EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Takhar	AND	Boots Opticians Professional Services Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT SOUTHAMPTON **ON** 16 to 24 August 2021

EMPLOYMENT JUDGE GRAY **MEMBERS** **MR K J SLEETH**
MR N A KNIGHT

Representation

For the Claimant: **In person**
For the Respondent: **Mr M Green (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that the Claimant's complaints of direct race discrimination and harassment fail and are dismissed.

JUDGMENT having been delivered orally on the 24 August 2021 and written reasons having been requested by email from the Respondent dated 26 August 2021, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

THE BACKGROUND TO THE CLAIM, THE HEARING AND THE ISSUES

1. In this case the Claimant claims that he was discriminated against because of a protected characteristic, namely race (he describes himself as of Sikh Origin / Indian British). The claim is for direct discrimination and harassment.

2. The Respondent contends that there was no discrimination.

3. For reference at this hearing we were initially presented with a 631-page bundle, the Claimant's witness statement, the witness statements of the four Respondent witnesses, Mr Weeks, Mr Taylor, Mr Popat and Mr Patel. The Claimant also submitted a chronology.

4. A preliminary matter for us to decide was the bundle. The Claimant said that his documents were missing from the 631-page bundle. Submissions were heard from the parties on the matter. In short, Respondent's Counsel did not object to returning to a previous version which ran to 714 pages and it was understood had all the documents in.

5. This was agreed and we were provided with an updated bundle to refer to for our reading (which was timetabled to take place for the first day). The hearing timetable then provided for Claimant's evidence for days 2 and 3. Then Respondent's evidence for days 4, 5 and half of 6. With submissions in the afternoon of day 6. Deliberation day 7 and then Judgment and remedy, if appropriate on day 8.

6. There have been three case management preliminary hearings on this matter.

7. The issues were identified at those hearings and they were confirmed and agreed at the start of this hearing as being, as extracted from the case management order of Employment Judge Livesey from the 18 December 2019 hearing (pages 45 to 52 of the bundle), with the addition of allegation 20 as permitted as detailed in the case management order and Judgment of Employment Judge Oliver from the 12 October 2020 hearing (pages 73 to 80):

> **"9 Section 26: Harassment on grounds of race**
>
> 9.1. Did the Respondent engage in unwanted conduct as set out in paragraph 10.1 below.

9.2. Was the conduct related to the Claimant's protected characteristic?

9.3. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

10. Section 13: Direct discrimination on grounds of race

10.1. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:

10.1.1. On 2 February 2015, the Branch Manager, Ms Tomes, was dismissive and unfriendly in relation to the Claimant's complaint about the loss of his nameplate from his door;

10.1.2. On 30 March 2015, Ms Tomes failed to release recommendations from an audit which would have enabled the Claimant to have acted before the deadline in the audit;

10.1.3. On 31 March 2015, Ms Tomes' last day at the Claimant's branch, she suspended him in relation to a minor issue for which no blame was ultimately attributed to him;

10.1.4. 11 August 2015, the new Branch Manager, Mr Birkett, launched a further investigation in relation to a patient appointment which, again, revealed that no blame attached to him;

10.1.5. On 1 November 2015, Mr Birkett told the Claimant to '*fuck off*' when he raised issues relating to his unpaid locum wages;

10.1.6. On 17 November 2015, Mr Birkett launched a further investigation which also resulted in another 'no fault' finding;

10.1.7. On 5 October 2016, Mr Birkett launched a further investigation against the Claimant in relation to the removal of patient data from the branch. He carried out two bag searches. Again, it is the Claimant's case that the investigation found no fault;

10.1.8. In or around November 2016, Mr Birkett criticised the Claimant's timekeeping with regard to clinics;

10.1.9. On 1 November 2016, Mr Birkett prevented the Claimant from bringing his case into the test room;

10.1.10. On 1 December 2016, Mr Birkett commented that the Claimant was '*nearly as dark as that cup of tea*';

10.1.11. On 13 February 2017, the new Branch Manager, Ms Prynn, was critical of the Claimant's recommendations;

10.1.12. On 1 February 2017, Ms Prynn again informed the Claimant that he could not bring his case into the test room;

10.1.13. On 21 March 2017, Ms Prynn initiated an investigation by Clinical Governance in relation to the Claimant's handovers;

10.1.14. On 17 July 2017, Ms Prynn refused the Claimant's request for time off to attend a doctors appointment. He alleges that he was threatened with disciplinary action if he had attended;

10.1.15. On 1 July 2017, Ms Prynn criticised the Claimant in relation to clinical timing and referrals;

10.1.16. Further on 1 July 2017, Ms Prynn intervened in the self-audit process and requested a Clinical Governance Manager to select records for the audit;

10.1.17. On 18 July 2017, Ms Prynn asked the Claimant why he did not want to move branches, to Andover;

10.1.18. In September 2017, the Claimant was suspended in respect of an alleged data breach;

10.1.19. The Claimant's grievance, that was commenced on 7 February 2018, was dismissed and the appeal was ultimately rejected on 7 February 2019.

Allegation 20 – ***[this allegation was added by amendment on the 12 October 2020 – Employment Judge Oliver having exercised her discretion to extend time to allow it to be added at that point]*** - Mr Weeks treatment of the Claimant at a return to work meeting on the 21 March 2019.

10.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; all other white, non-Asian optometrists and/or hypothetical comparators.

10.3. If so, are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

10.4. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

11. Time/limitation issues

11.1. The claim form was presented on 15 May 2019 Accordingly, any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

11.2. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period and/or that the conduct was part of a series of similar acts, at least one of which was in time? Is such conduct accordingly in time?

11.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable and/or that it was not reasonably practicable to have brought the claim in time but that it was issued within a further reasonable period?

12. Remedies

12.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

12.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest".

8. It was confirmed that the Claimant relies on a hypothetical comparator only.

9. It was confirmed that allegation 19 was made up of four parts:

a. First Grievance raised 9 October 2017 (page 394), with the outcome 16 March 2018 (Mr Taylor)

b. Appeal hearing 5 June 2018 (Mr Popat)

c. Second Grievance raised 17 July 2018 (pages 615 to 616), with the outcome 11 December 2018 (pages 643 to 648) (Mr Weeks)

d. The appeal rejection dated 7 February 2019 (Mr Patel).

10. The claim form was presented on 15 May 2019. The dates of the ACAS early conciliation certificate are 18 March 2019 until 18 April 2019. An act occurring on or after the 19 December 2018 will be in time. As to time limit jurisdiction it is understood that all the allegations save for 19d and 20 are potentially out of time.

11. It was agreed that we would address liability first.

12. The panel then adjourned to read for the rest of the first day.

13. At the commencement of the second day there were further issues with the bundle which were resolved with the agreed addition of a further 11 pages from the Claimant.

14. We were also provided with a copy of the Claimant's Chronology from the Respondent where Respondent's Counsel had sought to neutralise the content with tracked changes and it was confirmed we would review the version with the Respondent's tracked amendments to the Claimant's version when we needed to refer to it.

15. It was noted that the Claimant's witness statement did not deal with matters relating to just and equitable extensions and why he could not put his claim in before he did, so it was expressed to the Claimant that our assumption was that he was not presenting any evidence on this in the same way he did not at the time limit jurisdiction hearing before Employment Judge Oliver. The Claimant submitted that he did want to present evidence on this, it was therefore agreed that this would be dealt with by supplemental oral evidence after he was sworn in.

16. We then heard evidence from the Claimant who was sworn in just after 11am (day 2) and at the start of his oral evidence he was asked supplemental questions about the claim process.

17. Shortly after the commencement of his evidence the Claimant confirmed he wished to add a complaint against another employee of the Respondent that related to her decision to suspend him in January 2018. With consent

his evidence was adjourned so this application could be considered. After discussing the issues that we need to consider for such an application (the Claimant was aware of the process having undertaken it previously at the hearing before Employment Judge Oliver) the Claimant confirmed that he did not want to add that complaint on the basis he had the complaint against Mr Weeks to be considered, which had been added at the hearing before Employment Judge Oliver. The Claimant's evidence then resumed.

18. The Claimant concluded his oral evidence around 11:45 on day four (day four having started with consent at 9:30am). He was asked to confirm that as he had stated in his oral evidence, he was withdrawing allegations 6 and 18. He confirmed this was correct.

19. For the Respondent we heard from Mr Taylor (who decided the first grievance), Mr Popat (who decided the appeal to the first grievance), Mr Weeks ((by CVP) who decided the second grievance and dealt with the back to work interview) and Mr Patel (who decided the appeal to the second grievance).

20. Evidence on liability concluded at just after midday on day five. It was agreed that the hearing would then be adjourned to 10am on Monday morning (day six) to give the parties time to prepare their submissions, submit them in writing if they wished to, and then address us for 30 minutes each orally. We would then adjourn to deliberate and being slightly ahead on the timetable we may be in a position to deliver judgment on liability by Tuesday afternoon.

21. The parties were then released to 2:30pm on Tuesday (day seven) for judgment, and it was confirmed that we then had Wednesday to deal with remedy if appropriate.

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THE FACTS

22. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

23. It is confirmed in the chronology that the Claimant signed his employment contract to commence his employment with the Respondent on the 31 December 2014. It is also confirmed by an email dated 31 December 2014 the start date is the 31 December 2014 (see email page 108).

24. The Claimant was employed as an Optometrist, working 4 days a week at the Christchurch branch starting there on the 5 January 2015.

25. The Claimant remains in employment with the Respondent currently working at the Reading store.

26. The Claimant describes in his statement … "I commenced employment with Boots Opticians on 31st December 2014 after doing a trial week in the Christchurch branch to assess the store. I had an interview with the Area Manager Fraser Perman (qualified Pharmacist) in Lymington. Whilst in Lymington Fraser Perman told me Christchurch was a 'problem store that was under performing and had staffing issues'. He told me my objective was to turn it around and if I agreed to this there was a £3000 golden handshake".

27. We have observed that the 20 allegations the Claimant makes range from 2 February 2015 to 31 March 2019.

28. As already noted there have been three case management preliminary hearings on this matter, including on the 12 October 2020, a determination about time limits in respect of a protected disclosure claim (which was struck out for being out of time) and the race complaints.

29. For the race complaints it was found by Employment Judge Oliver that there was a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. The Claimant's case being that there was a campaign by a series of managers in a particular region, these are all linked together, and things have changed now he has moved region. It was noted that one of the intime acts will need to be found to be discrimination or harassment in order for the other allegations to be brought within time as a series of continuing acts.

30. It is clear from Employment Judge Oliver's Judgment that time issues are a key matter, both as to connection to any proven in time acts and if not, whether it is just and equitable to extend time.

31. The Claimant did not present in his witness statement any evidence about why he could not put his claim in before he did. He wanted to provide supplemental oral evidence about this.

32. By way of supplemental oral evidence, the Claimant confirmed that his claim was submitted on the 15 May 2019 (see page 7). The ACAS certificate was dated 18 March 2019 to 18 April 2019 (see page 21).

33. The Claimant was asked why he says he could not contact ACAS until 18 March 2019.

34. He explained that he was hoping that the matter could be resolved amicably through the internal processes and as he was suffering from severe stress at the time it delayed him. He said that he realised in January 2019 when he was suspended by Ms Alder that he had a complaint of race discrimination. He then contacted ACAS in March 2019.

35. The Claimant was referred to page 394 of the bundle and his email dated 9 October 2017 which is his grievance and which refers to a race discrimination complaint …"• I have been treated differently and bullied because of my race e.g. my manager told me I was as dark as a cup of tea. I informed my area manager about this but it was not dealt with and I was not given any support.". He confirmed that it was in respect of what Mr Birkett did only, i.e. the cup of tea comment. He says he did not realise the position until January 2019 (when he was suspended by Ms Alder) that the other matters he complains to the Tribunal about were in his belief race related.

36. The Claimant was asked to confirm he was not claiming that the actions of Ms Alder were race discrimination as they are not in the issues or his witness statement. He confirmed that was right, but he did now want to add that complaint. His evidence was therefore adjourned to consider an amendment application, which after reflection the Claimant then chose not to pursue.

37. Upon resumption of the Claimant's evidence he was asked when he first thought that he had to go to the Employment Tribunal. He said after the ACAS process not being successful, no option then need to go to ET.

38. Asked why he went to ACAS when he did, he said that it was the meeting with Mr Weeks (on the 21 March 2019). That was the trigger. It was confirmed that his evidence about the Mr Weeks matter was in the further information the Claimant had provided as detailed at page 91 of the bundle.

39. However, the Claimant then accepted in cross examination that he had started the ACAS process before the Mr Weeks meeting (it was started on the 18 March 2019 and the meeting with Mr Weeks was on the 21 March 2019). He explained that it was the phone calls from Mr Weeks to set up the back to work meeting that he found bullying, as Mr Weeks was too friendly when he had not met him, and he did not know who he was.

40. It was highlighted in cross examination that the grievance hearing in December 2018 was with Mr Weeks (see page 643), so he had met him. The appeal at page 650 also refers to Mr Weeks a number of times. The Claimant explained that he may have forgotten who Mr Weeks was when he had calls with Mr Weeks about the back to work interview because he was stressed at that time.

41. The Clamant confirmed that he is not impaired in giving his evidence now.

42. The Claimant accepted in cross examination that it was January 2018 (and not January 2019) that he was suspended by Ms Alder and therefore at that time that he accepts that he thought he had a complaint of race discrimination. As at the date of the October 2017 grievance he only thought that the comment by Mr Birkett was racist. The others he did not think were until later, after reflection, but he accepted he has no proof and does not know what their motives were.

43. It was highlighted in cross examination that Mr Taylor seemed to think his grievance was alleging more than that as race discrimination (see page 482), Mr Taylor's grievance outcome dated 16 March 2018 which says … "The overall theme of your grievance is around you feeling that you have been singled out or being managed in a certain way because of your race. You provided Appendix 1 which outlines the numerous examples of why you feel this way. I take such concerns seriously and have considered this as I have reviewed each of your examples individually but I have also considered your concerns as a whole taking into account the list of examples.". About this the Claimant said that he thought Mr Taylor had misunderstood his grievance.

44. As to the four managers who had heard the two grievances and two appeals the Claimant confirmed that he believed they had a laisse faire attitude towards him because he is Asian, and there is a company line that you don't overturn a decision previously made.

45. The Claimant accepted that he did not raise this in his appeal against Mr Taylor's decision as it would look bizarre saying this against another Asian. The Claimant asserted though that if white they would get a bit more favourable treatment.

46. About the lack of detail about any of this in his witness statement (which focuses on allegations 1 to 17) the Claimant explained that he had only realised he had to produce a written witness statement on the 13 August 2021. We note that there were orders made about witness statements for this hearing at the previous case management hearing before Employment Judge Oliver (see page 76, paragraphs 23 to 29).

47. Through his oral evidence the Claimant did appear confused and his recall of dates was poor. There were also conflicts in his evidence and also in his submissions. For example, he relies upon a positive reference from Mr Stannard (page 699). This is the same manager that issued him a final written warning on the 17 October 2017 (see pages 416 to 418). The Claimant submitted that we should take into account the positive reference,

but he submitted that he did not accept that he was guilty of what the final written warning was issued for, but he did not appeal as he wanted to move on. It was observed though that this contrasts with what he did then do, which was to pursue two grievances and appeals to conclusion.

48. It is fact that the Claimant does have documented a positive review in the first 4 weeks of his role (see page 111 – dated 17 February 2015) and has a positive review from Mr Birkett dated 20 May 2015 (see page 173 – " ATTITUDE IS EXCELLENT POSITIVITY FROM OTHER TEAM MEMBERS.").

49. There are also a number of supporting character references within the bundle, both from his time at Andover as a locum (see pages 259 and 206, which coincided with when he worked at Christchurch) and where he now works (see pages 699, 700, 701, 702, 703, 704, 709, 710, 711 and 713).

50. This is the heart of the Claimant's argument in that he asserts that as criticism seems to only arise in Christchurch it is those line managers that are acting towards him for racially motivated reasons. However, his claim does develop beyond that in him also accusing those who heard his grievances and appeals (allegation 19) and who are not based at Christchurch, finding against him for racially motivated reasons.

51. We were not presented any evidence to suggest that there is any connection with the managers who dealt with his grievances and appeals, or the back to work meeting (allegations 19 and 20) to the managers at Christchurch nor for that matter with Mr Stannard, who the Claimant does not make a race discrimination complaint against, but who issued him both a final written warning and a positive reference.

52. The Claimant has looked to relate the difference between what he perceives as positive feedback and negative feedback as being motivated due to his race, whereas the Respondent asserts that what was happening to the Claimant was reasonable management, as required at that particular time in those particular circumstances.

53. There is clearly a difference of perspective and we observe from this that the Claimant did not appear to intentionally mislead us in the way he presented his evidence and submissions, it is his interpretation of what has happened to him which he formed a belief about some time after the events (either in January 2018 or, as detailed below in our findings of fact, potentially May 2019), where not unsurprisingly, he finds it easier to accept the positive matters rather than the negative and his recall may not be exact.

54. The Respondent witnesses were focused on the more recent matters and assisted by contemporaneous documents. They appeared very credible

when recounting their recall of such matters. In contrast the Claimant is referring to matters over a 4 year period (2015 to 2019), without contemporaneous records of the allegations which are heavily reliant upon his recall of how he perceived something at the time and then subsequently reflected on and perceived to be race related at a later date, either in January 2018 or May 2019. This therefore made the Claimant seem less credible.

55. With these initial observations on the evidence and the issues, we consider that the logical approach is for us to look at the most recent allegations first, those that are in time, being the back to work meeting with Mr Weeks on the 21 March 2019 and the appeal outcome by Mr Patel issued on the 7 February 2019, then the rest of allegation 19 (all of which are not addressed in any detail in the Claimant's witness statement) before then considering the other allegations chronologically.

56. **Allegation 20 – Mr Weeks treatment of the Claimant at a return to work meeting on the 21 March 2019**

57. The Claimant confirmed that his evidence about this complaint is as per page 91 of the bundle:

"A return to work meeting was held where Sukhvinder had a representative present. The meeting was conducted in an unprofessional manner by Philip Weeks who didn't have any regard for treating Sukhvinder with respect and courtesy. Sukhvinder was refused basic rights such as speaking with his representative, having some time out and leave the room and Sukhvinder was not allowed to take notes which would be quite normal for any meeting informal/formal. The summary as stated below also formed part of the ACAS application Sukhvinder subsequently made. It was Sukhvinder's belief that he was not treated in an appropriate respectful manner as any other colleague of different race would have been. Thus, the continuation of applying a different treatment to Sukhvinder had continued.

[B] Conduct of Investigating Officers Being Obstructive [1] Philip Weeks preventing note taking at the investigation meeting [2] Philip Weeks seeking to restrict the ability of Sukhvinder to speak with his representative [3] Philip Weeks trying to prevent Sukhvinder and/or his Rep leaving the room …"

58. Three issues are raised from this, the Claimant says he was not allowed to:

    a. speak to his rep;

    b. leave the room; or

    c. take notes

59. The notes from the meeting (at pages 676 to 689) identify three breaks in a meeting that is recorded to have lasted from 11:40am to 12:45pm (see page 676):

    a. Page 676 – the Claimant is recorded as saying "can I take a break please 11:47am" … then it is noted there is a 11:50 restart (page 677)

    b. Page 680 – break requested by the Claimant and recorded as being from 12:01 to 12:13 – 12 minutes

    c. Page 687 – break requested – recorded as 12:33.

60. We also see at page 681 of the bundle in the meeting notes the comments of the Claimant's rep which follow the record of the 12-minute break, and which say … "I think it's inappropriate that the person as companion can't write things down – I have been advised not to speak and not to ask questions and you have requested no adjournments does that include comfort breaks?".

61. Then Mr Weeks is noted as saying – "yes – we have already taken 2 breaks" … "But obviously we will have comfort breaks" … "we are documenting the conversation".

62. The meeting notes do suggest that Mr Weeks was establishing the role of the rep at a back to work meeting, and that the notes were being taken by the note taker.

63. In his oral evidence the Claimant accepted that he had breaks (during cross examination he agreed that he had asked for a break and was given a break see page 676), although he was not sure about the third break, but he explained that it was just him and his rep walking out the door closing it and then turning around and walking back in again. When asked about the 12-minute break he said that he did speak to his rep. When asked why he claims he was not allowed to speak to his rep then, he said that it was not a proper discussion and that most of the 12 minutes was spent with him and his rep nearly jogging along the corridors with Mr Weeks chasing them until his rep went one way to the ladies and he then went another with Mr Weeks following him, until the Claimant stopped turned around and then saw his rep and they all headed back in to the room.

64. Mr Weeks addresses the back to work meeting in paragraphs 29 to 33 of his witness statement. He says that it is not correct that he treated the Claimant in an unprofessional manner with no respect or courtesy. He also

states that the Claimant did take notes, that the Claimant left the room and they did have breaks (paragraph 33 of his statement).

65. In cross examination Mr Weeks was clear that for him it was the fluidity of the meeting that was important. He wanted to focus on getting the Claimant back to work.

66. In his oral evidence Mr Weeks denied the Claimant's account about the 12-minute break, saying that he (Mr Weeks) had either been in discussions with HR or waiting in the room. This does seem consistent with the meeting notes as the Claimant's rep does not mention it. It also seems consistent with a subsequent email the Claimant sent to Mr Weeks on the 1 May 2019 (see page 697) which does not say this.

67. As to the Claimant taking notes, the Claimant said in cross examination that to the best of his memory he was not taking notes. This is not a definitive confirmation he did not take notes and it is clear from the Claimant's answers and evidence his memory is not always accurate.

68. The Claimant did not raise a grievance about the meeting.

69. The Claimant had no issue with the outcome of the meeting which was to refer him to Occupational Health and ultimately led to his current work circumstances which he is happy with. He accepted that he was pleased with outcome and it was what he wanted.

70. For these reasons we prefer the account of Mr Weeks about this which is supported by the meeting notes.

71. We do not find on the balance of probability that the Claimant has proven the he was denied breaks, or opportunity to speak to his rep or to make notes.

72. **Allegation 19 – The Claimant's grievance, that was commenced on 7 February 2018, was dismissed and the appeal was ultimately rejected on 7 February 2019**.

73. This was clarified as being made up of the following four allegations (dealing with the most recent first, which is in time):

74. **Appeal rejection on the 7 February 2019 (Mr Patel)**. The Claimant's complaint about Mr Patel is that he did not uphold his grievance despite agreeing with the Claimant, and this was as an act of harassment or less favourable treatment.

75. We observed during the Claimant's cross examination of Mr Patel that the Claimant went to great lengths to highlight how grateful he was of Mr Patel and in offering him a fresh start.

76. Mr Patel denied that he said to the Claimant in the off the record part of the meeting that the Claimant had gone through hell, nor that he (Mr Patel) has kids to feed, nor that he said he knew how the report was going to go, and denied his actions were motivated by the Claimant's race.

77. The Claimant has not expressly challenged any of the findings of Mr Patel.

78. For these reasons we prefer the account of Mr Patel and do not find that on the balance of probability that he gave an outcome he did not believe in.

79. It was clear that the Claimant was very grateful to Mr Patel for what he did do and expressly thanked him during his cross examination of Mr Patel.

80. As to the rest of allegation 19 (which are potentially out of time):

81. **First Grievance raised 9 October 2017 (page 394) with the outcome on the 16 March 2018 (Mr Taylor)**.

82. In respect of the cup of tea comment, in cross examination Mr Taylor agreed it was serious depending on the context said, he knew the Claimant was not happy about it and the way the Claimant perceived it was not good. Mr Taylor confirmed that his focus though was on the allegation against Mr Birkett as he did not understand at that time that the Claimant asserted that he had called his area manager at the same time to complain.

83. We note that the Claimant does not say that he did that in his grievance (page 394 and 394b), nor in the grievance interview notes (page 461) which say … "ST [Claimant] Racist remarks re dark as a cup of tea … NT [Mr Taylor] What context was that said … ST [Claimant] HR file from AM took over 40 days call 31/12, we are late sorry, George is no longer going to be with the Company…".

84. We also were referred to the Claimant's appeal (see page 492) where what the Claimant complains about in respect of this allegation is that Mr Taylor had minimised the racist comments made towards the Claimant and does not seem to have investigated at all. Mr Taylor confirmed his key focus was on the individual being accused, the accusation is against Mr Birkett. It is a matter of fact that Mr Birkett had left the Respondent's employment early in 2017.

85. Mr Taylor denied that he would have probed matters more if the Claimant was white. We note that this is not an allegation made against Mr Taylor in the Claimant's appeal.

86. Mr Taylor confirmed that everything he investigated and looked at where there were documents, were valid and done for valid reasons.

87. In respect of the pilot case, Mr Taylor did not accept his view was because of race. He said it was due to reasons of security, and patient safety as it could create a tripping hazard. He did not accept he had made this up and confirmed that it was security rules. He accepted it was not part of the Standard Operating Procedures, nor that there was anything specific about bag size, but that it is sensibility.

88. This does appear to be a management decision and not one specific to the Claimant. The Claimant has not presented us with any evidence that it was different for others save for what he felt. Mr Taylor has an explanation for the not allowing of pilot cases and we find this to be credible.

89. **Appeal hearing 5 June 2018 (Mr Popat) (page 517 to 520)**.

90. The Claimant accepted in cross examination that it was reasonable that Mr Popat had allowed the Claimant to put in a later appeal.

91. The conclusion of the appeal that the Claimant challenged Mr Popat about was around point 2 (page 518) in that it was illogical for Mr Popat to find that he was poor in Christchurch when he is found to be good in Andover, a franchise where the customer journey is more important.

92. However, in our view the explanation given by Mr Popat in his outcome letter does seem reasonable and not illogical as asserted by the Claimant. Mr Popat says … "it is, clear that Company Owned and Franchise locations operate in slightly different ways determined by the expectations of the Franchisees or Practice Managers. As explained by Nilesh we need to work in partnership within a practice team, which you have struggled to do in your employed locations and the reason for CGO visits was to support you achieve the highest possible standards of clinical practice". Mr Popat maintained this position in his oral evidence.

93. We note that the Respondent could have refused for the out of time appeal to go ahead, and by them not doing so they have demonstrated they are reasonable in trying to address the Claimant's issues.

94. The Claimant was very reluctant to put to Mr Popat that he (Mr Popat) did not find in his (the Claimant's) favour because of the Claimant's race. When the Claimant did this was denied by Mr Popat.

95. For these reasons we do not find that Mr Popat was illogical as asserted by the Claimant.

96. **Second Grievance raised 17 July 2018 (pages 615 to 616) with the outcome dated 11 December 2018 (pages 643 to 648) (Mr Weeks)**.

97. About this the Claimant confirmed that he accused Mr Weeks of harassment and less favourable on the basis that he did not reconsider his previous grievance.

98. In cross examination Mr Weeks confirmed that he would not do so where a grievance had been heard and then challenged by the aggrieved. Also, matters were a long time ago, so it was difficult to get witnesses.

99. In cross examination it was put to Mr Weeks that other colleagues would have been listened to based on their race. Mr Weeks stated that it would not matter what ethnic background or race it made no difference, he said that the facts were the grievance was looked at and the outcome challenged by Claimant and he (Mr Weeks) was satisfied proper process was followed by Boots.

100. We note that this is also what Mr Patel concluded when looking at this matter at the appeal before him and he concluded that Mr Weeks had acted appropriately. The Claimant did not accuse Mr Patel of making that finding because of race or as an act of harassment.

101. Allegation 1 - On 2 February 2015, the Branch Manager, Ms Tomes, was dismissive and unfriendly in relation to the Claimant's complaint about the loss of his nameplate from his door.

102. About this the Claimant said in cross examination that it was the way it was said to him that was unwelcome, but he did not consider it to be racist until he reflected back on matters in mid-2019 (around May 2019) after the meeting with Mr Weeks.

103. We note that the Claimant does not refer to the conduct of Ms Tomes being motivated by his race in his grievance in October 2017 (page 394).

104. Although there was an incident over carparking spaces between the Claimant and Ms Tomes, he did not agree that could be the reason for the way Tomes acted towards him. We note that the Claimant does not plead that the car parking space issue was harassment or less favourable treatment by Ms Tomes.

105. Allegation 2 - On 30 March 2015, Ms Tomes failed to release recommendations from an audit which would have enabled the Claimant to have acted before the deadline in the audit.

106. About this the Claimant confirmed in cross examination that he could not say that when this happened in 2015 it was because of his race or sloppy on the part of Ms Tomes, or an ulterior motive, but he does now say it is because of his race.

107. We note that the memo setting out concerns the Claimant has about Ms Tomes dated 2 April 2015 (pages 115 and 116) does not expressly say Ms Tomes' actions were deliberate. About this the Claimant says it is inferred from what he wrote, and he does not need to say it all with an oxford dictionary.

108. Allegation 3 – On 31 March 2015, Ms Tomes' last day at the Claimant's branch, she suspended him in relation to a minor issue for which no blame was ultimately attributed to him.

109. The Claimant accepted in cross examination that there were 6 allegations against him raised by a combination of patients and staff (see pages 119, 120, 122, 123 and 136). He was asked if he could see why an investigation took place. The Claimant said he could not. His reason for this was confirmed that in his opinion there should have been no formal investigation into the allegations.

110. About this we note that the Claimant describes no blame being attributed to him, however, we have read the outcome letter dated 15 April 2015 (see pages 170 to 171) and although no disciplinary action is initiated there are corrective actions for the Claimant including a PIP:

"I have now considered all the evidence before me and I believe that no formal disciplinary is required. However it remains a concern to me that after 14 weeks employment you have not finished reading the company SOPs and Clinical Policies and completed the required tests. The results of 2 red audits are of concern and whilst I accept there were issues with the feedback of the results to you (verbal not written) it is paramount that accept responsibility and achieve at least an amber result on the next audit. This combined with ensuring that the patients needs remain at the centre of your clinical practice with effective communication and teamwork to ensure this happens, does mean that I have decided to extend your probationary period by a further 4 weeks to 27/05/2015. To support you in abiding with our policies and procedure I require that a PIP is put in place with some specific actions.".

111. The Claimant does not raise issue with this outcome.

112. Allegation 4 – 11 August 2015, the new Branch Manager, Mr Birkett, launched a further investigation in relation to a patient appointment which, again, revealed that no blame attached to him;

113. The Claimant confirmed in cross examination that he did not know if this was a formal or informal complaint by a patient, and he accepted that if it were a formal complaint it needed to be investigated. He confirmed that if it were a formal complaint that he would withdraw this race discrimination allegation against Mr Birkett.

114. The Claimant was asked why he says this action could be linked to race and he confirmed that Mr Birkett has a severe history of criticising referrals he makes, because the Claimant hand delivers referral letters to a local GP practice, rather than send by post.

115. It was suggested this was a difference of view about data protection, the Claimant then said it was more than that and it was any area of work Mr Birkett could interfere with.

116. As to blame, the Claimant accepted that a follow up meeting for him about customer care was reasonable (see page 176).

117. The Claimant was also referred to positive feedback Mr Birkett gave in May 2015 (see page 173) and asked why Mr Birkett would do that. The Claimant said because they are the facts. The Claimant also explained in May 2015 that Mr Birkett was holding back from what he felt as he had just started in role.

118. ***Allegation 6 – On 17 November 2015, Mr Birkett launched a further investigation which also resulted in another 'no fault' finding***; **WITHDRAWN**- The Claimant was handed (with the consent of Respondent's Counsel) a separate copy of the case management order of Employment Judge Livesey as an easier reference to the allegations he makes. He accepted there was no evidence about this allegation in his Witness Statement and that he was not pursuing it. It was confirmed as withdrawn.

119. **August 2015 to October 2016**. It was put to the Claimant in cross examination that from August 2015 to October 2016, with the withdrawal of allegation 6 and the correction to the date of allegation 5 being in 2016 and not 2015, there are now no specific allegations of race against Mr Birkett. The Claimant said this was correct and that he had a good area manager at that time Mr Khalil, the Claimant said he was happy during this time.

120. He explained that when it became knowledge that Mr Khalil was about to leave that is when Mr Birkett acted.

121. There was no evidence about this in the Claimant's witness statement and it did appear to be just an assertion being made by the Claimant in response to questions put in cross examination, particular as the dates of the complaints he pursues were not made clear until his oral evidence.

122. When asked what he submits in evidence to support what he says, he said that Mr Khalil was a good policeman who was then leaving. If he raised any niggles with Mr Khalil, he knew he would have a word with Mr Birkett and the niggles not there. Any issues disappear and the Claimant said he rates Mr Khalil as an excellent manager.

123. The Claimant accepted that this was not the case for the locum payments though (see allegation 5).

124. **Allegation 7 – On 5 October 2016, Mr Birkett launched a further investigation against the Claimant in relation to the removal of patient data from the branch. He carried out two bag searches. Again, it is the Claimant's case that the investigation found no fault**;

125. The oral evidence on this matter focused on what the Claimant says about this at the investigation interview on the 10 October 2016 (pages 210 to 216), which was conducted by an employee that the Claimant does not allege race discrimination against. We also note that the Claimant signs these notes.

126. With reference to these notes at page 213 of the bundle the Claimant is asked about taking data off site who is responsible, and he accepts it is him.

127. In his oral evidence the Claimant was unclear if he redacted the data or not but agreed he did say no comment at the investigation when asked why he needed the patient DOB, address and name (see page 215).

128. There is no record in the notes that he said that Mr Birkett and Mr Rowat gave him permission to take it home. Asked why, if this was his defence to the allegations, he said that he wasn't asked that question and in the heat of the moment people don't give the best answers.

129. The Claimant accepted that Mr Birkett was aware that he had a copy of the record card in his bag, so he did a search to find it. It was put to him that the reason Mr Birkett did it was he thought there was a breach of data protection at the store. The Claimant confirmed that perhaps that was what

Mr Birkett was thinking. It was therefore put to the Claimant that Mr Birkett's motivation was he thought the Claimant was in breach of data protection. The Claimant did not accept this saying he thought Mr Birkett could use the event to get him in trouble. When the Claimant was asked which it was, his race or the protected disclosure he had alleged, he confirmed it was an act of vengeance to get him in trouble.

130. Allegation 8 – In or around November 2016, Mr Birkett criticised the Claimant's timekeeping with regard to clinics;

131. In cross examination the Claimant confirmed that this was an oral challenge and he accepted that the oral challenge of Optometrists about time keeping by Branch managers happens from time to time.

132. Allegation 5 – On 1 November [now 2016], Mr Birkett told the Claimant to 'fuck off' when he raised issues relating to his unpaid locum wages;

133. During the Claimant's oral evidence, it was established that the date of this allegation was wrong. The Claimant explained that the locum work he was seeking payment for was done in November 2014. He says that he did then speak to Mr Birkett about it in November 2015 and was told to fill in a form which he did and then gave back to Mr Birkett. It was not paid so he chased with his area manager Mr Khalil.

134. The Claimant accepted that Mr Khalil had not resolved this issue for him.

135. We were referred to an email dated 22 May 2018 from the Claimant (see page 507) that says … "despite raising a formal complaint with the area manager at that time Sam Khalil and been asked to fill out forms three times" and it was put to the Claimant that this does appear to criticise Mr Khalil. The Claimant accepted that a reasonable person may see it as criticism.

136. The Claimant says that he then raised payment with Mr Birkett again in November 2016 when the alleged swearing took place. The Claimant then says he raised that with his then area manager Ms Symanski, but it was not actioned by her. He explains that he raises a subject access request. He then has a call with Ms Symanski on the 31 December 2016 when he is told Mr Birkett is leaving. He does not then raise this matter again until his grievance in October 2017 (see appendix – page 394a).

137. The Claimant accepted that so far as the Respondent was concerned the date of the alleged comment was said to be November 2015.

138. The Claimant's recall in oral evidence is inconsistent and it would appear what he told the Respondent is also inconsistent. We were referred to the meeting notes from his grievance meeting with Mr Taylor (see page 477) where it records the Claimant saying he raised the matter with Mr Khalil, he said in cross examination that was incorrect and should say Ms Symanski. The Claimant accepted that the evidence he had given Mr Taylor at the time was factually incorrect.

139. **Allegation 9 – On 1 November 2016, Mr Birkett prevented the Claimant from bringing his case into the test room**;

140. We have already considered the evidential position of Mr Taylor about this. In cross examination the Claimant accepted that this was a common position taken by Mr Taylor, Ms Prynn and Mr Birkett.

141. **Allegation 10 – On 1 December 2016, Mr Birkett commented that the Claimant was 'nearly as dark as that cup of tea'**;

142. The Claimant's evidence as to what was said to him by Mr Birkett and how he found this at the time to be race discrimination is consistent.

143. As we have already noted what is not consistent is if and when he reported the matter to his area manager.

144. What we do have is a clear record of the comment in his grievance dated 9 October 2017 (see page 394), but this is over 10 months from when it was said and by which time Mr Birkett had left the business.

145. **Allegation 11 – On 13 February 2017, the new Branch Manager, Ms Prynn, was critical of the Claimant's recommendations**;

146. We were referred to Ms Prynn's notes at pages 241 and 243 of the bundle that record the Claimant was late and what appears to be a difference of view about the recommendation process. The Claimant's position was that as Ms Prynn has no clinical experience she shouldn't comment. However, we note (and as was as accepted by the Claimant) she is the Branch Manager who has line management responsibility for him.

147. **Allegation 12 – On 1 February 2017, Ms Prynn again informed the Claimant that he could not bring his case into the test room**;

148. The Claimant's evidence about this is that he did not believe a hypothetical white person would have the same issue. However as noted already we have considered the evidential position of Mr Taylor about this. In cross examination the Claimant accepted that this was a common position taken by Mr Taylor, Ms Prynn and Mr Birkett.

149. **Allegation 13 – On 21 March 2017, Ms Prynn initiated an investigation by Clinical Governance in relation to the Claimant's handovers**;

150. In cross examination the Claimant accepted that he had been asked to give the name of the patient to the final dispenser when he hands them over to sort out the purchase of eye wear.

151. The Claimant explained that in his view this was not necessary and referring to them as this gentleman or lady was fine. The Claimant said there is nothing unfriendly about the way he does it.

152. This seems to be a difference of opinion as to customer service expectations between him and the Branch Manager. The Claimant did accept that the Branch Manager was effectively his line manager in particular on the commercial matters rather than clinical.

153. **Allegation 14 – On 17 July 2017, Ms Prynn refused the Claimant's request for time off to attend a doctor's appointment. He alleges that he was threatened with disciplinary action if he had attended**;

154. This matter is investigated by Ms Boosey (see pages 248 to 255) and the meeting notes are signed by the Claimant. The Claimant does not allege discrimination against her.

155. The outcome of the investigation meeting can therefore be taken as a third-party and contemporaneous assessment of this matter as it was perceived at that time.

156. This is at page 256, dated 4 April 2017 and says:

> "After adjourning to make my decision. I explained that I had considered all the evidence before me. I felt there was some uncertainty regarding your appointment as the information you gave me did not clarify when or if an appointment was booked. I was also disappointed to see you had not followed the correct reporting procedures for booking a medical appointment (I have included a copy of these with your letter for future reference). As this incident seems to be a breakdown in communication between you and your line manager and a lot of assumptions had been made by yourself I have decided no formal action will be taken at this stage.
>
> I need to make you aware that I need to see an immediate and sustained improvement in your conduct. Any further occasions of misconduct may lead to further disciplinary action."

157. **Allegation 15 – On 1 July 2017, Ms Prynn criticised the Claimant in relation to clinical timing and referrals**;

158. We were referred to the contemporaneous emails about this matter at pages 283 to 285, and upon reading these it presents as a difference of opinion.

159. Ms Prynn ends her email to the Claimant (page 285) with … "Finally Sukhie, I am sorry if I have misunderstood some of our conversations. As your line manager, I need to give you feedback from time to time, as I would with all my team. I will be continuing to monitor timings of pre-screen and eye tests to understand the patterns, so we can sit down to work through a plan together.".

160. We note (and as was as accepted by the Claimant) Ms Prynn is the Branch Manager who has line management responsibility for him.

161. **Allegation 16 – Further on 1 July 2017, Ms Prynn intervened in the self-audit process and requested a Clinical Governance Manager to select records for the audit**;

162. We were referred to the statement of Ms Prynn taken for the first grievance investigation and in particular page 292. The account Ms Prynn gives was put to the Claimant and it was accepted there was not much in dispute. The Claimant wanted to pick the record cards for the audit and did say that he thought they would be perfect.

163. It was accepted that when Ms Prynn raised this difference of view as to who should pick the cards with the CGO, they confirmed that they would pick the cards.

164. **Allegation 17 – On 18 July 2017, Ms Prynn asked the Claimant why he did not want to move branches, to Andover**;

165. In cross examination the Claimant agreed that he enjoyed working in Andover and that Ms Prynn knew that he enjoyed working in Andover.

166. He also accepted that it was a long commute to Christchurch at that point for him.

167. It was put to him it was known he were not happy in Christchurch, and he confirmed that, yes everyone did.

168. The Claimant was asked therefore what was wrong with the comment Ms Prynn made and he said it was the way it was said.

169. It was put to him that he had no evidence that the comment about Andover was due to his race and his reply was that it was difficult without a body camera to record matters.

170. We therefore only have the Claimant's word for this perception, and as we have noted his recall of matters is not accurate and he only formed a view it was discrimination because of race sometime after the event.

171. Referring to this matter as set out by him in his first grievance in October 2017 (see page 394c) the Claimant does not say it is the way it is said that had upset him. He also confirmed in evidence that he did not think the allegations he makes other than the cup of tea comment were race related until May 2019.

172. ***Allegation 18 – In September 2017, the Claimant was suspended in respect of an alleged data breach***; **[WITHDRAWN]** - This was incorrectly pleaded and the Claimant confirmed it related to the actions of Ms Alder on 10 January 2018 suspending the Claimant, which the Claimant confirmed on the second day of hearing that he did not want to add by amendment. The Claimant confirmed that we should ignore this allegation, so it was confirmed as withdrawn.

THE LAW

173. Having established the above facts, we now apply the law.

174. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination and harassment.

175. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.

176. As for the claim for direct discrimination, under section 13(1) of the EqA 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.

177. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

178. In deciding whether conduct has the effect referred to, 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.

179. As Respondent's Counsel submits (paragraph 16 of his submissions) it is … "important to take into account the honest perception of C but if it is not reasonable for the conduct to have made C feel that way, then the claim is likely to fail.".

180. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

181. We remind ourselves of the guidance set out in ***Igen v Wong [2005] ICR 9311*** (approved by the Supreme Court in ***Hewage v Grampian Health Board [2012] ICR 1054***) which sets out the correct approach to interpreting the burden of proof provisions. The correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal). Only if such facts have been made out to the tribunal's satisfaction (which is on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the Respondent to prove (on the balance of probabilities), that the treatment in question was 'in no sense whatsoever' on the protected ground.

182. We also remind ourselves that in ***Madarassy v Nomura International PLC [2007] ICR 867*** Mummery LJ stated that: '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'.

183. Time Limits

184. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

185. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

186. We have considered the principals from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***;

187. We note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

a. The length of and the reasons for the delay.
b. The extent to which the cogency of the evidence is likely to be affected by the delay.
c. The extent to which the parties co-operated with any request for information.
d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
e. The steps taken by the claimant to obtain appropriate professional advice.

188. We note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

189. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important

to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule".

THE DECISION

190. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different.

191. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances.

192. With regard to the claim for harassment, the claim will fail unless the Claimant has been subjected to unwanted conduct that has the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for him which is related to race. This is decided by taking into account, the perception of the Claimant, the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

193. We need to start with the allegations in time, that is allegation 19d and allegation 20.

194. ***Allegation 20*** - We prefer the account of Mr Weeks about this which is supported by the meeting notes. We do not find on the balance of probability that the Claimant has proven the he was denied breaks, or opportunity to speak to his rep or to make notes. Therefore, the Claimant has not proven on the balance of probability the alleged unwanted conduct or less favourable treatment.

195. ***Allegation 19 d*** - We prefer the account of Mr Patel and do not find that on the balance of probability that he gave an outcome he did not believe in. It was clear that the Claimant was very grateful to Mr Patel for what he did do and expressly thanked him during his cross examination of Mr Patel. Therefore, the Claimant has not proven on the balance of probability the alleged unwanted conduct or less favourable treatment.

196. In this case, we therefore find that no facts have been established upon which the Tribunal could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred in these allegations. In these circumstances the Claimant's claim of direct discrimination and harassment about these allegations fails and is hereby dismissed.

197. With this finding we have no proven allegations within time that could connect to those potentially out of time. We note in any event, that even if we had, that the Claimant has not proven a connection between these allegations on the balance of probability based on the evidence we were presented.

198. Turning then to the question of whether it is just and equitable for us to extend time.

199. Considering the matters relevant to section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:

a. The length of and the reasons for the delay. ***There is a significant delay for the majority of the allegations made, the most recent before allegations 19 and 20 being allegation 17 on the 18 July 2017 which is nearly 2 years out of time. The reason the Claimant says he did not act before is he hoped internal processes would resolve it, that he was stressed (although the Claimant has presented no medical evidence to support the impact stress had on his ability to lodge a tribunal claim and his witness statement was silent on such matters), and he did not realise until January 2018 or May 2019, save for the comment made by Mr Birkett on the 1 December 2016, that it was in his view discrimination.***

b. The extent to which the cogency of the evidence is likely to be affected by the delay. ***This is considerable in our view as the Claimant relies heavily upon his recall of verbal matters and his perception of them which did not crystallise until January 2018 or May 2019. Further the Claimant accepted that he had got dates and details wrong, both in the grievance process and when giving his evidence to this Tribunal. With the departure of key witnesses at the Respondent, the passage of time and the lack of contemporaneous evidence (as the Claimant relies on his feelings about matters which changed over time), the delay has put the Respondent to greater prejudice by preventing or inhibiting it from investigating the claim while matters were fresh.***

c. The extent to which the parties co-operated with any request for information. ***This does not appear to be an issue in this case, particularly as the Claimant's allegations rely on his perception of what happened, and he suggests a body camera would have been needed to prove it.***

d. The promptness with which the Claimant acted once he knew the facts giving rise to the cause of action. ***The Claimant knew he had a complaint about Mr Birkett and the cup of tea comment from when it was said (1 December 2016). He did not raise it formally in writing until 9 October 2017 by which time Mr Birkett had left the business. It is then 2.5 years later that he raises it with the Employment Tribunal.***

e. The steps taken by the Claimant to obtain appropriate professional advice. ***This was not raised as a matter by the Claimant in this case***.

200. For these reasons the Claimant has not shown that it is just and equitable to extend time particularly where the exercise of discretion is the exception rather than the rule.

201. In any event we find from the primary facts we have found, as set out above, that no facts have been established upon the balance of probability which the tribunal could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred, save for the cup of tea comment (allegation 10).

202. Allegation 10 does have primary facts (accepting the Claimant's account of what was said to him on the 1 December 2016) from which the Tribunal could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred. However, we have observed that this comment was not raised formally in writing until 9 October 2017 by which time Mr Birkett had left the business. It is then 2.5 years later that it is raised with the Employment Tribunal, there is not sufficient in our view on the evidence presented to us to support that it was reasonable for the comment to have the affect the Claimant asserts, and in any event as already found, the Claimant has not shown that it is just and equitable to extend time for this allegation, particularly where the exercise of discretion is the exception rather than the rule.

203. Therefore, the unanimous judgment of the tribunal is that the Claimant's complaints of direct race discrimination and harassment fail and are dismissed.

204. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 7; the findings of fact made in relation to those issues are at paragraphs 22 to 172; a concise identification of the relevant law is at paragraphs 173 to 189; how that law has been applied to those findings in order to decide the issues is at paragraphs 190 to 203.

Employment Judge Gray
Date: 16 September 2021

Judgment & Reasons sent to Parties: 01 October 2021

FOR THE TRIBUNAL OFFICE