Respondent failed to maintain an accurate record of the Claimant's Productivity Points, which resulted in him losing employment opportunities for higher job titles.

70. The Claimant did not adduce any evidence in relation to this issue and himself accepted that he had been under-performing. With regard to losing employment opportunities, that arose due to the fact that the Claimant had been issued with formal performance warnings. The Respondent's policy clearing stated that an employee subject to a warning cannot be considered for a promotion until 90 days after the warning elapsed, and Mr Nash's letters to the Claimant confirming the warnings reminded him of that. This was therefore a straightforward consequence of the Respondent's policy, of which the Claimant was aware.

Issue 9.10

Between February and December 2017 the Claimant's profile was dented making him to lose career prospects, which the Pathways Operations Manager, Kareem Edwards and Human Resources Sara Hill acknowledged and rectified by removing all sanctions, restrictions and points that were placed on the Claimant due to productivity issues.

71. As we have noted in relation to issue 9.9, any loss of career prospects arose due to the Claimant's performance warnings. We did not hear from any representative of HR about this, but Mr Edwards was very clear that he had not removed any sanction or restriction from the Claimant, and we saw no evidence to conclude that that had happened.

Issue 9.11

On June/July 2017 the Respondent failed to see the malicious agenda of the group of five including Shara Wood and Brian Cottle.

72. The Claimant here alleged that the Respondent failed to see the malicious agenda of the "group of five", and he did on occasions in the hearing refer to a "group of seven", a group of employees that the Claimant felt had conspired against him. However, we saw no evidence of any agenda, malicious or otherwise, between the Respondent's employees. We did not see a connection between the various people the Claimant complained about. Mr Stanley and Mr Nash who managed him, Miss Wood and Mr and Mrs Cottle who worked with him, and Mr Bailey and Mr Edwards, Mr Whalley and Mr Pickin who dealt with his grievances and appeals. We certainly saw no evidence of any agenda or conspiracy on the part of anyone, nor did we see that anyone who dealt with the Claimant acted out of malice. The reason therefore that the Respondent failed to see the malicious agenda of the group of five was that we did not consider that it existed.

Issue 9.12

On 2 August 2017, Joshua Nash failed to accept the Claimant's mitigation in relation to two no call no show allegations at investigation stage and proceeded to disciplinary.

73. This has already been dealt with at issue 1.6 above.

Issues 9.13 – 9.16

9.13 *On 14 November 2017 Ian Whalley failed to acknowledge that Joshua Nash failed in his duties in investigating the no call no show allegations.*

9.14 On 29 March 2017 Christopher Bailey, on 14 November 2017 Ian Whalley, and on 20 December 2017 Scott Pickin, failed to acknowledge that Shara Wood had

showed the Claimant's personal data namely the contents of his appeal against the grievance to her friends.

9.15 On 26 September 2017 Kareem Edwards and on 14 November 2017 Ian Whalley failed to acknowledge that Christopher Bailey and Joshua Nash were friends with Shara Wood and Brian Cottle.

9.16 On 26 September 2017 Kareem Edwards, on 14 November 2017 Ian Whalley, and on 20 December 2017 Scott Pickin, failed to see acknowledge the Claimant had been subjected to racial and disability discrimination.

74. We could deal with these four issues collectively, as they all related to alleged failures by the Respondent's managers to acknowledge various matters. In each case, we did not see any evidence that the underlying matters that the Claimant contended the managers had failed to acknowledge had arisen as the Claimant asserted.

75. With regard to issue 9.13, as we have noted, we did not conclude that Mr Nash had in any sense failed in his duties in investigating the "No Call No Show" allegation. That view was also reached by Mr Edwards when considering the Claimant's grievance, and Mr Whalley did not therefore fail to acknowledge that Mr Nash had failed in his duties, he simply did not think that he had.

76. The same can be said of issue 9.14. As we have already noted, Miss Wood denied showing the contents of the Claimant's appeal grievance to her friends. We saw no reason not to accept her evidence on that, and we did not consider that Mr Bailey, Mr Whalley and Mr Pickin failed to acknowledge something that the evidence suggested had not happened. Again, they simply reached a conclusion with which the Claimant disagreed, although we noted in passing that the complaint of the failure on the part of Mr Bailey on 29 March 2017 could never have been made out in fact, as the grievance appeal was not lodged until 3 April 2017.

77. With regard to issue 9.16, there was no evidence of any friendship as alleged, and the Claimant did not in fact question the four individuals about any alleged friendship between them. Again therefore, there could not have been any failure on the part of Mr Edwards or Mr Whalley to acknowledge something for which there was no evidence.

78. Finally with regard to issue 9.16, the Claimant at no point asserted to Mr Edwards, Mr Whalley or Mr Pickin that he had been subjected to disability discrimination. Whilst he did assert that he had been subjected to race discrimination, none of the individuals concluded that that had arisen. As we have already noted, we also did not consider that the Claimant had been subjected to racial discrimination. Again therefore, we could not conclude that the managers had failed to acknowledge something for which there was no evidence.

Issues 9.17 & 9.18

9.17 On 14 November 2017, Ian Whalley dealt with the grievance in a biased, unfair and unjust way, as an academic exercise.

9.18 On 20 December 2017, Scot Pickin dealt with the grievance in a biased, unfair and unjust way, as an academic exercise.

79. We also dealt with these two issues together, as they asserted that the two managers Mr Whalley and Mr Pickin, had dealt with the Claimant's grievance, in the former case it was actually an appeal, in a biased unfair and unjust way and as an academic exercise. This was the same assertion advanced about Mr Bailey at point 9.7 and our conclusions were the same. Mr Whalley and Mr Pickin considered the Claimant's appeal and grievance respectively in a reasonable manner and formed reasoned conclusions. There was nothing to lead us to conclude that the appeal and grievance had been dealt with in the ways asserted.

80. Considering therefore the various issues identified in as giving rise to the Claimant's constructive unfair dismissal claim, we did not consider that any of them amounted to a breach of the implied duty of trust and confidence or that they in any way contributed to any such breach. There was therefore no fundamental breach of contract which, as noted in the Western Excavating case, is the foundation of a constructive unfair dismissal claim. Therefore, the Claimant's claim of unfair dismissal failed and was dismissed.

81. As the Claimant's claims all failed substantively, there was no need for us to consider whether the Claimant's claims had been brought in time. Clearly his unfair dismissal claim had been brought in time, but by reference to the date of commencement of ACAS Early Conciliation only matters occurring after 30 November fell in time with regard to the discrimination claims. Bearing in mind that the grievance appeal decision of Mr Whalley was heard before then, there clearly would have been an issue regarding time limits which we would have needed to consider had the need arisen, but, as we have noted, we felt that the Claimant's claims failed substantively in any event.

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Employment Judge S Jenkins
Dated: 11 August 2021

REASONS SENT TO THE PARTIES ON 18 August 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche