EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondents**
Dr J Ahmad	Rosemount Aerospace Ltd (R1) Ms C Knights (R2) Mr J Pawson (R3) Dr Marrs (R4)

AND

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 27 – 30 July 2021

EMPLOYMENT JUDGE Harding

MEMBERS
Mrs Bannister
Mrs Forrest

Representation
For the Claimant: In Person
For the Respondent: Mr Braier, Counsel

REASONS

An oral judgment and reasons were issued to the parties at the conclusion of the hearing on 30 July 2021. A written judgment was promulgated on 5 August 2021 and by email dated 19 August the claimant requested written reasons.

Case Summary

1 The claimant was dismissed on 24 October 2019. He had joined the respondent (R1) just four months earlier having been headhunted by them to fill a specialist role developing a prototype artificial intelligence system able to detect objects in large areas. The respondents' case is that the claimant was dismissed for capability (performance concerns). It is the respondents' case that there were a number of performance concerns about the claimant, including that he had failed to develop the prototype. The claimant disputes capability was the reason for dismissal. He asserts his dismissal was because of race. It is not disputed that no formal performance process was followed by the respondent prior to the claimant's dismissal. The claimant also complains that his manager, Ms Knights, subjected him to a number of acts of harassment related to race and that the rejection of his appeal against his dismissal was an act of direct race discrimination.

Background

2 At the start of this hearing we discussed with the claimant the list of claims and complaints that had been drawn up with him at an earlier case management preliminary hearing. The list contained a claim of harassment related to religion or belief, and the claimant told us that he wished to withdraw this claim. We explained to the claimant what the effect of dismissing the claim on withdrawal would be and the claimant confirmed that he was content to proceed in this way. Accordingly, this claim was dismissed.

3 The only other change which the claimant told us he wished to make to the list of claims and complaints was that he wanted to rely on an actual comparator, Dr Gary Smart, for the purposes of the direct race discrimination claim. Mr Braier, for the respondent, very pragmatically indicated that the respondent was not taken by surprise by this and he confirmed that the respondent was content for the claim to proceed on this basis.

4 Mr Braier raised that the claimant, in paragraphs 12 and 14 of his witness statement, had asserted that the peer review process was an act of direct race discrimination as was the way the grievance and grievance appeal processes were conducted. The claimant, very fairly, accepted that these complaints did not appear either in his claim form or in the list of claims and complaints drawn up at the earlier case management preliminary hearing. We explained to the claimant what was meant by an amendment application and the process for making one. We also explained the distinction between background information which might help prove a discrimination complaint and a specific complaint of discrimination. The claimant told us that he did not wish to make an application to amend and it was agreed that these paragraphs were relevant background, not stand-alone complaints of discrimination.

5 The respondent submitted that there was a jurisdictional point to be taken on the breach of contract claim, namely that it fell within the so-called "Johnson exclusion area". We explained to the claimant what was meant by this and the respondent forwarded to the claimant the case of **Edwards *v* Chesterfield Royal Hospital NHS Foundation Trust & Botham v Ministry of Defence [2011] UKSC 58** in order to help the claimant understand the point that the respondent was relying on. Having read the case the claimant confirmed to us on the second day of the hearing that he considered that his breach of contract could be distinguished from that of **Edwards v Chesterfield**. Accordingly, this claim remained a live issue to be determined between the parties.

6 The hearing, which had been listed in the summer of the previous year, was originally listed in person. On the first day of the hearing we gave the parties the option of either proceeding in person or conducting the remainder of the hearing remotely. The respondent indicated a preference for the hearing to be conducted remotely and the claimant, after being given the morning to consider his position whilst the tribunal conducted its pre-reading, indicated that he was also content for the hearing to take place remotely. In the event, we conducted the first two days of the hearing in person and then converted to a remote hearing.

The Issues

Direct race Discrimination

7 The claimant describes himself for the purposes of this claim as being of Asian origin. It is his case that he was less favourably treated because of his race in respect of the following matters:

(a) dismissal
(b) rejection of his appeal against dismissal.

The claimant relies on an actual comparator, Dr Gary Smart, and a hypothetical comparator. The respondent accepts that the claimant was dismissed and that his appeal was rejected. It is the respondent's case that the reason why the claimant was dismissed was because he was a poor performer and the reason why his appeal was rejected was because the grounds of appeal had not been made out and the decision-maker had not been persuaded that the dismissal decision was wrong.

Harassment related to race

8 It is the claimant's case that the following matters were unwanted conduct related to race:

8.1 Ms Knights (R2) made it mandatory for the claimant to make presentations at the monthly "show and tell."

8.2 Ms Knights (R2) harassed the claimant in her one-to-ones with him between 2 August and 24 October 2019 by:

(i) attacking the claimant's competence,
(ii) questioning the claimant's intellectual capabilities, and
(iii) telling the claimant that he was less able than an intern who had no formal qualifications.

8.3 R1, R2 and R3 failed to implement the disciplinary/capability process when dismissing the claimant.

9 Some of the harassment complaints are the subject of factual dispute between the parties and the respondent in any event denies that any of the above conduct was related to race.

Breach of contract

10 It is the claimant's case that the respondent's (R1) disciplinary procedure and the Code of Ethics formed part of his contract of employment. It is not disputed that the respondent failed to implement the disciplinary process when the claimant was dismissed. It is the claimant's case that this asserted breach of contract resulted in financial loss, namely loss of pay and benefits, because had the procedure been followed he would not have been dismissed. It is also the claimant's case that had the Code of Ethics been followed he would not have been dismissed and would not have suffered loss of pay and benefits. As set out above, it is the respondent's case that the tribunal has no jurisdiction to consider these claims as they fall within the so called "Johnson exclusion area".

Evidence and Documents

11 Witness statements were provided for the respondents by Ms Knights, Engineering Manager, Mr Johnston, Head of ILS and Support, Mr Pawson, the respondent's Managing Director and Dr Marrs, Head of Engineering. For the claimant we had a witness statement from the claimant himself. All witnesses attended to give evidence. We also had before us an agreed bundle of documents which ran to just short of 400 pages. We explained to the parties at the outset of the hearing that only those documents in the bundle to which we were referred would be considered to form part of the evidence of the case.

The claimant's credibility

12 The Tribunal thinks it likely that the claimant genuinely believed what he said in evidence. However, whilst his evidence was based on his perception and recollection of events, which the Tribunal felt with the passage of time had become his reality, that was often not consistent with the contemporaneous documentation. Judged objectively much of what the claimant had to say was based on an assertion that a document said

something when in fact it did not, or it was based on a misreading or misunderstanding of contemporaneous documents.

13 By way of example the claimant asserted that Ms Knights had said during a one-to-one with him in September that he was doing excellently. In fact, what Ms Knights had recorded in the one-to-one meeting notes on 19 September was that the claimant had said his tasks were going well, page 97. When this was put to him in cross examination the claimant conceded that this was, in fact, what had been said, but he then changed his evidence to say that Ms Knights had not disputed that his tasks were going well.

14 The claimant asserted, also at paragraph 10 of his witness statement, that on 26 September 2019 Ms Knights had sent an email to Dr Marrs in which "she asked Alan to replace me with Gary Smart". But this was a misrepresentation of the email. In the email Ms Knights set out various issues that she had with the claimant's performance and she then went on to say this;

"I know we've had issues with Gary (Smart) in the past and you've perhaps got not a particularly positive view of him, but *if we can't get anywhere with Fazal,* I wonder whether Gary *might be worth considering* as a replacement?" (all our emphasis).

Judged objectively, this simply comes nowhere near a request to replace the claimant with Dr Smart; on the plain and obvious meaning of the words it is a statement that in the event that the situation with the claimant does not improve Dr Smart might be worth considering as a replacement for him.

15 By way of further example the claimant complained at paragraph 10 of his witness statement that just one day before his dismissal Ms Knights had stated in an email that it was "not known" whether his work was good enough and he asserted that this supported his case that the reason for his dismissal (which on the respondents case was performance, or capability) was a fabrication. But again this was a misrepresentation of the position. It is true that in an email to Emma Butcher of HR sent at 2:41 PM on 23 October 2019 Ms Knights confirmed that she and Dr Marrs were meeting with the claimant and "will assess whether his work is good enough ", page 172, and she confirmed that she had been advised that if the claimant's work was not up to scratch and it seemed unlikely that a performance improvement plan would end favourably, they could decide to dismiss the claimant. But to assert that this indicated that immediately before the claimant's dismissal the respondent did not know whether his work was of the required standard and there could not therefore have been any performance concerns about him was to wholly ignore the email which was sent earlier in the day on 23 October, again by Ms Knights to Emma Butcher of HR, and which appeared in the bundle at page 171, just one page before the email on which the claimant relied. In that email Ms Knights set out that two demonstrations given by the claimant had not been up to scratch and that there was the impression he had not done much in the four months since he had joined the respondent. She set out that she had a meeting set up with the claimant to give him an opportunity to take her and Dr Marrs

through the work he had been doing since he had joined the company and went on to say that unless there had been a "terrible misunderstanding" she would be wanting to end his employment. I.e. Ms Knights was saying in this email that the upcoming meeting was a last opportunity for the claimant to persuade Ms Knights that he had been performing and should not be dismissed. That is a far cry from the respondent not having formed a view that the claimant was underperforming.

16 Our overall impression was that, to this very day, the claimant remains completely unable to accept that there might have been issues with his performance and he has therefore strived to find alternative explanations for what happened to him. We would add that this is, perhaps, not completely unsurprising given that, as we will set out in due course below, he went from being headhunted by the respondent to dismissed by them in under 4 months with no process having been followed, having been given no warnings, even informal ones, that he was at risk of dismissal and having been given only patchy feedback about his performance. What the claimant has done, in our view, is seek to fill these gaps left by the respondents. This case is, perhaps, a good example of why it is best practice to follow due process even where an employee has less than 2 years service.

17 The respondent witnesses we found to be generally more credible; their evidence was consistent and clear and, in the main, consistent with the contemporaneous documentation.

Findings of fact

18 We refer here to R1 as "the respondent", and to the other respondents by name. From the evidence that we heard and the documents we were referred to we make the following findings of fact:

18.1 The respondent produces intelligent solutions for the global aerospace and defence industry. It employs around 85 people but is part of a much larger group of companies which employs over 5,000 people in the UK alone.

18.2 In early 2019 the respondent decided that it needed to recruit a Machine Learning Engineer. A Machine Learning Engineer is an engineer who specialises in designing and building specific types of artificial intelligence systems. It is a more specialist role than that of software engineer.

18.3 The respondent, at this time, was looking to develop prototype software, to be used in conjunction with a camera which could be attached to aircraft, to take very large images of huge areas, such as parts of a desert, and automatically detect large objects in those images, such as tanks, and information about those objects, such as direction of travel.

This work was at the request of a client based in the United Arab Emirates. The prototype was to be developed from scratch.

18.4 This was a specialised project for which specific machine learning expertise was desirable. The respondent did not have a Machine Learning Engineer in its existing workforce and hence it approached the claimant.

18.5 The claimant was interviewed over the telephone on 12 April 2019 by Ms Claire Knights, the Engineering Manager who had ultimate project management responsibility for the project. The claimant presented as a strong candidate and he was then invited to attend a panel interview on 16 April 2019. The interview panel comprised Ms Knights, Dr Marrs, Head of Engineering and Dr Batchelor, Senior Software Engineer. The claimant did well at the interview.

18.6 On 7 June 2019 the respondent wrote to the claimant offering him the position of Machine Learning Engineer on a salary of £63,000 a year, pages 71 and 74. He was informed that he would report directly to Ms Knights.

Terms and Conditions and Policies

18.7 Enclosed with the letter was a written statement of employment particulars, pages 73 – 79. Under the heading of "policies" the statement of employment particulars said this:

You are required to read and comply with all the company's policies and procedures as a condition of your employment. On joining, you should take time to familiarise yourself with the policies and procedures on the intranet, which includes the company's disciplinary, grievance and data protection policies. Your local HR representative will make you aware of any site specific policies and procedures during induction, page 73.

18.8 Under the heading of "code of ethics" the statement of employment particulars said this:

As part of your employment at the company you will be required to comply with the United Technologies Corporation code of ethics, page 77.

18.9 The main focus of the disciplinary policy and procedure, on the face of the document, pages 40 - 45, appeared to be on how the respondent would handle conduct issues although there was also occasional reference in the document to performance issues, see for example page 42. We queried this with Ms Knights and she told us in her verbal evidence that this was the appropriate policy not just for conduct matters but for performance issues also. We accept this evidence and find that this

was the case. As one might expect, the policy set out an escalating series of warnings, as well as providing for investigatory and decision meetings prior to dismissal.

18.10 The respondent's code of ethics policy is entitled "United by Values", pages 259 – 313. The document is described as setting out guiding principles which will enable growth of the business for years to come, page 260. It sets out that the core values of the business are trust, integrity, excellence, innovation and respect and it addresses matters such as fostering a respectful workplace. It is also set out in the document that when there is an actual or potential violation of the code there will be a thorough investigation, page 268.

The Detection prototype project

18.11 The claimant's employment with the respondent started on 1 July 2019. Ms Knights was the claimant's line manager, but the claimant was placed in a team led by James Kinnersley, a Senior Software Engineer.

18.12 Overall, there were three strands of work involved in the development of the prototype end-to-end. At the core of the project was development of a machine learning algorithm which would be able to detect objects within images and features of those objects. This was the strand of work which the claimant was recruited to carry out. There was also a work stream which was focused on creating a framework to allow the respondent to train and verify the algorithm, and this work was being conducted by Dr Gary Smart, a Senior Software Engineer who was also in Mr Kinnersley's team. Finally, there was a work stream which was looking at taking the results of the algorithm and displaying it in a meaningful format. This was the responsibility of Mr Kinnersley. Mr Kinnersley, as the team leader, was required to have oversight of all three strands of work.

18.13 It was the claimant's evidence that Mr Kinnersley had responsibility for development and delivery of the prototype, and allocated him his work. We accept the evidence of Ms Knights and find that Mr Kinnersley did not have responsibility for delivery of the project overall, and neither did he have responsibility for the claimant's work stream. He did not allocate the claimant work or set him tasks. The only person who was responsible for producing the detection prototype, we find, was the claimant, who was overseen by Ms Knights as she had ultimate project management responsibility for the project. We prefer the respondent's evidence because machine learning expertise was desirable for the project, as we have set out above, and it seemed to us to be entirely consistent with the fact that the claimant was the only Machine Learning Engineer in the business, who was recruited specifically to develop the detection

prototype, that he was the one who was allocated the responsibility of developing and delivering it.

18.14 The claimant's role was, therefore, a senior and important one. It was a role in which the respondent expected that the claimant would be able to use specialist machine learning expertise to deliver the project. The respondent, and Ms Knights and Dr Marrs in particular, anticipated and expected that the claimant would work autonomously directing his own work and setting his own criteria. There was, however, an overall project plan, pages 163 – 166, which set out certain goals for July – October 2019. The first goal for September 2019 was that there should be an end to end demonstration of the tool, page 165. This would require all three work streams to have moved to the point where they had working software to demonstrate.

18.15 Also working on Mr Kinnersley's team were an intern, Ryanne Binns, who was gaining work experience with the respondent for a year as part of her university degree, and Dr Smart, who we have already mentioned. It was anticipated that both Ms Binns and Dr Smart would assist the claimant on occasion. Dr Smart, in fact, had a small amount of machine learning experience, although he was not a Machine Learning Engineer.

Daily stand ups and monthly software demonstrations

18.16 The respondent has a practice of carrying out what are termed "daily stand-ups" during which the software engineers will explain to each other the tasks that they are working on and will highlight progress to date and any problem areas where they would welcome help from colleagues. Ms Knights' entire team would take part in a stand-up everyday and there would also be stand-ups held within smaller team units. In addition to this there are monthly software demonstrations, which are informal meetings where the software engineers will demonstrate the work done in the previous month to the rest of the company. There is an expectation that everyone will present their work. Generally, if a team of people is working on a project, then only one person from that team will present, but for those working on their own project the expectation is that they will present their own work.

18.17 Ms Knights held regular one-to-ones with her twenty-strong team. She would take brief notes of these meetings. On 18 July 2019 she held a one-to-one with Mr Kinnersley and he confirmed that he was leaving the claimant, Dr Smart and another colleague, Dr Batchelor, to it as they were senior and his time would better be spent with more junior colleagues, page 84. Ms Knights conducted a one-to-one with the claimant on 28 July and he confirmed that everything was fine, page 85.

The first monthly software demonstration and Ms Binns' first complaint about the claimant

18.18 On 1 August 2019 the monthly software demonstration was scheduled to take place. The claimant failed to attend despite the fact that it was in his calendar. Also on 1 August Ms Knights held a one-to-one with Ms Binns. Ms Binns complained that the claimant was being condescending towards her in meetings and was ignoring her and shutting down her suggestions and then at a later point raising her suggestions as his own. She stated that Dr Smart had called the claimant out on it which she appreciated. Ms Knights called Mr Kinnersley into the meeting and told him what had been said. He said that he was not always the best at noticing things but would look out for it in the future, page 86.

18.19 Ms Knights then tried to conduct a one-to-one meeting with the claimant but she discovered that he was unexpectedly absent from work without permission and so she was not able to do so. Ms Knights thought little of this at the time; she considered that the claimant had most likely misunderstood the flexible working policy.

One-to- one on 2 August 2019

18.20 Instead she held her one-to-one meeting with the claimant on 2 August 2019. She handed him a copy of the flexible working policy and he apologised saying that he was not aware of the procedure. Ms Knights spoke to the claimant about Ms Binns' feedback about him and he was very apologetic. Ms Knights emphasised to the claimant that Ms Binns was well suited to the work that she was doing and might have some good ideas and the claimant's response was "but of course I know much more than her", page 87.

18.21 We do not find that Ms Knights told the claimant that the machine learning capability would be developed around Miss Binns and not the claimant. We prefer the evidence of the respondent that this was not said for the following reasons. Firstly, the respondent, as set out above, had specifically recruited the claimant to carry out the machine learning work and so it seemed highly unlikely that just 4 weeks later, and at a point when no significant performance issues with the claimant had come to light, the respondent would change its mind and decide that someone else should lead this work. That would, from the respondent's perspective, have been a complete waste of the claimant's £63,000 a year salary and the expertise for which the claimant had been recruited. Secondly, it seemed to us to be inherently implausible that the respondent would decide to build a specialist engineering capability around an intern who was on a placement with the respondent for only one year as part of her

university course. Neither do we find that Ms Knights emphasised that Ms Binns had previously carried out extraordinary work in machine learning "in a tone and manner that implied the claimant did not measure up to her", nor do we find that she said to the claimant that he was less able than an intern who had no formal qualifications. We preferred Ms Knights' account of this meeting, which we considered to be inherently more reliable given our assessment of the claimant's credibility.

18.22 The claimant made an effort with Ms Binns after that and matters improved for a while.

September monthly software demonstration

18.23 The September software demonstration was due to take place on 5 September 2019 and the claimant, along with the rest of the company, was invited to attend the meeting by Ms Knights who sent the invitation with the following message (this message was addressed to all on her team not just the claimant);
"this is a chance for you to check your demo is working", page 141.

18.24 The claimant did not present at the meeting. Ms Knights was concerned. She was worried that the claimant's work was not progressing as required.

18.25 The next day Ms Knights held a one-to-one meeting with Ms Binns who complained that she had no idea what the claimant was doing and that she could not get him to explain. Ms Binns stated that Dr Smart had no idea what the claimant was doing either.

18.26 Ms Knights also held a one-to-one meeting with Mr Kinnersley that day. She shared her concerns about the claimant and she told Mr Kinnersley that she wanted him to "get a grip" on what the claimant was doing, page 93. Mr Kinnersley stated that he had a better understanding of what the claimant was doing than Ms Binns and Dr Smart but that he shared their concerns to some extent. Mr Kinnersley stated that he had been hoping for the claimant to present a demonstration the previous day but he had not and he said that he would get a grip and there would be a demonstration (from the claimant) next month, page 93.

Concerns about the claimant are raised again

18.27 Ms Binns raised the same concerns about the claimant again on 12 September, page 94, and by this point Dr Smart had also raised similar concerns with Ms Knights verbally.

A conspiracy?

18.28 We do not find that Ms Binns and Dr Smart were conspiring to raise false complaints against the claimant nor that Ms Knights was in some way part of this conspiracy. Whilst the claimant stated many times in his evidence that he was the victim of a conspiracy this was, in reality, no more than an assertion. The claimant was asked repeatedly in cross examination what evidence or facts he relied on to demonstrate that there was a conspiracy. His response to this was that as he was taking part in daily stand-ups Dr Smart, Ms Binns and Ms Knights must have known what he was working on. Accordingly, he asserted, they all knew that the complaints against him were false. But we did not consider that there was any inherent inconsistency in the claimant taking part in daily stand-ups and his colleagues not understanding what the claimant was working on. After all, whether colleagues understood from the daily stand-ups what the claimant was working on would depend on what information the claimant presented to his colleagues.

18.29 Moreover, as we will make clear in our findings that follow, we find that the claimant failed to develop the prototype that he was recruited to deliver. In these circumstances it seemed to us to be highly likely that the claimant's colleagues would be very confused as to what it was that the claimant was doing, and would raise concerns about this.

18.30 Additionally, it was evident that Mr Kinnersley, who the claimant was very keen to emphasise was someone against whom he had no complaints, was also somewhat in the dark as to what the claimant was doing. Hence his comment on 6 September that whilst he had a better idea than Ms Binns and Dr Smart what the claimant was doing he "shared their concerns" and his comment on 18 September that he would know "the bones" of what the claimant was doing by the end of the month, for which see more below.

18.31 The claimant also told us in evidence that Ms Binns had "directly said she was conspiring with Gary Smart". Yet it turned out that what the claimant was relying on as a direct admission of a conspiracy were Ms Knights' notes of her 6 September one to one with Ms Binns in which Ms Binns had said she had no idea what the claimant was doing and Dr Smart had no idea either. The claimant told us that the fact that Ms Binns had discussed her concerns with Dr Smart was direct evidence of a conspiracy. Conspiracy is an extremely serious accusation to make; a conspiracy occurs when two or more people plot together to do something which is unlawful or harmful. Two colleagues sharing their view of another colleague, even if that view is negative, simply comes nowhere near, judged reasonably and objectively, what might be considered to be evidence of a conspiracy.

One-to-one 12 September 2019

18.32 Ms Knights held a one-to-one with the claimant on 12 September. The claimant told Ms Knights that he did not know that he had been expected to demonstrate on 5 September, page 95. During his next one-to-one on 19 September the claimant told Ms Knights that his task was going well and there would be something to demonstrate on the next occasion, page 97.

18.33 On 18 September 2019 Ms Knights held a one-to-one meeting with Mr Kinnersley. There was a discussion about the claimant's work and what he was doing and Mr Kinnersley told Ms Knights that he would "have the bones" of what the claimant was doing by the end of the month, page 96. We infer from this comment that, certainly at this point, Mr Kinnersley did not really know what the claimant was doing.

Dr Smart complains

18.34 On 25 September Ms Knights held a one-to-one with Dr Smart. He expressed frustration with the claimant, complaining that the claimant was getting "to play" with all the "fun machine learning work" and not really delivering much whilst other people had to do the less glamorous programming work. He also complained about the claimant's communication style stating that the claimant talked to him as if he was an idiot and he stated that he suspected the claimant was trying to improve someone else's algorithm and send the improvement back to them to gain fame rather than focusing on what the business needed to deliver, pages 99 and 150.

18.35 Ms Knights held a one-to-one meeting with the claimant the following day and the claimant told her that his demonstration preparation was going well, page 100. We accept the evidence of Ms Knights and find that she initially tried to raise some of her concerns about the claimant's performance with him but he was dismissive and she gave up. She decided not to inform the claimant of her concerns at this point but instead to wait to see how good the demonstration was that he was preparing for the following week. We find, based on Ms Knights' verbal evidence, that she did make it clear to the claimant that he would have to do a presentation at the next software demonstration, and she did so because she was concerned that the claimant's work was not progressing as required.

18.36 The October monthly software demonstration session was due to take place on 3 October. Ms Knights was on holiday that week and so in

advance of starting her holiday she decided to email Dr Marrs to inform him of her concerns about the claimant and to ask him to judge whether what was demonstrated by the claimant on 3 October was of an acceptable standard.

Ms Knight's email of 26 September

18.37 Ms Knights sent a lengthy email to Dr Marrs before she left for her holiday, page 150. In this email she repeated the concerns that Dr Smart had raised with her about the claimant. She stated that she had sympathy with Dr Smart as she did not know what the claimant was doing either. She stated that she had asked some questions (of the claimant) hoping to get some detail but had "got the brush off". She stated that she had decided not to push things as she wanted to wait until after the upcoming demonstration and said she was keeping an open mind. She asked Dr Marrs to judge the standard of the claimant's demonstration. She went on to say that she was expecting to need an HR conversation with the claimant covering what he was doing technically and his interactions with the rest of the team but that she would look at this more after her holiday. She went on to mention some of Ms Binns' complaints about the claimant.

18.38 She ended her email saying that whilst there had been issues with Dr Smart in the past if they could not get anywhere with the claimant she wondered whether Dr Smart might be worth considering as a replacement. She stated that although he was arguably too piratical for delivery work he could prototype a clever solution and it may be easier to recruit a senior software engineer to replace Dr Smart than to recruit a new machine learning engineer. She stated that Dr Smart was stepping up to cover for Mr Kinnersley. She ended her email commenting that if Dr Smart did not perform well in this role it was another opportunity that he had not made the most of and they could proceed accordingly.

18.39 We do not infer from this email, as the claimant invited us to do, that Ms Knights had already made her mind up to dismiss the claimant and replace him with Dr Smart because, put simply, that is not what the email says. What is said in the email is that in the event that there is no improvement with the claimant it would be worth considering Dr Smart as replacement.

Ms Knight's use of the word "other"

18.40 It was a central part of the claimant's case that Ms Knights, in this email, was making reference to the racial difference between him and "others" on his team. He relied heavily on her use of the word "other" in the second paragraph of the email to suggest that a distinction was being drawn by her on racial grounds. The relevant sentence read as follows:

"I had a one-to-one with Gary yesterday where he expressed some frustration about Fazal, specifically Fazal getting to "play" with all the fun machine learning work and not really delivering much, while *other people* (our emphasis) have to do the less glamorous programme work".

18.41 The claimant initially invited us to infer from this sentence that Ms Knights (and Dr Smart) were complaining that white people were being given the boring jobs whilst non-white people were being given the fun jobs. We reject that first interpretation not least because the claimant himself withdrew from it when it was pointed out to him in cross examination that one of the "others" carrying out the so-called "boring" jobs was Ms Binns, who is black.

18.42 The claimant then invited us to infer that Ms Knights and Dr Smart were complaining that Asian men were being given the fun work whilst non-Asian people were getting the boring work. Again, this construction was based on Ms Knights' use of the word "other" in the email.

18.43 We reject that interpretation because Ms Knights' use of the word "other" did not, judged objectively, support the interpretation contended for by the claimant. It is clear that Ms Knights used the word to distinguish between the claimant, doing machine learning work, and everyone else on the team doing programming work. It is an entirely commonplace use of the word "other". Additionally, we reject that interpretation because, from the face of the email, the complaint made about the claimant by Dr Smart and relayed by Ms Knights is obvious and straightforward and unrelated to race.

It is that the claimant was doing the "fun" machine learning work *and not delivering much* (our emphasis) whilst other people (i.e other people on the team) were having to do the less glamorous programming work. In other words it was a complaint that the claimant had the best job on the team but was not delivering. That is nothing to do with race and accordingly we draw no adverse inference from this email.

<u>The 3 October software demonstration</u>

18.44 Both Mr Kinnersley and Dr Marrs attended the 3 October software demonstration. The claimant, for the first time, presented. We accept the evidence of the respondent and find that neither Mr Kinnersley nor Dr Marrs were impressed. There was, we find, no demonstration of a machine learning algorithm which would be able to detect objects within images and Dr Marrs was of the view that the information which the claimant presented was likely downloaded from an online tutorial. All that the presentation provided by the claimant showed was what are termed

activations – i.e. the input images. There was no demonstration of software which had been developed to detect types of objects and features of those objects. In contrast, Ms Binns also did a presentation, which was well received.

18.45 Ms Knights returned from annual leave on 7 October. Mr Kinnersley reported to her that he had been underwhelmed by the claimant's presentation and that the claimant had not done what was expected.

One-to-one 10 October

18.46 Ms Knights held a one-to-one with the claimant on 10 October and she told the claimant that his demonstration had not been well received, page 102. The claimant's response to this was that the field was very complicated and he did not want to be too technical. She responded that it was a technical audience and so he should not worry on that account. The claimant said he would sort it out by the time of the next demonstration and that he had not understood the requirements. We do not find that Ms Knights said to the claimant "are you taking advantage of the intelligence of your colleagues", we prefer the evidence of Ms Knights, given our assessment of the claimant's credibility, and find that Ms Knights said to the claimant that he did not appear to value the intelligence and experience in the room. Ms Knights suggested that the claimant get advice from Dr Batchelor as he was good at presenting highly technical data. It was made clear to the claimant that he would be required to present at the next software demonstration, which was due to take place at the very end of October.

18.47 Ms Knights also told the claimant that Ms Binns' demonstration had been well received. The claimant responded that he would sort all this out in the next demonstration. Ms Knights ended the meeting by saying that Dr Marrs and Mr Pawson (the respondent's Managing Director) would want to see a return on their investment in him, page 102.

18.48 We do not, for the avoidance of doubt, infer, as the claimant invited us to do, that by saying that the claimant did not appear to value the intelligence of others Ms Knights was implying that he did not share their intelligence, because that is not an inference that can logically be drawn from the words used.

18.49 Around 17 October Ms Knights made a decision to bring the software demonstration forward to 22 October. We accept the evidence of Ms Knights and find that the reason why she did this was because she had received feedback from the development leads that the timing of the software demonstrations was creating issues for them. We accept Ms Knights' evidence because it was entirely consistent with the

contemporaneous email sent by her on 17 October to Dr Marrs explaining why she had moved the software demonstration forward, page 169.

18.50 Ms Knights held a one-to-one with the claimant on 17 October. She explained to him that the date for the demonstration had been moved forward. He said he was horrified by the change in date as this meant he would not have enough time. Ms Knights reassured him that he did not need to do a formal presentation and she suggested again that he ask Dr Batchelor for advice, page 103. The claimant made it clear that he did not like that suggestion.

18.51 On 21 October Ms Knights had a meeting with Dr Marrs and Liam Quinn from HR to discuss the claimant. There was discussion about the performance concerns that had arisen. It was agreed that Ms Knights and Dr Marrs would wait to see the quality of the claimant's next demonstration and if it was not of the required standard the claimant would be informed that Dr Marrs would be attending the next scheduled one-to-one and the claimant would be required to explain what he had achieved since joining the company. During this meeting Mr Quinn advised that as the claimant had less than two years service it was not necessary to follow a formal procedure in order to dismiss him and that he could be dismissed on the spot.

The demonstration of 22 October

18.52 We accept the evidence of the respondent and find that the next demonstration by the claimant did not go well. The claimant's presentation focused on the technologies that could be used to produce a detection prototype as opposed to actually demonstrating a working detection prototype. He also provided information in his presentation on improving image quality, but that was not an area of work that the claimant had been required to focus on.

18.53 Ms Knights spoke to Dr Smart, Dr Marrs and Mr Kinnersley about the claimant's presentation. Mr Kinnersley said it had not achieved the objectives set and Dr Smart stated that the claimant had simply used other people's work off the Internet. Dr Marrs also confirmed that he was not happy with the presentation, he was of the view that it was work that could have been done by a student in an afternoon, page 104. The respondent had reached a point, therefore, whereby nearly 4 months into the claimant's employment with them he had not produced a prototype machine learning algorithm which could be demonstrated. This was in contrast to Mr Kinnersley and Dr Smart both of whom had demonstrated their work streams (as indeed had Ms Binns).

18.54 Ms Knights decided to follow the advice of Liam Quinn to involve Dr Marrs in the next one to one with the claimant in order that a decision could be made about his future with the respondent, if this was necessary. The claimant was informed by Ms Knights that Dr Marrs would be attending his next one-to-one scheduled to take place on 24 October and that he should be prepared to talk Ms Knights and Dr Marrs through the work he had been doing since he had joined the company. There was no warning given to the claimant that he was at risk of dismissal. Moreover, whilst there had, up to this point, been some feedback given to the claimant about his performance, such feedback was relatively sparse. There was:

(i) Feedback concerning the complaint from Ms Binns that the claimant was being condescending towards her in meetings and was ignoring her and shutting down her suggestions,

(ii) The feedback to the claimant that his demonstration on 3 October had not been well received,

(iii) Discussions with the claimant about the fact that he must present at the next software demonstration.

(iv) And the rather oblique comment from Ms Knights that Dr Marrs and Mr Pawson would want to see a return on their investment in the claimant,

And that was it. Unsurprisingly, therefore, the events that followed, most likely, came as a bolt out of the blue for the claimant.

18.55 On 23 October Ms Knights emailed Ms Butcher from HR explaining that she had already received advice from Mr Quinn and that since then there had been another demonstration which had not gone well. She explained that she was due to have a one-to-one with the claimant and said she was keeping an open mind but was not expecting to be impressed. She stated that unless there had been a terrible misunderstanding she would be wanting to end the claimant's employment and that Dr Marrs had spoken to Mr Pawson who had approved this course of action, page 171.

18.56 After a discussion with Emma Butcher Ms Knights emailed her again later that day thanking her for her time and confirming her understanding of what needed to happen at the one-to-one with the claimant the following day.

18.57 She stated that she and Dr Marrs would assess whether the claimant's work was good enough and if it was not up to scratch they would adjourn the meeting and ask the claimant to leave the room whilst

they discussed next steps. She stated that if it seemed unlikely that a performance improvement plan was going to end favourably they could decide to dismiss the claimant and if they decided to dismiss the claimant they would call him back in and tell him that, page 172. We infer from this email that whilst it was very likely that the claimant would be dismissed the respondent (and Ms Knights and Dr Marrs in particular) was still open to the possibility that the claimant could remain in his role if he was able to demonstrate that he had been working to the required standard. We do so because of the constant use of the word "if" in this email, which is, in our view, a clear indicator that no definitive decision had been made.

The claimant's one to one on 24 October

18.58 The claimant, Dr Marrs and Ms Knights duly met on 24 October 2019. At the start of the meeting the claimant was asked to talk through his work to date. The claimant stated that he did not realise that the software demonstration was an assessment and he stated that he had only had three days to prepare because the date of the demonstration had been brought forward. He said that he was building a detector but that he had had no access to suitable data at the beginning of his employment to train and test it. Whilst the claimant asserted that he was building a detector he did not articulate exactly what it was that he was doing. The claimant stated that he could have done a better job of taking people along with him and promised that he would do better in the future. Dr Marrs pointed out that the goal had been to take a prototype to the United Arab Emirates around now, pages 176 – 177. The claimant stated that he thought he could do this (i.e. have a prototype ready) by the following month. Dr Marrs responded that the claimant was a senior engineer and as such had been expected to construct a plan and coordinate with other members of the team and that he had seen no evidence of this as it appeared the claimant had been doing his own thing. The claimant responded that this was due to a misunderstanding; he had a plan but had not communicated it.

18.59 The meeting was then adjourned for 15 minutes in order for Dr Marrs to consider matters. We do not find that Ms Knights was the decision-maker in respect of the claimant's dismissal nor do we find that she "pressurised" Dr Marrs in to deciding to dismiss the claimant, nor do we find that she was "pleading with him" to dismiss the claimant. The decision, we find, ultimately was that of Dr Marrs, although we have no doubt Ms Knights also expressed her own opinions on the matter. We make these findings for the following reasons. Firstly, Dr Marrs is Ms Knights' manager. Accordingly, he is more senior in the company hierarchy than her, which makes it less likely that he would be susceptible to pressure from her. Secondly, having had the benefit of seeing Dr Marrs give evidence before us, it was very evident to us that he is a confident

and assertive individual who would be extremely unlikely, in our view, to feel pressure from a more junior direct report. Thirdly, that it was Dr Marrs' decision to dismiss is consistent with the contemporaneous email that he sent to the Director of Engineering that day, page 173, for which see more below. Lastly, the allegation that Ms Knights was "pleading" with Dr Marrs not to dismiss the claimant was, it turned out, based on no more than the claimant's reading of an alleged facial expression during the meeting, which is not a cogent basis for such an inference.

18.60 The claimant was called back into the meeting and Dr Marrs informed him that a decision had been made that his employment was not working for the business and that the respondent was letting him go. He was dismissed, therefore, without any process having been followed. The claimant was told that he would have to leave that day and would be paid a month's notice. Dr Marrs did not explain to the claimant what the reason was for his dismissal and nor did he explain the basis on which the decision had been reached. We accept the respondent's evidence and find that the reason why Dr Marrs decided to dismiss the claimant was because of performance concerns, and in particular because the claimant had failed to develop the detection prototype to a point where it could be demonstrated. We will explain in detail in our conclusions why we have made this finding.

18.61 Shortly after the meeting Dr Marrs emailed the Director of Engineering stating that he had terminated the claimant's employment as his performance had not been up to scratch and his interaction with other staff had led to some complaints, page 173.

18.62 On 28 October Dr Marrs wrote to the claimant confirming that his dismissal had taken effect as of 24 October 2019 and that he would be paid in lieu of notice. In this letter Dr Marrs stated that it had been necessary for Ms Knights to speak to the claimant on five occasions in connection with his poor performance; an assertion which was not, on our findings of fact, accurate. It was said in the letter that during the meetings the gap in expectation from his current level of performance to the performance required to be successful was clearly outlined; again an assertion which was not, on our findings of fact, accurate. It was said that every effort was made to support an improvement in the claimant's performance, albeit in fact the respondent had offered no additional support other than suggesting the claimant seek help from colleagues. The claimant was informed he had a right to appeal.

The appeal

18.63 The claimant duly appealed by way of letter dated 27 October 2019, pages 178 – 179. He complained that the contractual disciplinary

process had not been implemented, that he had not been given any verbal or written statements about the allegations against him and he stated that he strongly believed his termination was discriminatory on the grounds of one or more protected characteristics (he did not identify which ones). He also stated in this letter that he wished to invoke the company's grievance procedure. It was decided that the respondent would deal with the appeal against dismissal first and then consider the grievance separately.

18.64 The claimant asked for a significant amount of information from the respondent in order to enable him to pursue his appeal, including, for example, requesting a copy of any investigation report and details of tasks that he was required to carry out together with the expected outcome and the actual outcome, page 187. The claimant stated that at no time had anyone ever mentioned to him either verbally or in writing that there were any concerns about his performance and he stated that the performance issue had been invented in order to hide the fact that the true reason for his dismissal was discrimination, page 188. Some, but not all, of the information requested was subsequently provided to the claimant, albeit some of the information requested did not in fact exist (for example there was no investigation report).

18.65 The claimant was invited to attend an appeal hearing to take place on 19 December. He was informed that the meeting would be conducted by Mr Pawson, Managing Director of the respondent, and Liam Quinn from HR, page 197. The appeal hearing duly took place on 19 December, pages 199 – 203. In the appeal hearing the claimant stated that everything had been fine until 2 August when things had suddenly changed. He said that on that date during a one-to-one Ms Knights had told him that the machine learning capability would be developed around Ms Binns, the intern. He said that was humiliating. He described Ms Knights as angry and emotionally involved. He stated that he believed that after that Ms Knights had wanted to demonstrate that he had less machine learning experience than others and that he was less intellectual. He complained that he was dismissed at a one-to-one meeting and said he did not believe that was the purpose of a one-to-one. He stated that he was surprised when he was dismissed and he was not sure why he had been dismissed. He asserted that Dr Marrs had been pleading with Ms Knights in the meeting and that it was clear that Dr Marrs did not wish to dismiss him. Mr Pawson asked the claimant what type of discrimination he was referring to and he said religion and colour of skin. When he was asked to explain what led him to believe that he stated "why would you recruit machine learning engineer and question their ability?" The claimant complained that the first time he was informed that his dismissal was performance based was when he received a letter two days after he had been dismissed.

18.66 After the hearing Mr Pawson reviewed Ms Knights' one-to-one notes and liaised with HR and Mr Quinn in particular. He concluded that there were no grounds to overturn the dismissal decision and, accordingly, he rejected the claimant's appeal and confirmed this to the claimant in writing on 16 January 2020, pages 205 – 207. He acknowledged that the disciplinary process had not been implemented but said that as the claimant had only three months service that decision was in line with UK legislation. Mr Pawson set out that he had concluded that there were performance concerns about the claimant and that he had been spoken to about these, and he rejected the claimant's contention that his dismissal was discriminatory. In reaching this conclusion he took into account that there was evidence to show that there had been concerns about the claimant's performance and he concluded that it had been this which had led to the decision to end his employment.

18.67 The claimant's grievance was dealt with by Mr Johnston. He met with the claimant on 12 February 2022 to discuss his grievance and he also subsequently interviewed Ms Knights, Dr Marrs and Dr Smart. He wrote to the claimant on a 12 March 2020 to confirm that his grievance was rejected, pages 252 – 255.

18.68 Dr Smart subsequently took over the machine learning role and has now produced prototype detection software.

Comparator

18.69 Dr Smart has been employed by the respondent for approximately 20 years. Around 4 or 5 years ago Ms Knights had some concerns in relation to Dr Smart's performance at work. He was not put through a formal performance process but he was required to attend a meeting with Ms Knights and the Head of Engineering to discuss the performance concerns. His performance improved after that and no further action was taken.

Other colleagues

18.70 TM was an individual managed by Ms Knights in 2019. His attendance record, both in terms of sickness absence and in terms of repeated lateness, started to give cause for concern and Ms Knights spoke to Liam Quinn of HR about this. She was advised to have a full and frank discussion with TM to tell him that it was not working for the business. She was further advised to terminate his contract if things did not quickly improve. In fact, after these discussions it transpired that TM had a hidden disability which was affecting his ability to be punctual and also causing sickness absence and after that the matter was handled with occupational health advice. We understand that TM was not dismissed.

18.71 Ms Binns, as set out above, worked as an intern for one year with the respondent as part of her university course. There were some issues with sickness absence on the part of Ms Binns but again this was dealt with through occupational health as Ms Binns has a disability. So far as we know Ms Binn was allowed to complete her one-year placement.

Submissions

19 Mr Braier, for the respondents, submitted, that the claimant had not established a prima facie case in relation to either his complaints of direct race discrimination or his complaints of harassment related to race. He submitted that the comparators for the purposes of the direct race discrimination claim were not appropriate statutory comparators and set out his reasons for saying this. He submitted that the claimant had put nothing before the tribunal which demonstrated that race played any part in either the dismissal or the appeal. He described the claimant's interpretation of Ms Knights' use of the word "other" in her email of 26 September as absurd. He submitted that the claimant was someone who was simply unable to accept that he could possibly have been dismissed due to his performance and consequently he had sought to find other reasons for his dismissal. He submitted that the claimant's interpretation of documents was often irrational. Mr Braier pointed out that the claimant's case had change substantially over time (initially the claimant had been pursuing claims of discrimination because of age, sex, race and religion) and he suggested that an adverse inference could be drawn from this. He submitted that the evidence was clear that the claimant was dismissed because of performance concerns. Whilst he acknowledged that there had been a lack of process he submitted that was common practice given the claimant's length of service. In relation to the harassment complaints he reminded us that there was factual dispute as to whether some of the incidents had occurred and in any event, he submitted, the conduct could not have had the proscribed effect and nor was it related to race. In relation to the element of the breach of contract claim which relied on the disciplinary procedure he pointed out that the claimant's case was that if the disciplinary procedure had been followed he would not have been dismissed and he submitted that such a claim fell firmly within the Johnson exclusion area. As to the Code of Ethics he submitted that there was no contractual obligation on the part of the respondent contained in the Code but, even if it was contractual and there had been a breach, it once again fell within the Johnson exclusion area.

20 Dr Ahmad told us that he had had a good job with his previous employer and had spent nearly 2 years there by the time he was contacted by the respondent via LinkedIn to ask if he would be interested in working for the respondent. He told us that initially everything was fine but then things changed and it was incomprehensible. He told us that he was treated as if he had no value or standing. He stated that most people would exhaust all possibilities before

dismissing someone and that he knew for a fact that he was doing very well in his job. He complained that he had been given no chance to put things right because of a lack of feedback and that this was because of his race.

The Law

21 Section 13 of the Equality Act 2010 states that:
(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.

22 Section 23(1) provides that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

23 The burden of proof is set out in section 136 of the Equality Act which states:
(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.

24 It is now well established that the term "because of" in the Equality Act has the same meaning as that given to the words "on the ground of" under the legacy legislation; see for example **Onu v Akwiwu [2014] ICR 571**. Accordingly we directed ourselves in accordance with the legacy case law as follows. When dealing with claims of direct discrimination the crucial question that has to be determined in every case is the reason why the claimant was treated as he was, Lord Nicholls **Nagarajan v London Regional Transport [1999] ICR 877**. As Lord Nicholls stated in the case of **Nagarajan**;

"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.

25 It is trite law that the protected characteristic does not need to be the only or even the main reason for the treatment, **Igen v Wong [2005] ICR 931**.

26 So far as the burden of proof is concerned, the proper approach has been addressed by the Court of Appeal in **Igen Ltd v Wong [2005 IRLR 258**, **Madarassy v Nomura International plc [2007] ICR 867** and **Laing v Manchester City Council [2006] IRLR 748**. The Supreme Court in **Royal Mail Group v Efobi [2021] EWCA Civ 18** confirmed that the law remains as set out in these cases despite changes to the wording of the burden of proof provisions in the Equality Act.

27 It was explained in **Amnesty International v Ahmed [2009] ICR 1450** that where explicit findings as to the reason for the claimant's treatment can be made this renders the elaborations of the "**Barton/Igen** guidelines" otiose. "There would be fewer appeals to this tribunal in discrimination cases if more tribunals took this straightforward course and only resorted to the provisions of s54A (or its cognates) where they felt unable to make positive findings on the evidence without its assistance." This approach was expressly endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37**. Lord Hope emphasised again that the burden of proof provisions have a role to play where there is room for doubt as to the facts necessary to establish discrimination, but that in a case where a tribunal is in a position to make positive findings on the evidence one way or another, they have no role to play. Accordingly, what these cases make clear, in summary, is that although a two stage approach is envisaged by section 136 it is not obligatory. In many cases it may be more appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatever in the adverse treatment, the case fails.

28 Mummery LJ explained in **Madarassy** what a claimant needs to show to establish a prima facie case where the two stage approach is adopted :

> 55. In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in **Igen Ltd v Wong**:
>
> > '28 … The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent 'could have committed' such act.
> >
> > 29. The relevant act is, in a race discrimination case …. that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act),(b) the alleged discriminator treats another person less favourably and (c) does so

> on racial grounds. All those are facts which the complainant, in our judgment, needs to prove on the balance of probabilities.'
>
> 56. The court in **Igen Ltd v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Accordingly, the burden is on the claimant to establish facts from which a tribunal could conclude on the balance of probabilities, and absent any explanation, that the alleged discrimination had occurred. At that stage the employer's explanation for the treatment - the subjective reasons which caused the employer to act as he did - must be left out of the account. It was also explained in **Madarassy** that the facts from which discrimination could be inferred can come from any evidence before the tribunal, including evidence from the respondent, save only for the absence of an adequate explanation.

29 There needs to be something more than a difference in treatment and a difference in status to move the burden across to the respondent, see for example **Hammonds LLP & Ors v Mwitta [2010] UKEAT 0026_10_0110** and Mr Justice Langstaff in **BCC & Semilali v Millwood UKEAT/0564/11** who again emphasised, paragraph 25, that more is required than a difference in (in this case) race and a difference in treatment to the detriment of the claimant. Whilst something else is therefore needed to reverse the burden "not very much" needs to be added to a difference in status and a difference in treatment in order for the burden to be on the respondent to prove a non discriminatory explanation, paragraph 56 **Veolia Environmental Services UK v Gumbs UKEAT/0487/12** and **Deman v The Commission for Equality & Human Rights [2010] EWCA Civ 1279**, paragraph 19; "we agree with both Counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal".

30 At the second stage, the respondent is required to prove that they did not contravene the provision concerned if the complaint is not to be upheld. 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 because of, in this case, age or belief since "no discrimination whatsoever" is compatible with the Burden of Proof Directive. That requires the 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 reason for the treatment in question. If the respondent fails to establish that the tribunal must find that there is discrimination.

Harassment

31 Harassment is defined as follows:

26(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 him.

(4) In deciding whether the 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.

32 Accordingly, there are three different elements to the statutory test to be considered. In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, a case bought under the RRA, it was explained that it is a healthy discipline for a tribunal specifically to address each of the three elements and to ensure that clear factual findings are made on each in relation to which an issue arises.

(1) *The unwanted conduct*. Did the respondent engage in unwanted conduct?

(2) *The purpose or effect of that conduct*. Did the conduct in question either:
(a) have the *purpose* or
(b) have the *effect*
of either (i) violating the claimant's dignity or (ii) creating an adverse environment for him? (We will refer to (i) and (ii) as "the proscribed environment".)

(3) *The relationship of the conduct to the protected characteristic.* Was that conduct related to the claimant's protected characteristic?

33 The law provides that if the tribunal concludes that there was unwanted conduct related to a protected characteristic which has the *purpose* of violating the dignity of the claimant, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him, the conduct would, as a matter of law, constitute harassment. As to what is meant by purpose, in **Dhaliwal** this was equated with intent, paragraph 14. So far as effect cases are concerned, in the

case of **The Reverend Canon Pemberton v The Right Reverend Inwood [2018] EWCA Civ** 564 Lord Justice Underhill reformulated the guidance that he had given, whilst sitting in the EAT, some years previously in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, as to the approach to be taken by Tribunals to harassment claims. It is now as follows, paragraph 88;

In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the proscribed effects under sub-paragraph (1) (b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4) (b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then (even if the claimant did feel that his dignity was violated or an adverse environment created) it should not be found to have done so.

34 The conduct must be "related to" the relevant protected characteristic. This is a question of fact, **Warby v Wunda Group Plc [2012] EqLR 536**. This stands in stark contrast to the use of "because of" elsewhere in the Act in that there is no requirement for a causative link. It is enough if there is a connection or association with the prohibited ground. Often with harassment complaints the nature of the conduct complained of consists, for example, of overtly racial abuse. If such conduct is proved on the facts then it follows that the conduct will be related to the protected characteristic. Sometimes it will not be obvious from the face of the comment or conduct that it is related to a protected characteristic. Then the focus is on the alleged perpetrator's conduct and whether that conduct, objectively, is related to the protected characteristic, **Unite the Union v Nailard [2016] IRLR 906.** Whilst the mental processes of the alleged harasser will be relevant to the question of whether the conduct complained of was related to the protected characteristic (see for example **Bakkali v Greater Manchester Buses (South) Ltd UKEAT/0176/17**) it is not determinative. The question of whether the conduct related to the protected characteristic has to be judged objectively and the alleged perpetrator's perception of whether the conduct relates to a protected characteristic cannot be conclusive of the question.

Breach of Contract

35 In **Edwards *v* Chesterfield Royal Hospital NHS Foundation Trust & Botham v Ministry of Defence [2011] UKSC 58** it was held that loss for the unfair manner of a dismissal (the unfairness being either in breach of the implied term of trust and confidence or express terms such as an incorporated

disciplinary policy) falls within what is termed the Johnson exclusion area. The Johnson exclusion area applies where common law claims for damages conflict with the statutory jurisdiction in relation to unfair dismissal claims, and it applies to prevent such claims from being pursued**.** The demarcation area can be identified, it was explained in **Edwards**, by asking if the damages for loss claimed are consequential on the dismissal, in which the cause of action does not arise independently from the dismissal itself, and it falls within the exclusion area.

Conclusions

Direct race Discrimination

The claimant's dismissal

36 This complaint is, of course, factually accurate; it was not disputed that the claimant was dismissed. As we have already set out, we have found that the decision maker was Dr Marrs, paragraph 18.59. We were prepared to assume that the burden of proof had moved across to the respondent (and for this reason we did not need to engage with an analysis of the claimant's comparator, Dr Smart, or the other individuals mentioned during the hearing who were alleged to be in similar circumstances to the claimant, TM and Ms Binns, and whether they were appropriate statutory comparators or not). We concluded that the reason why Dr Marrs decided to dismiss the claimant was because he considered that the claimant was not performing well enough in his role, and in particular the claimant had not developed the prototype that he was taken on to deliver. That is an explanation that is in no sense whatsoever because of race. We reach that conclusion for the following reasons;

37 Firstly, it was clear that there were performance issues with the claimant; many different individuals had concerns about the claimant's performance;
Ms Binns; that the claimant was condescending and would reject her ideas and that she did not know what the claimant was doing, paragraphs 18.18 and 18.25.
Dr Smart: that there was no real output from the claimant, he did not know what he was doing and the claimant spoke to him like he was an idiot, paragraphs 18.27 and 18.34.
Ms Knight; that she did not know what the claimant was doing and he was not progressing with the detection prototype as required, paragraphs 18.24, 18.26, 18.35, 18.37 and 18.46.
Mr Kinnersley; that he did not really know what the claimant was doing, paragraph 18.33.
Dr Marrs; that the prototype had not been developed as required within the required timescale, paragraphs 18.58 and 18.60.
Dr Marrs and Mr Kinnersley; that the claimant's demonstration on 3 October had not been up to standard, paragraphs 18.44 and 18.45.

Dr Marrs, Dr Smart and Mr Kinnersley; that the presentation on 22 October had not been up to scratch, paragraph 18.53.

38 Five individuals with concerns. The number of people who either raised concerns or had concerns corroborates that the claimant was under performing against the respondent's expectations of him.

39 We took into account also that the contemporaneous documentary evidence supported the respondent's case that there were performance issues. The one to one documents, whilst brief, clearly show that there were discussions between Ms Knights and others as to what the claimant was actually doing. The claimant's one-to-one notes demonstrate that Ms Knights was regularly talking to the claimant about his demonstration to try to ensure it was on track. And the notes also show Ms Knights providing feedback to the claimant, albeit in quite limited form, once the demonstration had taken place. It cannot be said therefore, in our view, as the claimant suggested, that the performance concerns were fabricated.

40 Dr Marrs knew about these issues, see paragraphs 18.37, 18.44, 18.51, 18.52,18.53 and 18.58 above.

41 We considered that the email that Ms Knights sent on 26 September 2019 to Dr Marrs also provided significant support for the respondent's case. Ms Knights clearly set out in this email that she did not know what the claimant was working on and that she was concerned about the upcoming demonstration by the claimant. It is evident from the email that Ms Knights was very concerned about the claimant's performance as she stated that she was expecting to need an HR conversation with the claimant covering what he was doing technically and his interactions with the rest of the team and she started, in this email, to succession plan for the eventuality that the situation with the claimant did not improve. This is a significant document, we considered, because it is an internal document sent at a point well before the claimant's dismissal and, of course, well before there was any hint of litigation. For these reasons we considered that what was set out in the document was likely to be an accurate representation of Ms Knights' view. The email was, moreover, sent to Dr Marrs, who on our findings was the person who decided to dismiss the claimant, and it was sent to him just a matter of weeks before he decided to dismiss the claimant, making it very likely that this information would have been in his mind at the time.

42 We took into account also that whilst before us the claimant appeared to assert that he had done the work that was required of him that did not appear to be his position on 24 October in his meeting with Dr Marrs. The claimant told Dr Marrs in the meeting that he was "building a detector" and that he would have it ready for the following month – i.e. that he was in the process of building it, not that one had been built. That led to Dr Marrs pointing out to the claimant that the goal had been to take a prototype to the United Arab Emirates that month and

that it appeared the claimant had been doing his own thing. That discussion, it seemed to us, was entirely consistent with the Dr Marrs' principal concern, which was that after nearly 4 months of employment the claimant had not produced the prototype that he was taken on to produce.

43 The claimant invited us to infer that performance was not the real reason for his dismissal from a number of different factors. He invited us to infer this from the fact that no process was followed in order to dismiss him, in particular that the disciplinary process was not followed. We did not draw an adverse inference against the respondent in this regard because it was quite evident from the contemporaneous documentation that the reason why the process was not followed was because of the claimant's short length of service. That is unsurprising; it may not be best practice, but it is a very common practice, for an employer to dismiss without following due process when an employee has only short length of service.

44 He invited us to infer discrimination from the fact that there was a conspiracy against him, but we have already dealt with this in our findings of fact above and explained that we do not find as a fact that there was a conspiracy, paragraph 18.28.

45 He invited us to infer it from Ms Knights use of the word "other" in the email of 26 September. We have already explained why we do not consider that any adverse inference can be drawn in that regard, paragraphs 18.40 and 18.43.

The Appeal

46 It is correct that the claimant's appeal against dismissal was rejected. The relevant decision-maker was Mr Pawson. There was no actual comparator for the purposes of this complaint (the actual comparator related to the complaint of dismissal) and neither party addressed us on the characteristics of the hypothetical comparator. We considered that the hypothetical comparator would be a senior employee who was not Asian who had been dismissed for poor performance concerns and who had appealed against that dismissal and who had raised similar points to the claimant on their appeal. We concluded that the claimant had not proved facts from which we could conclude that he was treated less favourably than this comparator because of his race. It was striking that the only matters which the claimant relied upon as facts from which we could conclude his appeal was rejected because of race were matters which went to the potential *fairness* of the appeal. He relied in particular on the fact that both Mr Quinn and Mr Pawson had had some involvement with his case at dismissal stage and he relied on the fact that certain information that he had requested for the appeal was not provided to him.

47 But it is well settled law that unfairness and discrimination are not one and the same thing and we did not consider, in the circumstances of this case, that

the unfairness that there was in the process was sufficient to move the burden of proof across to the respondent. It is true that Mr Quinn had some involvement with the case at dismissal stage, in that he had advised on next steps after the 22 October software demonstration and he had advised the respondent that it could dismiss without following a process. Likewise Mr Pawson had some prior involvement, as he had approved the dismissal of the claimant if Dr Marrs considered it necessary to dismiss the after the one to one of 24 October, paragraph 18.55. Additionally, whilst some of the information requested by the claimant for the appeal was provided, not all of it was, paragraph 18.44.

48 But, as is always the case, context is important. The respondent had been advised, correctly, that it was not legally obliged to follow any particular process in order to fairly dismiss the claimant. In such circumstances we concluded that the unfair aspects of the process were not sufficient to raise a prima facie case against the respondent.

49 In any event, even had the burden of proof moved across to the respondent, we would have concluded that the reason why the claimant's appeal was rejected was because Mr Pawson decided that there were no grounds to overturn the dismissal decision because he was satisfied that there was evidence of poor performance on the claimant's part and he was satisfied that the claimant had been dismissed because of these concerns, paragraph 18.66. This is a non-discriminatory explanation that is in no sense whatsoever because of race.

Harassment related to race

Complaint 2(a) on the CMO (paragraph 8.1 in these reasons): Ms Knights made it mandatory for the claimant to deliver presentations at the October software demonstrations.

50 This did, as a matter of fact, occur, paragraphs 18.35 and 18.47. On balance we were prepared to conclude that this was unwanted conduct. We did not consider that the actions of Ms Knights could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him but we concluded that the claimant had proved that it had that effect on him, particularly given his own perspective. We did not conclude that there were facts from which we could conclude that the conduct of Ms Knights in insisting that the claimant present at the software demonstrations was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed, we concluded that the conduct of Ms Knights was not in any way related to race. The reason for the conduct was that Ms Knights was concerned that the claimant had not demonstrated at earlier software demonstrations and she was concerned that his work was not progressing as required, paragraphs 18.24, 18.26, 18.35, 18.37 and 18.46. Accordingly, the conduct was not caused by the protected characteristic of race.

The concept of conduct "related to" a protected characteristic goes wider than the "reason why" but there still requires to be some connection between the conduct and the protected characteristic and there was nothing on the evidence before us to suggest that the conduct was more broadly associated with race in some way.

Complaint 2(b)(i) on the CMO (paragraph 8.2(i) in these reasons): Ms Knight had attacked the claimant's competence in one-to-one's.

51 We would note, as an aside, that there seemed to us to be some inconsistency between this complaint and the claimant's firm position before us that he never received any feedback from Ms Knights about performance concerns**.** When we asked the claimant in submissions to confirm specifically what incidents he was referring to as part of this complaint he identified three incidents as follows;

(1) Ms Knights told the claimant that the machine learning capability would be developed around Ms Binns and not him. This complaint has failed on the facts, paragraph 18.21.

(2) Ms Knights told the claimant on 10 October that his presentation had not been well received and Ms Binns' presentation had been well received. On our findings of fact this did happen, paragraphs 18.46 and 18.47. We had little hesitation in concluding that this was unwanted conduct. We did not consider that the actions of Ms Knights could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him but we concluded that the claimant had proved that it had that effect on him, particularly given his own perspective. We did not conclude that there were facts from which we could conclude that the conduct of Ms Knights in giving the claimant this feedback was related to race and consequently we concluded that the claimant had not established a prima facie case. There was simply nothing on the facts from which we could conclude that this unwanted conduct was related to race. Even had the burden of proof moved across to the respondent we would have concluded that the respondent had proved the conduct was not related to race. The claimant's presentation had not gone down well (and Ms Binns' presentation had), paragraph 18.44, and Ms Knights needed to inform the claimant of this. That was the reason for the treament and there was nothing to suggest that the conduct was more broadly associated with race in some way.

(3) Suggesting to the claimant on 10 October that he got advice about his demonstration from Dr Batchelor.

52 This, on our findings of fact, did occur, paragraph 18.46. We had little hesitation in concluding that this was unwanted conduct. We did not consider that the actions of Ms Knights could be characterised as conduct that had the

purpose of violating the claimant's dignity or creating the proscribed environment but we concluded that the claimant had proved that it had that effect on him, particularly given his own perspective. We did not conclude that there were facts from which we could conclude that the conduct of Ms Knights in making this suggestion was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed, we concluded that the respondent had proved that the conduct of Ms Knights was not in any way related to race. The reason why Ms Knights made this comment is because the claimant's demonstration had not gone well, the claimant's explanation for that had been that the field was complicated and he did not want to be too technical and because, as Ms Knights set out in her one-to-one notes, she considered that Dr Batchelor was good at presenting highly technical data and he could therefore help the claimant. Accordingly, the conduct was not caused by the protected characteristic of race and there was nothing to suggest on the evidence before us that the conduct was more broadly associated with race in some other way.

Complaint 2(b)(ii) on the CMO (paragraph 8.2(ii) in these reasons): Ms Knights had questioned the claimant's intellectual capabilities in one-to-one's.

53 We clarified with the claimant in submissions that this complaint was about a comment that he asserted Ms Knights had made in the 10 October one to one; "are you taking advantage of the intelligence of your colleagues". In fact, as we have set out above, paragraph 18.46, we found as a fact that she said something slightly different to this; she said that the claimant did not appear to value the intelligence and experience in the room. Moreover, we rejected the inference which the claimant invited us to draw from these words, which was that Ms Knights was actually implying that the claimant did not share his colleagues intelligence, paragraph 18.48. Accordingly, it seemed to us that this complaint fails on the facts. We would not in any event have concluded that there were facts from which we could conclude that the conduct of Ms Knights in making this comment was related to race and consequently the burden of proof would not have reversed. There was simply nothing on the facts before us to link this conduct to race.

Complaint 2(b)(iii) on the CMO (paragraph 8.2(iii) in these reasons): Ms Knights told the claimant he was less able than an intern who had no formal qualifications.

54 This complaint fails on the facts. Ms Knights did not say this, paragraph 18.21.

Complaint (c) on the CMO (paragraph 8.3 in these reasons): a failure to implement the disciplinary/capability process when dismissing the claimant

55 This as a matter of fact occurred. So far as we know (no specific questions were asked about this) the decision-makers were Ms Knights and Dr Marrs, who took advice about the process to be followed from Mr Quinn, paragraph 18.51. We had no hesitation in concluding that the failure to implement the process was unwanted conduct. We did not consider that the actions of Ms Knights and Dr Marrs could be characterised as conduct that had the *purpose* of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him but we concluded that the claimant had proved that it had that effect on him. We did not conclude that there were facts from which we could conclude that the conduct of Ms Knights and Dr Marrs in deciding not to follow the process was related to race and consequently it did not appear to us that the burden of proof had reversed. However, on the assumption that the burden of proof had reversed, we concluded that the respondent had proved that the conduct of Ms Knights and Dr Marrs was not in any way related to race. The reason why Ms Knights and Dr Marrs did not follow the process was because they had received HR advice that they did not need to given the claimant's short length of service, paragraph 18.51. Accordingly, the conduct was not caused by the protected characteristic of race and there was nothing to suggest on the evidence before us that this conduct was more broadly associated with race in some other way.

Breach of contract

56 The claimant's breach of contract claim was based on the respondent having failed to follow the disciplinary process and also on asserted breaches of the "United by Values" document.

Disciplinary policy

57 It was clear from the documentation that was before us that, as a condition of the claimant's employment, he was required to read and comply with the respondent's policies, including the disciplinary policy, paragraph 18.7. We did not, however, consider that the wording in the claimant's contract was such that it could be said that the entire disciplinary process was incorporated, such that the terms of the process became enforceable by *both parties* to the contract. The contractual requirement, it seemed to us, was simply that the claimant read and comply with the policies. Accordingly, the claimant has not proved that the disciplinary policy was contractual.

58 However, contrary to our primary conclusion set out above, we were prepared to assume for the purposes of this element of the claim that the disciplinary policy was a contractual document enforceable by both parties. The claimant's case was that had the disciplinary procedure been followed he would not have been dismissed and would not have suffered the resultant loss of pay and benefits, see paragraph 15 of his witness statement. That claim, we concluded, falls fairly and squarely within the Johnson exclusion area. That is

because the loss claimed for arises when the claimant is dismissed and it arises by reason of his dismissal. On the authority of **Edwards** v **Chesterfield** that loss falls entirely within the Johnson exclusion area, and accordingly we have no jurisdiction to consider this claim. The claim would therefore fail on this basis also.

59 In relation to the breach of contract claim based on the "United by Values" document, it was clear from the documentation that was before us that, as a condition of his employment, the claimant was required to comply with the Code of Ethics (which we understand was another name for the United by Values document). We did not, however, consider that the wording in the claimant's contract was such that it could be said that this policy had become incorporated such that there were enforceable obligations on *both parties* to the contract. Once again it seemed to us that the contractual requirement was that the claimant read and comply with the policy, paragraph 18.8.

60 In any event, even if the policy was incorporated, only such terms as are apt for incorporation would become part of the claimant's contract of employment. The claimant did not take us to the specific parts of the policy which he asserted had been incorporated into his contract and breached by the respondent and in these circumstances we do not conclude that the claimant has proved that any particular part of this policy was incorporated or breached. In any event, the vast majority of this document, it seemed to us, was aspirational and discursive and not apt for incorporation into an employment contract.

61 But even if it was incorporated, the claimant's case, once again, was that had the policy been adhered to he would not have been dismissed and would not have suffered the resultant loss of pay and benefits. Once again, therefore, this claim falls squarely within the Johnson exclusion area and accordingly we have no jurisdiction to consider it.

Employment Judge Harding
Dated: 3 September 2021