EMPLOYMENT TRIBUNALS

Claimant: **Mr A Liburd**

Respondents: **G-Staff Limited (in voluntary liquidation) (1)**
Mr Onkar Singh Bamber (2)
Mr Jason Colin Shaw (3)

Heard at: **Midlands West** **On:** **1 and 2 June 2021**

Before: **Employment Judge Woffenden**
Members: **Ms MD Rance**
Mr AA Moosa

Representation
Claimant: In person
The First Respondent: Did Not Attend and Was Not Represented
The Second Respondent: Mr A McMillan of Counsel
The Third Respondent: Did Not Attend and Was Not Represented

RESERVED JUDGMENT

1The claimant's complaints of race discrimination against the respondents under section 13 Equality Act 2010 fail and are dismissed.

REASONS

Introduction

1 The claimant had presented a claim for unfair dismissal race discrimination and a number of other money claims (including unpaid commission and a redundancy payment) on 6 May 2019. He had been employed by the first respondent from 31 October 2016 to 15 March 2019.

2 On 22 April 2020 judgment was issued in the claimant's favour against the first respondent (which had gone into voluntary liquidation that day) for his unfair dismissal and unpaid commission (from August 2017 to February 2019 in the sum of £40190) but not for a redundancy payment.

3 On 23 October 2020 at a preliminary hearing the issues in relation to the claimant's claim of direct race discrimination against the second and third

respondents were identified , the final hearing of that claim was listed for 1 and 2 June 2020 and orders were made to enable those respondents to be served and to present a response and for all parties to get ready for the final hearing. None of the respondents appeared or were represented at the preliminary hearing.

4 The second respondent presented a response but the third respondent has not. The second respondent confirmed to the tribunal on enquiry that the third respondent was aware of the proceedings. Having considered the information available to us about reasons for his absence we decided to proceed under rule 47 Employment Tribunal Rules of Procedure 2013.

Issues

5 Having clarified with the claimant at the commencement of the final hearing what allegations were made against which respondents and in what capacity for the purposes of section 110 (a) Equality Act 2010 and the dates on which it was alleged the matters complained of took place, the issues to be determined by the tribunal were as follows:

Had the second or third respondents subjected the claimant to the following treatment falling within section 39 Equality Act 2010 ,because of his race (Black British) ,specifically :

5.1 Treating the claimant less favourably than other employees called Peter Hegarty and Ray Brown ,by providing:

a) Peter Hegarty with a higher salary and better package than the claimant (October /November 2018)
b) Ray Brown with a company car allowance when the claimant had no such allowance (December 2018).

This allegation is against the second and third respondents, as agents of the first respondent.

5.2 Providing the claimant with a less attractive commission structure than :

a) Ray Brown, who had lower thresholds to reach before he would receive commission on sales in October 2018 (this allegation is against the second and third respondents)
b) Peter Hegarty ,who was given a retainer in October 2018 (this allegation is against the third respondent)
c) Ray Brown and Peter Hegarty who had more attractive margin rates for their side of the business in October 2018 (this allegation is against the second and third respondents ,as agents of the first respondent).

5.3 Paying the claimant his salary late whereas others were on time in October 2017.Comparators are other office employees. (This allegation is against the second respondent as agent of the first respondent).

5.4 Failing to pay the claimant commission that he was owed in accordance with his contract of employment on 31 October 2017 15 May 2018 28 June 2018 November 2018 24 January 2019 and 8 April 2019 .The claimant alleges that all other staff members were paid their commission including Hegarty ,Brown ,Oli,

Baiba and Miks (this allegation is against the second and third respondents, as agents of the first respondent).

5.5 Failing to pay the claimant a redundancy payment that he was owed in or around the time of his dismissal on 15 March 2019.He names Olivia Gruszecka as a comparator, who was paid a redundancy payment in or around July 2019 (this allegation is against the second and third respondents, as agents of the first respondent).

5.6 Failing to give the claimant pay rises despite other employees in the office receiving pay rises such as Olivia Gruszecka who received a pay rise in August 2018 (this allegation is against the second and third respondents as agents of the first respondent).

5.7 Refusing the claimant permission to carry over or be paid in lieu for outstanding holiday allowance on 24 January 2019 and 7 February 2019.Two other employees ,Harry Kalirai and Olivia Gruszecka ,were paid in lieu for outstanding holidays (this allegation is against the third respondent as agent of the first respondent).

5.8 Disregarding complaints made by the claimant on 31 October 2017 15 May 2018 28 June 2018 November 2018 24 January 2019 and 8 April 2019 about failure to make financial payments he was owed. It is alleged the second and third respondent failed to attend pre-arranged meetings and 'fobbed off' his complaints over unpaid commission .The claimant says he regularly raised this issue throughout 2017 and 2018 with the second and third respondents. He was not paid a redundancy payment on specious grounds .He relies on a hypothetical comparator for this complaint (this allegation is against the second and third respondents as agents of the first respondent).

5.9 Not submitting the claimant's PAYE properly for 2016/2017 and 2017/2018 meaning that he was required to make repayments to HMRC .The claimant contends he was treated less favourably than non-black employees who had their pay submitted properly (this allegation is against the second respondent , as agent of the first respondent).

5.10 Dismissing the claimant. The claimant contends this was a decision taken by the second and/or third respondent through the agency of Neil Farrow who was a business consultant working for the third respondent. The claimant had raised issues over TUPE ,unpaid commission and underpaid PAYE tax. The first respondent through Mr Farrow was seeking to apply an increased bonus threshold .On 15 February 2019 Mr Farrow dismissed the claimant purportedly on the ground of redundancy without any warning or consultation .The claimant relies on a hypothetical comparator.

Evidence

6 There was an agreed bundle of documents of 112 pages to which was added during the course of the hearing page 99 A (an exchange of emails on 31 August 2018 between the claimant and the second respondent) and page 56A (an email exchange concerning Miks Vizbuilis dated 5 October 2017).We heard evidence from the claimant and the second respondent, both of whom had prepared witness statements. We had regard only to those documents in the agreed bundle to which we were referred in witness statements or cross-examination.

Fact Finding

7 The claimant was employed as a branch manager by Adjustopen Ltd trading as Solutions Recruitment ('Solutions Recruitment') from 31 October 2016. He was recruited by Anthony Hudson who started the business .His letter of offer dated 18 October 2016 said that his starting salary was £ 32,000 a year ,his line manager was Anthony Hudson and '*You will be paid commission as outlined in the commission policy*.' The letter said '*This letter and documents will serve as your Contract of Employment .Additional Contract details are contained in the Company handbook which is given to new employees on commencement*.' The claimant was issued with a company handbook dated February 2016 (the Handbook'). The Handbook said '*To help you, we have produced this handbook ,which sets out the terms and conditions that will govern your employment with this Company*.' Under the heading '*Commission*' it said '*Certain recruitment consultants will be eligible to enter into the company's commission scheme .If you are unsure please consult with your direct line manager to determine whether or not you are eligible to enter the scheme'.* It went on to say that commission is paid '*based on calendar month'* and '*at the discretion of the Company*'. It also provided that '*commission is usually paid on a 2 month rolling basis . i.e November's commission would be paid in January '*.

The Employee shall be entitled to receive commission on the temporary/permanent placements which he/she arranges.' Commission thresholds were set out in the Handbook ;they were 15% for monthly earnings £7001 to £12000 and 20% for monthly earnings £12001 to £17000 and 25% for monthly earnings of £17001 and above. It is common ground that the claimant was never paid any commission.

8 The second respondent did not dispute the claimant's calculation of the commission to which he was entitled in the agreed bundle over the period April 2018 to March 2019 (total sum £22 ,548.51) .He accepts that the claimant raised the issue of commission with him and it was discussed in their meetings. His evidence in his witness statement was that the claimant's role as branch manager was not one that was usually subject to a commission structure and he believed the claimant had been paid correctly. If that was so we would have expected him to have stated that clearly in his response to correspondence when the claimant raised the issue or in one of his meetings with the claimant. When we asked him why he had not given this explanation to the claimant his evidence was vague and lacked any credibility. We find the claimant was entitled to commission as set out in his letter of offer under the terms of his contract of employment which included the commission scheme. We did not believe the second respondent's explanation as to the reason why the claimant was not paid commission nor do we consider he was telling us the truth when he told us he believed the claimant had been paid correctly.

9 It was also stated in the Handbook that it was not permitted to carry over unused holiday from one holiday year to the next and that employees were entitled to be paid mileage for use of a non company car.

10 The claimant worked at Solution Recruitment's Leicester branch. Solutions Recruitment had bought the first respondent in July 2017 as part of an informal plan to develop a national platform for recruitment in the north and the south. A sale and purchase agreement was made between another individual and the

second and third respondent . The second respondent was the controlling shareholder and director of the first respondent. The third respondent is an accountant and operates a company called JSA Partners Ltd to which (in due course) the first respondent's pay roll function was outsourced. The claimant was moved to the Rugby branch as branch manager when the Leicester branch was closed.

11 The claimant had to pay to HMRC an underpayment of tax for 2016-2017 in the sum of £2328 and an underpayment of tax for 2017 – 2018 in the sum of £ 2043.60. He attributed this in an email to the third respondent on 1 November 2018 to incorrect submissions made by '*Solutions*.' There was no evidence before us that indicates that the second respondent was responsible for whatever state of affairs led to the claimant being required to make such payments and we accept the second respondent's evidence that he had no knowledge of this.

12 On 31 October 2017 the claimant emailed the second respondent and said he had finally received his pay slips but had not been receiving any commission or been paid that day. The second respondent emailed him that day to say it was '*hopefully sorted* 'and if there was anything else to go through they could look at it on Tuesday when he was in. The claimant thanked him by return of email for '*clearing that up*'. The second respondent accepts that the claimant was paid late on this occasion but here was no evidence before us that other office employees were paid on time on this occasion.

13 The second respondent accepted in his witness statement that in May 2018 the claimant raised concerns about his commission and pay. On 15 May 2018 the claimant emailed the second respondent and said '*After our conversation on Friday regarding my salary and commission I have attached the Solutions handbook I was sent when I started at Solutions with the commission structure in section 5 for you*.' We find on the balance of probabilities that on or around 15 May 2018 the claimant complained to the second respondent about nonpayment of commission and (the amount) of his salary (but not that his salary had not been paid).

14 On 28 June 2018 the claimant sent the second respondent a plan for the office. Under the heading '*Negatives*' the claimant set out among other matters '*No commission has been earned or salary review since I joined the business*.' We find on the balance of probabilities that on or around 28 June 2018 the claimant complained to the second respondent about nonpayment of commission and the lack of salary review (but not that his salary had not been paid).

15 Oliwia Gruszecka (who was Polish) carried out administrative duties at the first respondent but became a candidate coordinator and ,after a meeting between her and the second respondent which the claimant did not attend ,the second respondent instructed the claimant to notify payroll of a pay rise of £2000 for her which he did on 13 August 2018.We accept the second respondent's evidence that this was because she had taken on additional responsibilities. The claimant also asked the second respondent for a pay rise in August 2018. A figure of £35000 was agreed in principle subject to a further meeting between the claimant and the second respondent at which the figures for the business would be looked at .The second respondent emailed the claimant on 31 August 2018 (when he told the second respondent he had realised his salary had not been increased) to remind him that they had spoken about the salary and said that we were waiting to go through the figures before it was increased and that he was

happy to meet early the following week. The claimant replied 'ok that's fine' and whenever was best for him was fine for the claimant. It is common ground no such meeting took place.

16 In addition to the claimant and Ms Gruszecka there were a number of other staff members at the Rugby branch. There was Miks Vizbuilis (who was Hungarian) had the title 'senior consultant – industrial') was self-employed and remunerated on a commission only basis. He was junior to the claimant. Biaba (his partner and also Hungarian) was a consultant in industrial and was junior to the claimant. Harwinder Kalirai (Hairi)(who was Asian) was a consultant - account manager in industrial who focused on the first respondent's bigger industrial clients .On 4 October 2017 the claimant sent an email to Mr Vizbuilis confirming an agreement reached with the second respondent about working from home on a commission only basis and responding to other complaints he had raised that day .This was the only example before us of another employee having had their concerns addressed and resolved immediately and it was addressed and resolved in part by the claimant.

17 In or around late August 2018 the claimant's employment transferred to the first respondent.

18 The second respondent rang the claimant on 4 October 2018 and told him that Solutions Recruitment had sold its share of the business and his new business partner was the third respondent. In fact in October 2018 the second respondent sold his shareholding to the third respondent, and was paid for his shares in instalments at the rate of £3000 a month. He remained a director of the first respondent until 1 May 2019 in order to protect his investment until such time as he had been paid for his shares .

19 On 8 November 2018 the third respondent sent Peter Hegarty and the claimant an email from JSA Associates Ltd to say '*As you are aware there has been some big changes in the business the last few months to hopefully start turning the corner for G Staff.*
One of these changes is the backstep of Onkar from anything to do with the day to day running of the business.
Onkar will no longer be the go to person with any issues or needs for authority. With this in mind I would like yourself Pete to step up and make the final decisions with anything within G Staff obviously I am here if anything is needed but day to day issues can be resolved by the pair of you.' We find Mr Hegarty was therefore in post prior to the second respondent's step back from the day to day operations of the first respondent and not (as pleaded) that his involvement with the business of the first respondent occurred when the second respondent was no longer active in that business.

20 Mr Hegarty's job title was branch manager for construction. He focused on the construction business sector. The claimant focused on the industrial business sector. We accept the second respondent's evidence under cross examination that the construction business sector was different from and more lucrative than the industrial business sector and as a result individuals working in that sector were paid higher. The claimant's undisputed evidence under cross examination was that Mr Hegarty was given a higher salary than him (the first respondent's bank statement for November 2018 shows Mr Hegarty was paid £3680.49 net per month when the claimant was paid £2043.60 per month) and a company car. We reject the second respondent's evidence under cross-examination that he

had been simply told as a shareholder that Mr Hegarty was joining the business and that he was not aware when the contract with Mr Hegarty had been agreed. As we have found above Mr Hegarty's involvement in the business predated 8 November 2018 when the second respondent ceased to have anything to do with the running of the business. The second respondent was the sole director and major shareholder (albeit divesting himself of the latter from October 2018 onwards) and he was up to 8 November 2018 the 'go to ' person with any issue or need for authority .There is no evidence before us that up to that date anyone else was responsible for the day to day running of the business. We find on the balance of probabilities that he decided to recruit Mr Hegarty on the salary set out above and the terms in paragraph 26 below.

21 Up to 8 November 2018 the second respondent had seen the claimant about once or twice a week in the office and was available for contact by phone or email . They had held strategy meetings about how to take the business of the branch forward. The third respondent had played no active part in the day to day operations of the first respondent. He had been (as the second respondent described him under cross examination) a silent partner.

22 After 8 November 2018 the claimant was pretty much left to his own devices. From that date on there was no evidence of any contact between the claimant and the second respondent until 29 March 2019 and then only when the claimant was directed to contact him by Ms Rogers (see paragraph 35 below).The second respondent no longer played any active part in the day to day operations of the first respondent and we find that the claimant both knew of and accepted the change in the second respondent's role. From the evidence before us the claimant's interactions after 8 November 2018 were with Mr Farrow as his appointed point of contact (see paragraph 24 below). The second respondent would however talk to the third respondent every couple of weeks and continued to speak to the claimant if he called him.

23 The claimant accepted under cross examination that ,at the time of the events about which he complains, the Rugby branch was under performing. He was cross-examined about the basis on which he asserted that other people had been paid commission when he had not and he said that had they not been paid they would have come to talk to him about it and no-one had from which he concluded that they had been paid. In our judgment this was not adequate evidence to support his assertion.

24 On 26 November 2018 the claimant sent an email to Neil Farrow. It was the claimant's evidence (which we accept) that he had been appointed as his main point of contact. Mr Farrow was an external consultant who operated a business called Farrow and Co (which described itself as '*Recruitment Growth Specialists'*).In the email the claimant asked for an update about holidays salary commission and underpaid tax. He said he currently had 10 days holiday left to take and asked if the holiday year was going to change or stay the same or would he paid a lump sum because the holiday year was due to end on 31 December and any untaken holidays would be lost. He said it had been agreed his salary would be increased on 13 August 2018 (though he did not identify the amount) but then '*back tracked dependent on figures and a meeting*' which never took place. He also when he would be paid commission due to him from August 2017 to *'the present*' which he said he had first raised on 31 October 2017.He also referred to the underpayments of tax in 2016 -2017 and 2017 -2018 and asked whether this would be repaid to him and whether he was likely to

receive another underpayment. We find on the balance of probabilities that on 28 November 2018 the claimant complained to Mr Farrow about nonpayment of commission and the failure to increase his salary (but not that his salary had not been paid) and inquired about reimbursement of the tax underpayments.

25 It was the claimant's evidence (which we accept) that his request to have the holiday carried over or to be paid in lieu was subsequently refused so on 10 December 2018 he took 10 days holiday.

26 In a letter dated 21 December 2018 Mr Hegarty offered Ray Brown the position of senior recruitment consultant at a base salary of £32000 and a Company Car. He was provided with an Audi. Both he and Mr Hegarty had a commission scheme with a threshold of £5000 (built up over 6 months) and 10% for monthly earnings £0 to £10000 and 15 % for monthly earnings £10000 to £15000 and 20% for monthly earnings of £15000 to £25000 and 25% for monthly earnings over £25000.Like Mr Hegarty he focused on the construction business sector. They were both white. We accept the second respondent's evidence that he had no knowledge of Mr Brown or the terms of his appointment which postdated his stepping back from the first respondent's day to day operations. Mr Hegarty had autonomy as far as day to day matters were concerned and there is no evidence that (as was the case with Mr Farrow) he had to pass on or seek the permission of the third respondent in personnel matters. Mr Brown was to work in the same sector as Mr Hegarty. We find that it was Mr Hegarty's decision to appoint Mr Brown on the terms set out in his letter to Mr Brown dated 21 December 2018.

27 On 24 January 2019 the claimant sent an email to Mr Farrow saying among other matters that a salary increase had been agreed for him and Ms Gruszecka on 13 August 2018 but he found '*come pay day*' this had not been done and that '*The reason stated was that we needed to sit down to look at the figures which did not happen even though the figures were sent each week and Oliwia's salary was increased to £ 20,000*.'He also said '*I know you are working on putting a commission structure in place and you mentioned that the commission will not be backdated from August 2017 due to costs involved etc. I appreciate what you said but the terms of my contract does not state that the expenditure of additional costs should be taken into consideration*.' He said as far as holidays were concerned '*The guys have said their holidays have been topped up to 25 and any holidays rolled over will be paid out which I was informed couldn't be done last year. My current holidays include my birthday and a duvet day as 2 additional days ,will I get an additional 5 days to my allowance or will it remain the same?'* We find on the balance of probabilities that on this occasion the subject matter of his complaint to Mr Farrow was about the failure to increase his salary (but not that his salary had not been paid), and he pointed out that whatever commission structure was put in place the relevant terms for him were enshrined in his contract of employment and sought clarification about his holiday entitlement for that year.

28 A meeting was arranged with Mr Farrow which took place on 7 February 2019. Mr Farrow told him that the issues he had raised about his unpaid commission tax and his contract would not be entertained and his commission threshold would be increased or it would not end well for him. The claimant said the increase in the commission threshold was not unfair and not in line with TUPE ; he would be taking advice and left the meeting feeling unfairly treated threatened and singled out. He felt he had been spoken to in an extremely

condescending way which he at that point felt was due to his race. Mr Farrow sent an email to the claimant that day in which he described the meeting as a discussion about *' the financials on the industrial division of G-Staff.'* He said '*For the business to be sustainable, there needs to be a real focus on sales and winning new business as G- Staff needs to get to a point where it is at least breaking even.'* He set out a commission structure to be offered which required a threshold of £10,000 after overheads of 9000 and a profit for staff of £1000 before commission would be paid at 25% for an initial band from £10,000 to £15,000.He asked the claimant to contact him to say what his intentions were going forward after having taken advice and suggested another meeting the following week. That same day he sent the third respondent an email (copied to the claimant) in which he said he had met with the claimant and asked him to come up with a plan to make a significant increase in profitable sales for the business to *'stop the losses'* as the only other way to break even was *'to make cuts '*and *'the only possible cuts that could be made were to the 'wage bill.'* He also set out the proposed new commission structure.

29 That same day Mr Farrow emailed the third respondent to ask him to '*pay the holidays over* ' to '*Harry And ollie*' because (he said) they were changing the holiday year from April to January and they were owed days which they could not take over /before Christmas as there was not sufficient cover in the office for the business to operate.

30 On 8 February 2019 the claimant became aware that the first respondent was advertising the job of recruitment consultant at its Rugby branch at a salary of £26000 to £ 32000 a year.

31 On 15 February 2019 Mr Farrow called the claimant into an office. The claimant made a note of what was said during their discussion which we accept as an accurate account of what was said . Mr Farrow said that the first respondent was losing more money than they had realised and what now made more sense was to make him redundant .The construction department was starting to make money so they were looking to close the industrial department to make the first respondent more focused on construction. He then said they would probably keep the former department going .The claimant would be on paid garden leave until 15 March 2019 and holidays and expenses would be paid. He concluded by saying it was probably better for the claimant anyway because he had on going problems with pay and as a result was not as motivated. When the claimant asked about a redundancy package Mr Farrow told him that was not their problem because he did not have a G-Staff contract .The claimant said he had more than two years' service and Mr Farrow said he would ask 'them' (which the claimant assumed was a reference to the third respondent) to review this and an email would be sent to him. There was no mention of the recruitment consultant vacancy.

32 We infer from the third respondent's email dated 8 November 2018 that ,having acquired the second respondent's controlling shareholding, he intended thereafter that he would be the final arbiter in relation to the business of the first respondent. Mr Farrow was then interposed as a point of contact for the claimant and it was to him (not the third respondent) that the claimant addressed his contractual and other concerns. However we find Mr Farrow did not have autonomy in personnel matters but passed them on or sought the permission of the third respondent. As far as the second respondent is concerned we have found he ceased to play an active part in the day to day operations of the first

respondent from 8 November 2018. There was no evidence that it was the second respondent who took the decision to dismiss the claimant or of any interactions with Mr Farrow. We conclude that the second respondent did not as alleged decide to dismiss the claimant through the agency of Mr Farrow.

33 As far as the third respondent is concerned the decision to dismiss the claimant was taken some time after 7 February 2019 and before 15 February 2019. When informing the claimant of the decision Mr Farrow used the plural and not the singular. We infer from our finding about Mr Farrow's lack of autonomy above that when doing so he was referring to the third respondent and conclude the decision to dismiss was taken by the third respondent and Mr Farrow was deployed by the third respondent as the means to communicate that decision.

34 On 20 February 2019 the claimant sent a grievance to the third respondent in which he said he believed he had been subject to unreasonable and unlawful treatment and that he had been discriminated against because of his ethnic origin. Among other things he said colleagues had been given an increase in their holiday allowance but he had not and prior to his holiday on 10 December he had asked if his remaining days could be paid out or 'rolled over' but he was told this was not possible. Others in the office had since had their holiday allowance increased and their remaining days have been paid.

35 On 29 March 2019 the claimant sent an email to Laura Rogers at the third respondent's company JSA Partners Limited asking about non payment of wages (4 weeks' pay holiday pay and redundancy pay) and non-receipt of wage slip on what he believed was pay day. She replied to say that she had been told that '*we will not be making any payment and any queries you have should be directed to Onkar*.' The claimant emailed the second respondent about this that same day and the second respondent replied by return of email that he knew nothing about it but '*will find out what's going on and get back to you.*'

34 The claimant chased the second respondent again about his pay by email on 8 April 2019.The second respondent replied that he had spoken to '*Pete*' to find out and it '*was mentioned that they were investigating whether you'd contacted a client after you were made redundant .I'll speak with Pete and find out where we're at*. The claimant emailed him on 8 April 2019 to explain what contact had been made and reiterate he was owed pay redundancy and answers to his grievance complaining about breach of contract and unfair redundancy. The second respondent said he would pass this on. When the claimant indicated in a subsequent email he would contact the client the second respondent emailed him to tell him he must not do so and that '*As an employer we have every right to withhold monies due when harm to the business has been made.*
We are dealing with this action and will revert back by the end of April.
However we must warn you that any contact with customers again will only go against your case. The customer is no way to be contacted as this isn't there (sic) matter and solely g staff.'

35 Ms Gruszecka was told she was redundant in July 2019 following a staff meeting on 11 July 2019 when all staff were informed that the first respondent would cease trading. The first respondent sent her an undated letter telling her she would get £3000 redundancy pay plus all outstanding holiday pay due. The claimant was never paid a redundancy payment by the first respondent. We accept the claimant's unchallenged evidence in his witness statement that Ms Gruszecka was paid in full in July 2019.

The Law

36 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.

37 Under Part 5 (Work) section 39 (2) (c) and (d) of the Equality Act 2010 an employer (A) must not discriminate against an employee of A's by dismissing him or subjecting the employee to any other detriment.

38 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.

39 Under section 110 Equality Act 2010 a person (A) contravenes this section if-
(a) A is an employee or an agent ,
(b) A does something which ,by virtue of section 109 ((1) or (2) ,is treated as having been done by A's employer or principal as the case may be) ,and
(c) The doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

40 Under section 83 (2) Equality Act 2010 'Employment ' means –
Employment under a contract of employment ,a contract of apprenticeship or a contract personally to do work .

41 The burden of proof is set out in section 136 of the Equality Act 2010 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.

42 It is 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**. 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. The crucial question just mentioned is to be distinguished sharply

from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred.

43 That the focus is on, in a "reason why" case, what was in the decision maker's mind (consciously or subconsciously) was emphasised relatively recently in the case of **CLFIS v Dr Mary Reynolds [2015] EWCA** Civ **439.** It is trite law, however, 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**.

44 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**.

45 However 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. 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.

46 Accordingly although a two stage approach is envisaged by s.136 it is not obligatory. Where the two stage approach is adopted Mummery LJ explained in Madarassy that the approach is as follows:

> 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."

47 Therefore, 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.

48 The need for there to be something more than a difference in treatment and a difference in status has been emphasised repeatedly by the EAT, 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,** paragraph 25.

49 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**. This might include the fact that the respondent has given inconsistent explanations for the treatment, although it is the fact of the inconsistency not the explanations themselves that move the burden across, paragraph 57 **Veolia**, as well as a finding that an explanation for the treatment is a false one or a witness is lying in relation to the explanation, paragraph 59 **Veolia**. It cannot, however, include a failure by the respondent to call a relevant decision maker as a witness. That may be relevant at the second stage but is not a matter from which an adverse inference can be drawn at the first stage as the failure to provide an explanation cannot be taken into account at this point, **Royal Mail Group v Efobi [2019] EWCA** Civ **18**. There is certainly no requirement that there needs to be a finding of something happening that is obviously and blatantly discriminatory to reverse the burden, paragraph 55 **Veolia**. **Metropolitan Police v Denby UKEAT/0314/16:** "The authorities do not require the tribunal at the first stage to blind itself to evasive, economical or untruthful evidence from the respondent which may help the tribunal decide there are facts which suffice to shift the burden, paragraphs 43 and 49".

50 In **Metropolitan Police v Denby UKEAT/0314/16**, paragraph 48, it was held "there is nothing wrong with the tribunal…. considering all the relevant evidence at the first stage … even if some of it is of an explanatory nature and emanates from the employer".

51 In considering the burden of proof each allegation or complaint should be looked at separately, **Essex County Council v Jarrett UKEAT/0045/15**, although in the event that a particular complaint is found to be substantiated that in itself may well be such evidence as justifies the reversal of the burden of proof in respect of other allegations, **Jarrett.** Likewise if a particular complaint is not substantiated that may equally inform a decision on the reversal of the burden of proof on another complaint, although it will not be decisive of it, **Jarrett**. It is always important to look at the totality of the evidence. The Court of Appeal in **London Borough of Ealing v Rihal 2004 IRLR 642** paragraphs 31 – 32, applying the approach of the Employment Appeal Tribunal in **Qureshi** is authority

for the proposition that in determining whether the less favourable treatment was on the proscribed ground, a tribunal is obliged to look at all the material put before it which is relevant to the determination of that issue, which may include evidence about the conduct of the alleged discriminator before or after the act about which complaint is made. The total picture has to be looked at.

52 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, race 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 (in this case) race was not a reason for the treatment in question. If the respondent fails to establish that the tribunal must find that there is discrimination.

53 In **Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16**, in the context of whether unreasonable treatment supports an inference of discrimination the EAT said, paragraph 97;
It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings. Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.

54 In **London Borough of Islington v** Ladele **[2009] IRLR 154** Mr Justice Elias said this about unreasonable treatment;
"It may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one." As Lord Browne-Wilkinson stated in **Zafar v Glasgow City Council [1997] IRLR 229**:
" it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."

55 It is trite law that direct discrimination requires there to have been less favourable treatment of the claimant. That is not the same as unfavourable treatment. Treatment may be unacceptable, inappropriate, bullying or irrational but it may nonetheless be no less favourable than that given to others. It is implicit in the concept of direct discrimination that a person (actual or hypothetical) in a similar position to the claimant who did not share the claimant's protected characteristic would not have suffered the less favourable treatment. Establishing less favourable treatment therefore involves a comparison of the claimant's treatment with the treatment of others, actual or hypothetical, (the statutory comparison). Section 23 identifies how that comparison should be

made; the circumstances between the claimant and their comparator must be the same or not materially different. Where there is a true actual comparator, asking the less favourable treatment question may be the most direct route to determining if there has been less favourable treatment and the reason for the less favourable treatment; but where there is a hypothetical comparator or a dispute as to the relevant circumstances of the actual comparator relied on it may be better to focus on the reason why question rather than getting bogged down in "the often arid and confusing task" of constructing a hypothetical comparator.

56 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

57 Section 123 EqA provides that:

> "(1) Subject to sections…140B, proceedings on a complaint within section 120 (which relates to a contravention of Part 5 (Work) of EqA)may not be brought after the end of –
>
> 1. The period of three months starting with the date of the act to which the complaint relates ,or
> 2. such other period as the employment tribunal thinks just and equitable .
>
> …..
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period:
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

58 As far as employment status is concerned the leading case is **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, [1968] 1 All ER 433**, in which McKenna J said as follows:

" A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service …'.'

59 The editor of Harvey on Industrial Relations and Employment Law Division A1 1 B (2) Paragraph 11 states that in addition to the traditional indicator of the degree of control consideration should be given to the following:

> *3.*
>
> *— What was the amount of the remuneration and how was it paid?—a regular wage or salary tends towards a contract of*

employment; profit sharing or the submission of invoices for set amounts of work done, towards independence.

4. *— How far, if at all, did the worker invest in his or her own future: who provided the capital and who risked the loss?*
5. *— Who provided the tools and equipment?*
6. *— Was the worker tied to one employer, or was he or she free to work for others (especially rival enterprises)? Conversely, how strong or otherwise is the obligation on the worker to work for that particular employer, if and when called on to do so?*
7. *— Was there a 'traditional structure' of employment in the trade or has it always been a bastion of self-employment?*
8. *— What were the arrangements for the payment of income tax and National Insurance?*
9. *— How was the arrangement terminable?—a power of dismissal smacks of employment.'*

60 Harvey further states that 'The modern approach is to deny that any one test or feature is conclusive. All the so-called tests should be regarded as useful general approaches, but in every case it is necessary to weigh all the factors in the particular case and ask whether it is appropriate to call the individual an 'employee'.

61 Tribunals are bound by the ordinary principles of agency law (**Kemeh v Ministry of Defence (2014) EWCA Civ 91 [2014] IRLR 377** followed in **Unite the Union v Nailard 2018 EWCA Civ 1203)**.

Submissions

62 We thank the parties for their submissions which we have carefully considered.

63 Mr Macmillan made written and oral submissions. In summary he said that the second respondent was not the employee or agent of the first respondent, the claimant had not shifted the burden of proof on him , the claims against the second respondent were out of time and there was no basis on which it would be just and equitable for time to be extended in the claimant's favour.

64 After a brief adjournment the claimant made oral submissions. He said that although the second respondent stepped back from active duties from 8 November 2018 his emails indicated he was still involved. His claim that he had sold his shares was only mentioned during the hearing. The evidence showed he had raised concerns during his employment. The first respondent's normal practice as far as commission for branch managers was concerned was irrelevant ;this was not in the contract of employment which should have been rectified. It had been asserted that commission was not paid because he was under performing. If so, he did not believe this situation would have been allowed to on for 2 years. Comparators were paid commission ;was he the only employee who was underperforming and therefore penalised? Mr Hegarty Mr

Vizbulis and 'Baiba' were all carrying out the same duties but he was subjected to detriment. His career had been damaged and he had received no apology. He had been 'victimised' in a number of ways : holiday ,commission and holiday pay. He had been singled out and isolated .As a black British man he had been treated differently .He wanted to be heard and given closure for the discrimination he had received.

Conclusions

Employee or Agent

65 We have first considered whether either the second or third respondents were the employee or agent of the first respondent for the purposes of section 110 EqA. If they are neither, the claims against them cannot succeed.

66 There was no evidence before us in relation to either the second or third respondent of any contractual relationship whatsoever between them and the first respondent . The claimant did not put his case to us on that basis. We conclude neither of them were employees of the first respondent within the meaning of section 83 (2) EqA.

67 Was the second respondent the agent of the first respondent? He was the sole director of the first respondent until 1 May 2019.Directors of a company have the power under its Articles of Association to manage its business. As sole director of the first respondent we conclude the second respondent had the sole power to manage its business, which would include the management of its employees ,of which the claimant was one. The second respondent was to all intents and purposes acting as the claimant's line manager up to this date. There is no evidence that anyone else had the first respondent's express or implied authority to manage the claimant. We conclude that up to 8 November 2018 he was the first respondent's agent.

68 After 8 November 2018 (although he continued to be its sole director) the second respondent's role changed (see paragraph 22 above). We conclude that on that date he ceased to act as the first respondent's agent as far as management of the first respondent's business was concerned which included the management of the claimant. We infer from the tone and contents of his email of 8 April 2019 (while he was still the first respondent's sole director) that on that date he resumed acting as the first respondent's agent.

69 As far as the third respondent is concerned there is no evidence that prior to 8 November 2018 he played any part in management of the first respondent's business or the management of its employees. He was not a director and we infer from his acquisition of the second respondent's controlling shareholding that ,prior to this, he was a minority shareholder of the first respondent and ,as such, could not dictate how the business was run or what direction it would take. We conclude that he was not the first respondent's agent prior to 8 November 2018.After that date ,although he seems on the evidence of the email of 8 November 2018 to have assumed (or never turned his mind to whether) he had any authority necessary and indeed assumed (or never turned his mind to whether) he had the authority to appoint another agent (Mr Farrow) to act on its behalf, there was no evidence that the first respondent ever expressly or impliedly assented to the third respondent acting on its behalf .No correspondence from the third respondent or Mr Farrow to the claimant used the

first respondent's headed note paper or email address. In our judgment implied assent cannot be inferred merely from the fact that the third respondent was the first respondent's majority shareholder .Although the third respondent acted as if he had the authority of the first respondent to dismiss the claimant (either alone or jointly) it does not follow that he had that authority. We conclude that he was never the agent of the first respondent.

70 However in case we are wrong in our conclusions above we have gone on to consider the allegations made by the claimant against the second and third respondents.

Allegation at paragraph 5.1 a)

71 We have found Mr Hegarty was provided with a higher salary and better package (in that he was provided with a company car) than the claimant and that the second respondent was the decision maker . The material circumstances of Mr Hegarty differed from the claimant; he was recruited some years after the claimant and was branch manager for construction ,not the industrial business sector. Even if the material circumstances of Mr Hegarty and the claimant were the same and there was less favourable treatment ,the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place. If we were to assume the burden of proof had passed to the respondent, we conclude that Mr Hegarty was provided with a higher salary and better package because the construction business sector was different from and more lucrative than the industrial business sector and as a result individuals working in that sector were paid higher.

Allegation at paragraph 5.1 b)

72 We did not find that Mr Brown was provided with a company car allowance when the claimant had no such allowance ; Mr Brown was provided with a company car (an Audi). This allegation is not proven (**Chapman v Simon**).

Allegation at paragraph 5.2 a) b) and c)

73 The claimant has not proved that he was provided with a less attractive commission structure than Mr Brown in October 2018; Mr Brown was not appointed until December 2018. We found at paragraph 27 above that the provision of terms for Mr Brown was the decision of Mr Hegarty not the second or third respondent and the allegations against them in relation to Mr Brown are not proven.

74 Mr Hegarty did have more attractive margin rates and lower thresholds in the relevant commission structure for their side of the business (construction) than those for in the claimant's commission structure for his side of the business (industrial) but our conclusions in this respect are as set out under paragraph 71 above. We have not found he was given a retainer in October 2018.

Allegation at 5.3

75 It was not in dispute that the claimant's pay was paid late in October 2017 but we have not found that (unlike him) other employees were paid on time or that the late payment was attributable to any act or omission by the second respondent. This allegation against the second respondent is not proven.

Allegations at paragraph 5.4 and 5.8

75 It is common ground that the claimant was never paid any commission during his employment and judgment has been issued for unpaid commission from August 2017 to February 2019 . The second respondent knew of the terms of the claimant's contract and of the claimant's complaints about nonpayment and as we have found in paragraph 67 above was acting to all intents and purposes as the claimant's line manager prior to 8 November 2018.We conclude that it was his decision not to pay the claimant commission up to that date.

76 The material circumstances in which the claimant was not paid commission by the second respondent was that the claimant (the only black employee) was the branch manager of a poorly performing branch with a contractual entitlement to commission. We have not found that (unlike him) the comparators he named were paid commission. There are therefore no actual comparators .If we were to construct a hypothetical comparator whose circumstances were not materially different from the claimant (other than the hypothetical comparator's race) there is no evidence on which we could conclude they would have been paid commission. We have not therefore found any less favourable treatment of the claimant. However ,if we had ,we found the second respondent's explanation for not paying the claimant commission a false one. Assuming the burden of proof has passed to the second respondent, we conclude that the reason why the second respondent did not pay the claimant commission to which he was contractually entitled was because the branch was performing poorly and he decided he would simply ignore the unpalatable fact of the claimant's contractual entitlement for as long as he could. That was unreasonable and unjustifiable treatment of the claimant but had nothing whatsoever to do with his race.

77 Post 8 November 2018 the claimant continued as branch manager and the branch continued to underperform .As we found in paragraph 32 above Mr Farrow passed on or sought permission of the third respondent as far as personnel matters were concerned. We conclude that when Mr Farrow told the claimant on or about 24 January 209 that commission would not be backdated 'due to costs' he was passing on a decision taken by the third respondent. We have not found any less favourable treatment of the claimant (see paragraph 76 above) but even if we had ,the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place. He has complained of feeling spoken to by Mr Farrow in an extremely condescending way which he at that point felt was due to his race but his allegations of race discrimination are against the second and third respondent, not Mr Farrow. Even if we were to assume the burden of proof has passed, we conclude that the reason why the third respondent did not pay the claimant commission to which he was contractually entitled was because of costs and his intention to introduce a new commission scheme.

Allegation 5.5

78 No redundancy payment was made to the claimant. However he has alleged that he was owed such a payment in or around the time of his dismissal on 15 March 2019.This does not sit well with his further allegation at 5.10 above that his dismissal on 15 February 2019 was '*purportedly*' on the ground of redundancy and was an act of direct race discrimination. There would only be a failure to pay a redundancy payment that he was owed if his dismissal was

indeed by reason of redundancy. We note that judgment for such a payment was not issued on 22 April 2020 when the claimant's other money claims were determined. If however he was indeed owed such a payment we conclude for the reasons set out in paragraph 33 above that these were decisions taken by the third respondent . We have found a redundancy payment was paid to Ms Gruszecka (his comparator in relation to this allegation).However the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place. Even if we were to assume the burden of proof has passed, we conclude that the initial reason why the third respondent did not pay the claimant a redundancy payment was because the claimant did not have a G-staff contract and later because additionally he was suspected of having contacted a customer. Those may be inadequate or unreasonable explanations in the claimant's opinion but they had nothing whatsoever to do with his race.

Allegation 5.6

79 We have found the claimant was not given a pay rise and Ms Gruszecka did receive a pay rise in August 2018. The material circumstances of Ms Gruszecka differed from the claimant; she was a junior employee, not branch manager and unlike the claimant , she had taken on additional responsibilities . We have not found any less favourable treatment of the claimant but even if we had ,the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place. If we were to assume the burden of proof had passed, we conclude that the claimant was not given a pay rise because its implementation was subject to a further meeting with the second respondent to look at figures which never took place (see paragraphs 15 and 27 above). Not holding another meeting to look at the figures was discourteous and poor management of the claimant by the second respondent but had nothing whatsoever to do with his race. We conclude that the third respondent did not give the claimant a pay rise because ,on the information he provided in his email of 24 January 2019 to Mr Farrow, the salary increase was subject to another meeting which had not happened.

Allegation 5.7

80 We have not found that there was any refusal (as alleged) on 24 January 2019 and 7 February 2019 to permit the claimant to carry over or be paid in lieu for outstanding holiday allowance. The refusal (which we conclude was a decision of the third respondent) occurred sometime after 26 November and before 10 December 2018. The Handbook states it was not permitted to carry over unused holiday from one holiday year to the next and the claimant took his holiday before Christmas. The following year the third respondent agreed that Mr Kalirai and Ms Gruszecka were paid in lieu for outstanding holidays. Unlike the claimant they had been unable to take their holidays before Christmas because there was insufficient cover in the office. Their material circumstances therefore differed from the claimant because unlike him they had not been able to take their holidays. There was no less favourable treatment of the claimant .However, even if there was ,the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place such that the burden of proof has passed.

Allegation 5.8

81 We have found that the claimant complained to the second respondent on 31 October 2017 15 May 2018 and 28 June 2018 about a failure to pay him commission and ,to the extent the complaints concerned the nonpayment of commission, we conclude that his complaints were disregarded by the second respondent. We have found that on 28 November 2018 the claimant complained to Mr Farrow about the failure to pay him commission and ,to the extent the complaint concerned the nonpayment of commission, we conclude that this was disregarded by the third respondent. We have found that on 8 April 2019 he complained to the second respondent about the failure to pay him pay arrears and (a) redundancy (payment) but it was not disregarded ;indeed the second claimant responded to him on 8 April 2019 in robust terms that the monies were being withheld. We conclude the second respondent did 'fob off' his complaints over unpaid commission. We do not conclude that the third respondent did so; he made his position about commission abundantly clear via Mr Farrow. There is no evidence before us that he or the second respondent failed to attend pre-arranged meetings. However again in relation to those parts of the allegation which we have found proven the claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place. If we were to assume the burden of proof had passed, the reason for the claimant's treatment was as set out in paragraphs 76 and 77 above.

Allegation 5.9

82 We have found that the claimant was required to make repayments to HMRC in relation to underpayments of tax for 2016/2017 and 2017/2018 but we have not found that this was as alleged caused by any act or omission by the second respondent in not submitting the claimant's PAYE properly . This allegation against the second respondent is not proven.

Allegation at paragraph 5.10

83 It is the claimant's case that although Mr Farrow told the claimant that he was dismissed on 15 February 2019 , the decision to dismiss was not his but was that of either the second or the third respondent. We have found the decision to dismiss was that of the third respondent (see paragraph 33 above). We have found the claimant did raise issues over TUPE ,unpaid commission and underpaid PAYE tax and the first respondent through Mr Farrow was seeking to apply an increased bonus threshold and on 15 February 2019 Mr Farrow told the claimant that he was redundant without any warning or consultation . There is however no evidence on which we could conclude that a hypothetical comparator whose circumstances were not materially different from the claimant (other than the hypothetical comparator's race) would not have been treated in exactly the same way. If they had raised issues about TUPE unpaid commission underpaid PAYE tax and Mr Farrow was seeking to apply an increased bonus threshold to them they too would have been told they were redundant without any warning or consultation. We have not therefore found any less favourable treatment of the claimant. The claimant has failed to prove any facts from which we could conclude or infer that race discrimination has taken place.

Time Limit

84 We found that the second respondent did not act as agent of the first respondent from 8 November 2018 to 8 April 2019.We did not find the last act of discrimination alleged against the second respondent as agent (8 April 2019)

proven. Any claim against the second respondent should therefore have been made by 7 February 2019. The claim was presented on 6 May 2019. No extension is afforded by the ACAS Early Conciliation Certificate because it was not received until 21 March 2919 and issued on 15 April 2019 after expiry of the primary time limit .The claimant has not put forward any evidence nor did he put his case to us that it was just and equitable that time be extended in his favour. It follows that the claims against the second respondent are all out of time in any event.

85 Although we have not found the allegations of race discrimination have succeeded, we take this opportunity to observe that the claimant's dismissal was effected without even the semblance of a fair procedure. The management structure of the first respondent was shambolic and the channels of communication poor. Line management was infrequent and inadequate. Employee concerns were allowed to fester. The way the claimant has been treated by all the major actors during his employment is very far from best practice and does them no credit.

Employment Judge Woffenden

Date 27/08/2021

Pay Rise August 2018