



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Gyimah

**Respondents:** (1) Commerzbank AG  
(2) Robert McMillan  
(3) Bastian Buhlmann  
(4) Miro Pertusini  
(5) David Clapham

Heard at: London Central  
(Via Cloud Video Platform)

**On:** 9, 12, 13, 14, 15, 16 July 2021, 17  
and 18 August 2021 and 13 and 22  
September 2021 (latter three days in  
chambers)

**Before:** Employment Judge Joffe  
Ms S Brazier  
Mr R Miller

## **Appearances**

For the claimant: Mr R Downey, counsel

For the respondents: Mr S Gorton QC, counsel

## **RESERVED JUDGMENT**

1. The claimant's claims of direct race discrimination are not upheld and are dismissed.
2. The claimant's claims of harassment related to race are not upheld and are dismissed.
3. The claimant's claims of victimisation contrary to section 27 Equality Act 2010 are not upheld and are dismissed.

## **REASONS**

## **Claims and issues**

1. The parties had had some difficulty in agreeing a comprehensive list of issues in a form which was readily usable by the Tribunal. The situation was complicated by the fact that there was a disagreement between the parties as to whether issues in the list about the review of what we will call the KYC QA report (issue numbered 1.2.1 below) had been the subject of deposit orders by E J Hodgson which had led to particular claims being struck out. However neither party was urging us to determine whether those issues remained live as a preliminary issue, as both parties agreed that we would need to hear evidence on those matters in any event. We therefore consider the extent to which we were able to determine those issues substantively as part of our conclusions.
2. The issues including the controversial issues are as follows. The abbreviations are taken from the parties' list.

### **Direct race discrimination (Equality Act 2010 section 13)**

#### 1.2 Did the respondent do the following things:

1.2.1 In Sept 2019 Robert McMillan and Bastian Buhlmann reviewing C's QA Know Your Customer report against the Q12019 Skilled Person Report and disregarding C's objections to Mr Bulhmann's criticisms [R says struck out].

1.2.2 Jul-Oct 2019 Robert McMillan excluding C from all senior management communications and meeting whereas BB was invited

1.2.3 4.10.19 Robert McMillan purporting to interview C for the position (promotion) of Functional Lead (Head of Team) when R1's records show that Bastian Buhlmann had already been given this role

1.2.4 4.10.19 Robert McMillan told C without explanation, to cease providing support to R1's Anti-Fraud Lead, which detrimentally restricted C's range of work duties and restricted his ability to develop his work profile

1.2.5 5.11.19 Robert McMillan nominated Alex Denley (white) to complete an overview of the Financial Crime Department for an external bank, despite C having personally been requested by the Business Unit to do this task.

1.2.6 7.11.19 Robert McMillan aggressively and loudly shouting at C to locate Bastian Buhlmann for a management meeting despite C being in the middle of a call

1.2.7 January 2020 By Robert McMillan's departure from R's written appraisal procedure in relation to C, including involving Bastian Buhlmann in the process, failing to acknowledge the full range of C's achievements, disregarding C's representations and closing the process prematurely

1.2.8 Jan 2020, 27.2.20, 3.3.20 HR's continuing failure to act in response to C's complaints about how he had not been allowed to challenge his appraisal marking in January 2020

1.2.9 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him

1.2.10 9.3.20 Robert McMillan telling C by phone of his reduced bonus whilst C was on sick leave, despite HR having indicated that this would be notified to C by email and post

1.2.11 7.5.20 Miro Pertusini sending the grievance outcome letter to C, yet it did not deal with most of the specific concerns or refer to the evidence or representations used. The dismissal of the 'chicken' comments as a 'cultural misunderstanding' was particularly offensive

1.2.12 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts

1.2.13 12.6.20 Dismissal: Did R1's actions culminating in the 'last straw' of PC's letter constitute a repudiatory breach of the implied term of trust and confidence, entitling C to treat himself as constructively dismissed and if so, was that repudiatory breach on the grounds of C's race?

1.2.14 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment

1.2.15 30.6.20 David Clapham's letter dismissing C's grievance appeal, including that the chicken comments were reasonable because C had published his love of chicken to Bastian Buhlmann

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

1.4 If so, was it because of race?

### Harassment related to race (Equality Act 2010 section 26)

2.1 Did the respondent do the following things:

2.1.1 7.11.19 Robert McMillan aggressively and loudly shouting at C to locate Bastian Buhlmann for a management meeting despite C being in the middle of a call

2.1.2 January 2020 By Robert McMillan's departure from R's written appraisal procedure in relation to C, including involving Bastian Buhlmann in the process, failing to acknowledge the full range of C's achievements, disregarding C's representations and closing the process prematurely

2.1.3 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him

2.1.4 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts

2.1.5 14.10.19 and 15.11.19 On two separate occasions, Bastian Buhlmann using a racially offensive stereotype about C loving chicken (a derogatory caricature about black people) to C

2.1.6 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment

2.2 If so, was that unwanted conduct?

2.3 Did it relate to race?

2.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

### Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows:

3.1.1 grievance on 10 February 2020

3.3 Did the respondent do the following things:

3.3.1 25.1.20 When C complained to HR about Bastian Buhlmann having told members of the department that C was suffering from a mental illness, C received no reply from HR

3.3.2 Jan 2020, 27.2.20, 3.3.20 HR's continuing failure to act in response to C's complaints about how he had not been allowed to challenge his appraisal marking in January 2020

3.3.3 14.2.20 Hope Jackson asking the Claimant why he want to raise a grievance on race discrimination, harassment, bullying and victimisation if he might be leaving R1 soon.

3.3.4 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him

3.3.5 9 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him

3.3.6 9.3.20 Robert McMillan telling C by phone of his reduced bonus whilst C was on sick leave, despite HR having indicated that this would be notified to C by email and post

3.3.7 1.5.20 HR reduced C's full pay whilst on sickness absence, to SSP. From 7.2.20 to 1.5.20, R had exercised its discretion to pay C full pay during his sickness absence

3.3.8 7.5.20 Miro Pertusini sending the grievance outcome letter to C, yet it did not deal with most of the specific concerns or refer to the evidence or representations used. The dismissal of the 'chicken' comments as a 'cultural misunderstanding' was particularly offensive

3.3.9 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts

3.3.10 12.6.20 Dismissal: Did R1's actions culminating in the 'last straw' of PC's letter constitute a repudiatory breach of the implied term of trust and confidence, entitling C to treat himself as constructively dismissed and if so, was that repudiatory breach an act of victimisation?

3.3.11 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment

3.3.12 30.6.20 David Clapham's letter dismissing C's grievance appeal, including that the chicken comments were reasonable because C had published his love of chicken to Bastian Buhlmann

3.4 By doing so, did it subject the claimant to detriment?

3.5 If so, was it because the claimant did a protected act?

3.6 Was it because the respondent believed the claimant had done, or might do, a protected act

Time limits

- 4.1 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
- 4.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 4.1.2 If not, was there conduct extending over a period?
- 4.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 4.2 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
- 4.2.1.1 Why were the complaints not made to the Tribunal in time?
- 4.2.1.2 In any event, is it just and equitable in all the circumstances to extend time?

## **Findings of Fact**

### The hearing

3. The claimant gave evidence on his own behalf. We saw witness statements for the claimant from Ms Jagruti Rajput, Mr Damilare Ajao, Dr Liliya Gelemerova, Mr Anthony Forbes and Ms Janine Von Pickartz. Only some of those witnesses gave evidence relevant to the issues in the claimant's case as opposed to giving evidence about their own complaints about the first respondent and Mr Gorton indicated that he had no cross examination for a number of those witnesses. We ultimately heard live evidence from Ms Rajput and Dr Gelemerova.
4. For ease of comprehension we refer to the first respondent employer as 'the respondent' and the remaining respondents by their names. For the respondent we heard from Mr Robert McMillan, Mr Bastian Buhlmann, Mr Miro Pertusini, Mr Jose Arevalo, Ms Hope Jackson and Mr David Clapham.
5. We had an electronic bundle running to 1456 pages.

### The facts

6. The respondent is the London branch of a global business and is an investment bank. It is regulated by the Financial Conduct Authority ('FCA').
7. We were not provided with any structure charts but the area of the respondent's business we were concerned with was a department devoted to anti-financial crime compliance, sometimes referred to by the parties simply as 'financial crime'.

8. The claimant is an expert in financial crime with over ten years' experience in banks and specialist qualifications in money laundering and financial crime.
9. It is relevant to record that in May 2017, the FCA appointed a 'Skilled Person' to undertake an independent review of the respondent's financial crime controls over a period of two years. Weaknesses had been identified in a number of processes including Know Your Client ('KYC'). One resultant change in the respondent's compliance function was the establishment of a Financial Crime Quality Assurance ('QA') team.
10. On 19 July 2018 Mr McMillan commenced employment as head of anti financial crime compliance. He reports to Mr A Lowther, head of regional compliance UK.
11. As part of that role, Mr McMillan became Money Laundering Reporting Officer ('MLRO'), a position required by the FCA. He was approved and regulated by the FCA to act as a focal point for the respondent's anti money laundering activity. An MLRO can be held personally liable for failings of an institution in relation to anti financial crime controls.
12. The anti financial crime compliance team had about thirty people in the various functions: policy and advisory, monitoring and investigations, AML Advisory and enhanced due diligence and the QA team. We were told that there were three lines of defence against financial crime:
  - Client facing checks such as KYC;
  - The QA team;
  - The independent audit function.
13. As of 20 July 2018, the claimant had accepted job offers from Deutsche Bank and the respondent. The claimant emailed Deutsche Bank that day to say that due to family circumstances he had decided to pull out of the role he had accepted.
14. On 31 July 2018, the claimant commenced employment with the respondent as a Senior VP Financial Crime Quality Assurance. He was recruited on a salary of £85,000 plus bonus.
15. The QA team was just forming and, on 3 September 2019, Mr Buhlmann was appointed to an identical role to that of the claimant. They were joined on 17 September 2018 by Mr Arevalo. All were on the same salary and rank and worked to the same job description. The financial crime QA team was a new team. Its core role was to perform periodic testing and QA reviews on other areas within the financial crime team. The members of the team took on other ad hoc roles. There was a flat structure with no head of team; the members of

the team agreed the allocation of work amongst themselves. Mr Arevalo and the claimant worked on various types of customer due diligence including KYC jointly whereas Mr Buhlmann concentrated on transactional reports.

16. Mr Buhlmann said in evidence that he had experience of looking at the KYC files when looking at transactions monitoring to see if activity was in line with what would be expected from KYC files and that he had some experience in previous roles of KYC.
17. There was some dispute between the parties as to how much experience Mr Buhlmann had in comparison with the claimant. It was clear from his CV that he had several years of financial crime experience and some of KYC. He had fewer years in the field overall than the claimant had.
18. We heard that when reviewing KYC files, the process involved looking at a sample; each file would pass, fail or pass with observations.
19. All members of the QA team were providing ad hoc support and getting involved in activities outside of the team but the core role was QA. All of the members of the team wanted to gain additional experience and skills for development purposes by taking on these other tasks.

#### Contract, policies and procedures

20. We saw some policies and procedures which were relevant to the issues we had to consider.

#### *Sick pay*

21. The respondent's Employee Handbook sets out entitlement to pay during sickness absence:

*Subject to certain statutory limits and conditions, you are entitled to receive Statutory Sick Pay ("SSP"), under the Social Security Contributions and Benefits Act 1992, for up to 28 weeks absence in any one period of incapacity for work in accordance with the SSP scheme ...*

*Subject to satisfactory initial notification to your line manager and subsequent documentary evidence provided to the Bank, in normal circumstances the Bank will pay company sick pay based on your normal basic salary. Any such payment made to you by the Bank in respect of a day of absence, through sickness or injury, will be entirely at the discretion of the Bank and will not be an automatic entitlement. ....*

*The maximum period that the Bank will pay enhanced sick pay. where satisfactory medical evidence is provided. is 26 weeks in most cases.*

22. The claimant's contract of employment provided that he was entitled to SSP or other discretionary sickness benefit in accordance with the Handbook.
23. We saw a document entitled *Statutory Sick Pay Guidelines* which we were told was introduced in 2020 and which included the following guidance:

*As per the Employee Handbook under Section B, Sickness and Injury, clause 12.7, the company can pay Company Sick Pay (CSP) provided satisfactory evidence is provided by the employee to the line manager. However, CSP is paid entirely at the Bank's discretion and should not be seen as an automatic entitlement.*

*It is accepted by the Bank that CSP may be paid for the first four weeks of absence in order to overcome any payroll constraints, however after this period, the Bank should default to Statutory Sick Pay (SSP).*

*We need to link the certification of absence and verification of this certification with line managers with the active exercise of discretion to pay CSP. The key here is establishing appropriate dialogue with the employee in the early stages of absence. The frequency and nature of dialogue depends on the circumstances but should be an agreement between the HRBP and line manager on this.*

*Each case should be reviewed on a case by case basis. Upon receipt of satisfactory medical evidence, the line manager with the relevant HRBP should decide whether CSP continues or SSP should be put in place.*

*In order to assess whether CSP or SSP should apply, the Bank needs to review all the evidence, for example is there other evidence such as hospital appointments, consultant appointments, other medical care/treatment that could help the Bank it's discretion to pay CSP or not.*

*There are often situational circumstances where employees go off sick with stress in relation to a grievance. It is these situations where a judgement call needs to be made. HR needs to engage in dialogue with the employee to ascertain all the facts. If once an employee has been placed on SSP, but evidence is received after, there is nothing to stop the Bank from backdating the payment of CSP.*

*If the absence is continuing, the Bank may make the decision to refer the employee to OH and the employee should be asked to take along any supporting evidence from treatment they are receiving to any OH appointment. Failure to do so, and OH should request the information. By receiving as much information as possible, this enables the Bank to make an informed decision around whether CSP should or should not be paid.*

## Grievance procedure

24. The respondent has a grievance procedure which includes this provision about grievance appeals:

### *Step 3 — Appeal*

*If your grievance is not resolved to your satisfaction by Step 2, you should raise an appeal with the next level of management within five working days of the decision being advised to you.*

*You must set out all the grounds of your appeal against the grievance outcome in writing. In stating your grounds of appeal, it would be helpful for the Bank to know if you are raising a new fact or matter that was not presented or evident at the time of the original grievance hearing, whether you believe that the procedure was unfair or deficient in some way or if you are contending that an incorrect, inaccurate or unreasonable interpretation of fact or matter occurred at the time of the original grievance decision.*

*The manager who considers the grievance appeal will not have been involved with earlier meetings or investigations. On the receipt of an appeal, the manager dealing with it will arrange an appeal hearing to be held without unreasonable delay. A HR representative not involved in the case to date will also attend the appeal hearing.*

*Further investigation may take place as the manager considering the grievance deems appropriate.*

## Discrimination

25. The Handbook section has a section on discrimination / harassment / bullying which includes the following:

### *Discrimination / Harassment / Bullying*

*The Bank is committed to creating a work environment free of harassment and bullying, where all employees are treated with dignity and respect.*

*Harassment because of an individual's sex, race, colour, nationality, ethnic or national origin, age, disability, marital or civil partner status, pregnancy and maternity, gender identity, religion or belief or sexual orientation is unlawful. Harassment is conduct that is unwanted by the recipient and which:*

*54.1.1 has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person; and*

*54.1.2 it is reasonable to consider would have the effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them, even if this effect was not intended by the person responsible for the conduct.*

*Harassment can occur in a variety of ways, including physical contact, verbal comments, physical gestures. excluding an individual, ignoring an individual because they are perceived to have a protected characteristic (whether or not they do, in fact, have that protected characteristic) or looks.*

*Some examples of harassment are: unwelcome sexual advances or suggestive behaviour (which the harasser may perceive as harmless), racist, sexist, homophobic or ageist jokes, or derogatory or stereotypical remarks about a particular ethnic or religious group or gender, refusing to address a trans person by their preferred name and correct gender pronoun, outing a person as gay, lesbian or trans without their permission, spreading rumours or gossip about others, including their gender identity, expression and/or history, or inappropriate personal questions relating to sexual orientation. gender identity, gender expression or domestic circumstances. A single incident can amount to harassment*

#### *Appraisals / bonuses*

26. We were not shown any documents which set out in detail the respondent's policy and practice relating to performance appraisals or bonuses.

27. The claimant's contract of employment provided:

*You are eligible to participate in the Bank's discretionary bonus scheme under the terms of the Commerzbank Incentive Plan (CIP) and within parameters defied for Non Pay Scale compensation model (the 'NPS model'). Such participation is subject to the terms and conditions of the CIP and model from time to time in force and shall not form part of your contractual remuneration.*

[We saw no documents relating to the CIP or NPS model]

*The decision as to whether or not to award a bonus. the amount of any award and the timing and form of the award are at the discretion of the Bank. Factors which may be taken into account by the Bank in deeming whether or not to award a bonus and the amount of any bonus include:-*

*2.3.1 The performance at the Bank*

*2.3.2 The performance of your business area*

*2.3.3 Your individual performance and your contribution to the Bank's performance*

*2.3.4 The strategic objectives of the Bank*

*2.3.5 The Bank's obligation to comply with the Capital Requirements Directive I V (CRD IV) and the German Remuneration Ordinance for Institutions*

*2.3.6 You successfully passing your probationary period*

*2.3.7 Whether you will be remaining in the employment of the Bank*

*2.3.8. Your start date of employment within the business year (bonus will be pro-rated for start date)}*

### Chronology

28. In February 2019, the claimant, Mr Buhlmann and Mr Arevalo were on a work trip to the Frankfurt head office. Mr Arevalo and the claimant ordered chicken burgers one evening at their hotel. We saw a receipt dated 18 February 2019 for two chicken burgers. Mr Buhlmann gave evidence that the claimant said to Mr Buhlmann and Mr Arevalo he ordered a chicken burger as he loved chicken. He said the claimant said this in a humorous way.
29. Mr Arevalo gave evidence that he remembered mentioning that he and the claimant had ordered chicken burgers to Mr Buhlmann and confirmed that this was an occasion when the claimant said he liked chicken.
30. The claimant accepted that he and Mr Arevalo had ordered chicken burgers on this occasions but generally denied that he said he loved chicken to Mr Buhlmann and denied that he said so on this occasion.
31. We accepted that the claimant said that he liked or loved chicken on this occasion. Mr Buhlmann and Mr Arevalo gave similar evidence about the incident and both seemed to us to be straightforward witnesses. We comment further in our conclusion about why where there were straight points of dispute we have tended to prefer the evidence of some witnesses over others, whilst considering each dispute in context and on its own merits.

### *Other chicken discussions*

32. We heard some general evidence about whether the claimant referred to a liking or love for chicken at work.

*In witness statements produced on behalf of the claimant:*

33. Mr Forbes worked with the claimant for various periods in 2013, between November 2015 and 2016 at HSBC, and from July to October 2018. He said they worked in an open plan office and he had never heard the claimant declare a love of fried chicken.
34. Dr Gelemerova said that, whilst employed by the respondent, the claimant sat behind her, often having lunch at his desk. She said that she had never heard him declare a love for chicken and did not recall seeing him eat chicken in the office.

*Respondent's evidence:*

35. Mr Buhlmann's evidence was that the claimant mentioned liking chicken several times and commented on his wife cooking his favourite chicken dinner. The claimant also said he liked chicken in response to Mr Arevalo mentioning a particular restaurant.
36. Mr Arevalo said that the claimant talked about his liking for chicken on numerous occasions, of which he could specifically remember two – the Frankfurt chicken burger occasion and a further occasion as follows.
37. Mr Arevalo said that he was talking about attending a birthday meal for a friend at a restaurant with an 'all you can eat' buttermilk fried chicken buffet and the claimant said he liked chicken and asked for the name of the restaurant. The claimant said that conversation did not happen.
38. Under questioning, Mr Arevalo did not recall the claimant talking about a liking for other types of food. In particular there was a theme in relation to chicken; it was something the claimant repeatedly talked about. Mr Arevalo said he also liked chicken; he was not sure whether he would ever have said he loved it. He could not recall Mr Buhlmann making any jokes about Mr Arevalo's own preference for chicken.
39. We accepted that the occasion described by Mr Arevalo and Mr Buhlmann (the chicken restaurant recommendation) occurred in a context of some other passing remarks by the claimant about chicken being a favoured food.
40. The fact that some other witnesses were not aware of the claimant expressing a liking for chicken does not change our view. Mr Buhlmann and Mr Arevalo were closest to the claimant at work and in the same small team; we could see why the subject would not necessarily have come up with Dr Gelemerova, for example, who was a senior person in a different team.

41. It was the observation of the Tribunal members that workplace teams often bond around mild jokes about apparently neutral topics such as food and sport. A minor incident such as the Frankfurt chicken burger occasion can spark a running theme.
42. On 8 March 2019, the claimant received a bonus of £2378 for 2018. This was a pro rata award as the claimant had only been employed for part of 2018.
43. On 13 May 2019, the claimant withdrew his application for an internal post, the Policy Risk and Control Lead post, having decided he was not interested in the post.
44. Mr Arevalo, who had also applied, was appointed to the post and on 1 June 2019 Mr Arevalo left the QA team to take on his new role.
45. The claimant was the only person doing the KYC reviews at that point and must have experienced an increase in workload, especially prior to Weronica Ruci starting in the team later in the year.
46. On 9 July 2019, the claimant sent an email to Mr Treuner in the Customer Lifestyle Management 'CLM' Team:  
  
*The Financial Crime QA team have recently completed a review on CLM KYC High, Medium and Low files.*  
  
*We sampled a population of files completed in Q1 2019.*  
  
*We would like to discuss our initial findings with CLM next week, can you please provide us with a contact within CLM?*
47. In July 2019, Mr McMillan told us he spoke to Ms D Trivedi, business manager, about the possibility of appointing someone as head of the QA team. Ms Trivedi in turn spoke to HR who said that the team was not big enough to have a formal head of team or manager. It was possible to have a functional lead for such a small team.
48. On 17 July 2019, Ms Trivedi emailed Mr McMillan:  
  
*I have spoken to HR and they have advised there is no formal process for selecting a 'functional manager'...*  
  
*If there is more than one candidate suitable for this role then you will need to have a specific selection criteria.*

49. On 31 July 2019, Ms Messmer, a director in the Financial Crime Department, did not include the claimant in an email chain about 'London remediation milestones'. Mr Buhlmann was included, along with a number of other individuals, many of whose names were not familiar to the Tribunal and whose positions were not explained to us. The email related to 'Some question from PwC re Milestone #30 of the LRP'. The claimant said in his witness statement that Ms Messmer had failed to include him despite him being the other member of the QA team at the time.
50. We heard very little about this email, but Ms Messmer was noted, when interviewed for the claimant's grievance appeal on 9 June 2020, as having said that that she was 'there for a month or so', that Mr Buhlmann was the 'more visible one on the team', that she had spoken to Mr Buhlmann about another topic and hence went back to him and that she could not recall whether she had been told to send this email to Mr Buhlmann. She had not been aware of any hierarchy in the QA team at that point.

#### The August 2019 KYC QA report for Q1 (the KYC QA report)

##### *The role of the Skilled Person's report*

51. There was in evidence what may have been an excessive focus by the parties on how the claimant's report differed from the Skilled Person's findings. This seems to have arisen from the way the case had been pleaded by the respondent, which focussed in its response on a deviation between the claimant's report and the Skilled Person's findings. However it became clear from the evidence that the claimant's findings differed materially from a review other than that undertaken by the Skilled Person.
52. We were told that the Skilled Person had reviewed a sample of KYC files for the first quarter of 2019 and found an average level of compliance of about 40%. That was Mr McMillan's evidence, which he was not challenged on.
53. Dr Gelemerova told the Tribunal that the Skilled Person report used different methodology from that used by the QA team; it was not a pass or fail system and there were no defined percentages for pass or fail. She was not challenged on that evidence. She did not say that the Skilled Person found a high level of compliance.
54. In cross examination, Mr Buhlmann accepted that there was no percentage pass rate in the Skilled Person's report; what he said was 60% of files had observations and, although the methods of the Skilled Person and the QA team were different, the purpose was the same - to see if the files were compliant with policies and external obligations.

55. The claimant's oral evidence about what he knew about the Skilled Person report was that he did not know the Skilled Person had done a review of Q1 KYC and he did not know what the pass rate in the Skilled Person's review was.
56. We did not see the Skilled Person's report or any part of the report, an application for that document having previously been rejected by E J Sutton.
57. We noted that the claimant said in his grievance: *Following a gap analysis, we identified that 5 Customer files that we reviewed were also reviewed by the Skilled Person. Bastian Buhlmann's approach was to copy the Skilled Person's findings into the Q1 CLM KYC 2019 Review Execution Sheet and fail the files .It was never established that the Skilled Persons findings had been remediated by CLM or were in the process of being remediated or not. This accounted for a reduction of 22% of my original pass rate.*
58. However none of the respondent's witnesses were cross examined on this point nor did we receive any evidence about it, so we were not able to make any finding about the possible effect of remediation on the 40% pass rate.
59. We concluded that it was clear that the Skilled Person's report did not use the same methodology or reporting method as the QA team's report but that it showed poor levels of compliance in KYC for that period (Q1 2019) and that it would understandably be a significant concern to the respondent if there was a major discrepancy between the two types of review: that done by the Skilled Person and that done by the QA team.
60. On 7 August 2019, the draft KYC QA report was sent by the claimant to James Clancey in the CLM team at 14:52 with a covering email from the claimant:
- James and Team,*
- Following consultation with CLM SME stakeholders on our initial findings, please find attached the draft report for our QA Review of CLM KYC Files (Q1 2019).*
- The pass rate is approximately 96%. Let me know if you have any questions.*
- We will be issuing the final report on Friday following Robert McMillan's approval.*
61. At 15:11 that day, the claimant emailed Mr McMillan asking him to approve the report. He told Mr McMillan in person that Mr McMillan needed to sign off on the report before the latter's holiday. Mr McMillan said he would look at the report but did not get an opportunity that day.

62. On 8 August 2019, the KYC QA report was discussed in a meeting of the CLM Group, including Mr Arevalo, after which Mr Arevalo emailed Mr Clancey, copied to the claimant, Mr McMillan and Mr Buhlmann:

*Given the point raised on polarised results for CLM QA & FCT QA for a sample across Q1 2019, we are consulting internally.*

*In in the interim, please do not forward the draft report to any further stakeholders, it is not yet finalised.*

63. The 'polarisation' referred to by Mr Arevalo in this email is between the work done as part of the first line team's own QA exercise and the claimant's report. That was Mr Arevalo's evidence.
64. The claimant's evidence was that he did not realise there was polarisation in relation to the Skilled Person's report at that stage. His evidence was that he thought a review was carried out by Mr Buhlmann because of the high pass rate.
65. In Mr McMillan's witness statement he only mentioned the variance between the claimant's report and the Skilled Person's report. He was cross examined on the issue and it was suggested to him that he had made a mistake or misrepresented the situation in saying there was an issue in relation to the Skilled Person's report. He said that both the variance with the first line report and with the Skilled Person's report were problematic – both were relevant benchmarks which required investigation of the claimant's results. Everyone was aware of the Skilled Person's report. He said that the Skilled Person's report was available on request to anyone in financial crime. It rang alarm bells that there was a disparity between the claimant's report and both the front line QA and the Skilled Person's report.
66. Mr Buhlmann's evidence was that although the email itself does not refer to the Skilled Person's report, that variance came up in later meetings (as for example the meeting with Mr Lowther we discuss below).
67. We did not conclude that Mr McMillan had been deliberately misleading in his witness statement, nor could we see how it would have benefitted him or any of the respondents to be misleading on this point. Because of his own particular responsibilities, it was natural that for Mr McMillan the greatest concern would be a variance with the Skilled Person's report rather than the variance with the CLM team's own QA. We did not conclude that the concern about the Skilled Person's report had been in any way concocted.
68. Mr McMillan asked Mr Buhlmann to do what is called a '4 eye check' on the QA report and to have the review done by the time he returned from holiday. A 4 eye check is a review of a report by someone other than the author.

69. Mr Buhlmann said that Mr McMillan asked him to do the review confidentially. He said that the claimant would have been aware that Mr Buhlmann was looking at his files but not why. It was an uncomfortable position to be in and he was relieved when they had a discussion with Mr Lowther a few days later, at which point they all knew a review was ongoing.
70. Mr Buhlmann described his review as consisting of a broad overview of the process and re-reviewing a small subset of the files the claimant had looked at. He pointed out comments by the Skilled Person where there was an overlap with the Skilled Person report.
71. Mr McMillan's evidence on why he asked for confidentiality was that the claimant might not have needed to know about the 4 eye check if his report was correct. He knew that there was a review from Mr Arevalo's email, so the 4 eye check would not have been a particular surprise. He wanted to balance everyone's interests and get a measure of what could be the situation and enter a discussion with the claimant from a more informed position and give the claimant an opportunity to discuss the merits of Mr Buhlmann's findings. Mr Buhlmann could have concluded that the claimant was 100% correct in which case there would have been nothing to discuss.
72. The claimant said that he had tried to meet with Mr McMillan before the latter's holiday and Mr McMillan did not make himself available.
73. Mr McMillan said he would not have been aware of attempts to meet him whilst he was on holiday as he had no access to emails during that period. We heard no evidence about whether he was aware of attempts to make contact before his holiday.
74. The claimant had a number of concerns about Mr Buhlmann being appointed to do the 4 eye check. He said that this was the first 4 eye check he had encountered in his time at the respondent. Mr McMillan said that 4 eye reviews were common in financial crime. The claimant in evidence to Tribunal said that Mr McMillan should have had a discussion with him so he could explain his findings. Mr McMillan could have asked senior directors reporting to him with KYC experience, for example Shairon Hill or Dr Gelemerova, or internal audit for their views. Mr Buhlmann should not have been asked to do the review due to his lack of experience with KYC.
75. Dr Gelemerova agreed with the claimant that Mr Buhlmann did not have significant KYC experience, based on a review of his CV. Dr Gelemerova gave some detailed evidence in chief which was critical of the proposition that the Skilled Person's report could fairly be used to critique the claimant's report and made criticisms of Mr Buhlmann's review. We did not understand that she had any involvement at the time in these matters and we make some general

comments on our findings about Dr Gelemerova's evidence in our conclusions below.

76. In terms of Mr McMillan's initial request that Mr Buhlmann carry out his review confidentially, we accepted what he told us about his reasoning at a time when we noted he would have been preparing to go on leave. We considered it would probably have been better to be open with the claimant at the outset, given how events developed, but we did not find that Mr McMillan had any but innocuous intentions. We did not find that the fact Mr McMillan did not refer to asking Mr Buhlmann to keep the matter confidential in his long witness statement which covered a large number of issues suggested that Mr McMillan was being evasive with the Tribunal, as the claimant submitted. Mr Buhlmann referred to the request in his statement.
77. From 12 August 2019, Mr McMillan was on annual leave. This was something called 'Mandatory Time Away', during which Mr McMillan was required to be uncontactable.
78. On 13 August 2019, the claimant and Mr Buhlmann met with Mr Lowther about another matter but Mr Lowther asked about the KYC QA report and they agreed it would be sensible to review the report. Mr Lowther specifically requested that the Skilled Person's report should be looked at. By this point the claimant would have been aware that Mr Buhlmann was carrying out the 4 eye review.
79. On 27 August 2019 Mr Buhlmann sent the claimant the results of his 4 eye review in an email:
- Please find below the outcome of my 4-eyes review of the KYC QA report for Q1 2019.*
- I reviewed 20/23 files (2 KYC files were duplicated in the sample and 1 was not available on AOP).*
- Based on my test 20% of reviewed KYC filed passed the review.*
- He then set out some detailed observations and concluded:
- Please let me know if you have any questions and happy to discuss further.*
80. Mr Buhlmann said in evidence that he was hoping to have a discussion with the claimant before Mr McMillan returned from leave but the claimant did not respond to this email with any questions, comments or challenges either in writing or orally.
81. The claimant said in evidence that: 'I challenged his findings at our desks'; the challenges were in discussion but not in writing. He said that Mr Buhlmann had not understood requirements of the KYC policy, that he, the claimant,

was the subject matter expert and that Mr Buhlmann carried out the review without reading the Bank's KYC document.

82. We preferred Mr Buhlmann's evidence on the issue of whether the claimant had raised his dissent with Mr Buhlmann. We considered it to be inexplicable that the claimant would not have documented his disagreement with Mr Buhlmann's review if he had been challenging it at the time. This was a serious matter and, given the claimant's work in compliance, he would have been well aware of the need to record matters and ensure there were paper trails. The claimant's evidence in chief barely touched on the alleged discussions and gave no details of the challenges he said he had made.
83. Most significantly, the email chain we refer to below shows that on 11 September 2019, Mr Buhlmann was asking if the claimant had had a chance to look at his work and the claimant replied that he was in the middle of doing so; this demonstrates that there was no discussion of the claimant's findings prior to the meeting with Mr McMillan on 10 September 2019.
84. The claimant accepted in oral evidence that one of he and Mr Buhlmann got his review badly wrong and that level of error would raise questions about the competence of person who got it wrong. He did not accept that he had got it wrong or that Mr Buhlmann's report was correct.
85. The claimant said this was his fourth KYC QA review and that he continued to do the KYC reviews until he left the Bank. We note that earlier KYC reports had been done in conjunction with Mr Arevalo and subsequent reports of the QA team were routinely subject to 4 eye review.
86. On 2 September 2019, Mr Buhlmann emailed Mr McMillan about the QA report, copying in the claimant:  
  
*Please find below the outcome of the 4-eyes review of the KYC QA report for Q1 2019.*  
  
*I believe George scheduled a meeting for Friday to go through the amended report.*  
  
*Please let me know if you have any questions.*
87. On 9 September 2019 the claimant uploaded his CV to the 'efinancial' careers website.
88. On 10 September 2019, the meeting suggested and set up by the claimant about the KYC QA report took place between Mr McMillan, the claimant and Mr Buhlmann.

89. Mr Buhlmann said that by this point he had not heard back from the claimant as to whether he had any issues with his review and we accepted that evidence for the reasons we have set out above.
90. Mr McMillan's evidence was that he expected a discussion to ensue and both of the team members to represent their views at the meeting and for him to take a view on any points of difference. He expected that he might have had a written response from the claimant ahead of the meeting; he thought that the claimant would put his rationale in writing given the challenges to his report including the 4 eye review.
91. The claimant gave an account of what occurred in the meeting. He said that Mr McMillan asked why he made mistakes by comparison with the Buhlmann review. He said that he said that Mr Buhlmann did not have the right experience to do the KYC review. He said that he tried to explain why Mr Buhlmann's criticisms were unfair but Mr McMillan refused to listen and called the claimant 'useless' and 'not vice president material' and said that he was attempting to deflect blame from himself.
92. The claimant said that Mr McMillan insisted he accept Mr Buhlmann's feedback and stop challenging him. The claimant said that Mr McMillan said he was in charge and that the claimant had no choice.
93. Mr McMillan's account of the meeting was that the claimant was not willing to defend his analysis and largely conceded every point without a real explanation or justification for his findings. The claimant just said he wanted to get the report over the line.
94. Mr McMillan said he wanted to go through some sample files to understand the claimant's methodology but the claimant tended to respond to questions by saying that he would need to check his papers.
95. Mr McMillan said that if the claimant had explained his findings and demonstrated that there was a reasonable difference of opinion, he would have got a third party to mediate. He did not tell him he had to accept Mr Buhlmann's feedback and to stop challenging Mr Buhlmann. He denied that he said that the claimant was useless and not vice president material.
96. Mr Buhlmann's evidence was that he had printed out test files and went through some examples with Mr McMillan where he had made an observation and the claimant had not, to look at why there were differences in outcome.
97. Mr Buhlmann said that Mr McMillan was trying to understand the difference in results but the claimant did not seem to remember many details and seemed content to accept Mr Buhlmann's amendments. Mr McMillan did not say the claimant was useless and not vice president material.

98. We accepted the evidence of Mr Buhlmann and Mr McMillan that the claimant did not really defend his own findings or engage with the detail. We accepted that account not simply because Mr Buhlmann and Mr McMillan were in agreement but also because the correspondence showed that the claimant had not by this point fully engaged with the review.
99. When questioned about the fact that he made no complaint about Mr McMillan saying he was 'not vice president material' and 'useless' until his grievance, the claimant said he was intimidated, looking for a way to challenge it and was not comfortable approaching Mr Lowther. The whistleblowing process would go to the compliance department. He just carried on working as he was fearful about what would happen.
100. It was put to the claimant that this incident (ie the alleged remarks by Mr McMillan) was not mentioned at his grievance hearing with Mr Biggs. He said the notes of the meeting were not accurate and that he did raise it. He had been too stressed to edit the minutes when they were subsequently sent to him for comment.
101. There was no contemporaneous account by the claimant relating to Mr McMillan saying he was 'useless' and 'not vice president material' which seemed to us to be surprising if Mr McMillan had made the statements alleged by the claimant; even if the claimant had not decided to bring a complaint, he could have logged what had occurred. The account he gave in his witness statement differed in material respects from what he told Mr Biggs in his grievance meeting. We ultimately found it difficult to place reliance on the claimant's account of the meeting.
102. In answer to Tribunal questions, Mr McMillan said that he thought he said in the meeting that the report was an error of judgment he would not have expected a vice president to have done. We think the claimant perceived this as Mr McMillan saying he was not vice president material and was very offended. What he reported to the Tribunal was his interpretation, which may well have become his memory, of what Mr McMillan said. We did not accept that Mr McMillan has said that the claimant was useless and not vice president material.
103. The claimant said that he asked Mr Buhlmann to leave the meeting. During the part of the meeting where he was alone with Mr McMillan he said that Mr Buhlmann lacked appropriate experience in KYC reviews and had not followed the Bank's KYC procedures. Mr McMillan refused to listen and repeated that the claimant was useless and not vice president material.
104. Mr McMillan's evidence was that he did not think that the claimant said that Mr Buhlmann did not have enough experience of KYC in the Bank and had not

followed internal KYC procedures. He did not think that the claimant made any substantive qualitative comment on Mr Buhlmann's review and he would in any event have expected detailed analysis rather than sweeping statements.

105. We concluded that the claimant may well have made a general critique of Mr Buhlmann's experience once Mr Buhlmann had left the room but that in the absence of any detailed response, Mr McMillan probably did shut down that conversation. Again we did not accept that Mr McMillan said that the claimant was useless and not vice president material during the part of the meeting when the two were alone.
106. Mr McMillan said that the claimant said that he had been keen to get the report done in time although he had not received everything he needed from Mr Clancey's team. He said that he might have rushed the report and that was the explanation for his conclusions. The claimant denied that he had said that. However it seemed to us that, given we had accepted that the claimant had failed to make any substantive response or defend his own report, it was likely that he would have said something intended to mitigate the situation. We accepted Mr McMillan's evidence on this point which seemed to us to be consistent with what we found about the rest of the meeting.
107. The claimant was asked in cross examination why he said race would have anything to do with the view Mr McMillan took of his report. He said that Mr McMillan was concerned about a possible merger of the respondent with Deutsche Bank and became closer to Mr Buhlmann as Mr Buhlmann was German and could read the German press. This was a surprising answer as it did not seem to bear any relationship with the race case which had been identified. The claimant had identified his race for the purposes of his Tribunal claims as 'Black British'.
108. On 11 September 2019, the claimant emailed Mr Buhlmann:  
*Still in the middle of looking at your findings.*  
*I will set up a meeting for tomorrow morning to discuss your findings.*  
*We can provide Rob an update following the meeting.*
109. We note that the suggestion in this email that the claimant might still be going to challenge Mr Buhlmann's findings and update Mr McMillan is inconsistent with the suggestion that Mr McMillan said in the meeting that the claimant would just have to accept Mr Buhlmann's findings.
110. Mr Buhlmann's evidence was that the claimant did not set up the meeting envisaged in this email. The claimant said that Mr McMillan insisted he set up a meeting with Lars Voglemann, head of CLM operations, to present Mr

Buhlmann's feedback. He said that he never confirmed in writing that he agreed Mr Buhlmann's review and was bullied into accepting it. He was scared of Mr McMillan so did not challenge the report. The claimant ultimately did not challenge Mr Buhlmann's findings anywhere in writing and the report was presented without objection by him.

111. It seemed to us that that was consistent with our finding that the claimant made no detailed challenge to Mr Buhlmann's report in the 10 September meeting. He told us he wanted to move on and we concluded that his approach to the whole matter was to seek to move on with the hope that there would be no lasting consequences for him.
112. The fact that the claimant, as a compliance professional, allowed Mr Buhlmann's report to be presented without any reservation persuaded us that he ultimately had no genuine challenges to Mr Buhlmann's conclusions.
113. On 16 September 2019, Weronika Ruci joined the QA team as an assistant vice president.
114. We saw a new starter induction pack for the EDD/AML advisory team (another part of financial crime) dated 16 September 2019. In this document, Mr Buhlmann is identified as the 'team lead' for the QA team. We return to this issue later.
115. On 23 September 2019, Mr McMillan's line manager, Mr Lowther, sent an email to Mr Buhlmann and Ms Trivedi without copying in the claimant, although the claimant alleged that there was reference in the email to reports in the claimant's portfolio. This was an email headed: *We need to issue the QA Q1 and Q2 reports as its showing up on our risk appetite database.*
116. We were provided with screenshots of parts of an email chain of which this email formed part; the first email in the part of chain we saw was from Mr McMillan. We did not have the whole email chain.
117. We could see that there was a series of emails between Ms Trivedi, Mr McMillan and Mr Lowther into which Mr Buhlmann was copied. The entire chain appears to have been sent to the claimant and Ms Ruci by 30 September 2019.
118. Mr McMillan's evidence was that he was not sure which Q1/Q2 reports were being referred to; it might have been transaction and monitoring reports Mr Buhlmann was responsible for. A lot of reports were overdue, and Ms Trivedi was reaching out to someone who could answer questions.

119. Mr McMillan's general evidence on this issue was that he was not excluding the claimant from anything deliberately that he should have been invited to or included in. He gave no instructions not to include the claimant in correspondence and the claimant could have been left out in error.
120. It was impossible for us to reach any sensible conclusion as to why the claimant was not initially included in this email; the part of the chain we saw seemed to start with Mr McMillan, but it was not all clear how the entire chain started or what in fact the emails referred to. We were conscious that our attention was directed by the claimant in relation to his allegation that he was excluded from correspondence to a tiny handful of emails in what must have been a very large body of emails sent over the relevant period.
121. Some time in September 2019, Mr McMillan said that he decided to appoint a functional lead for the QA team.. His evidence was that the team was increasingly busy and likely to grow in size.
122. Mr McMillan said that he spoke to each of the claimant and Mr Buhlmann and said they should apply for the role and he would have a meeting with each of them; the role would not be advertised and they would be the only candidates.
123. Mr McMillan said that Mr Buhlmann was very interested in the role and the possibility of taking on more responsibility and he suggested that Mr Buhlmann speak to HR to find out more as he was not sure of some of the answers to Mr Buhlmann's questions. He said the claimant showed little interest in the role and did not speak with him about it.
124. Mr Buhlmann says that he had been working on an update of the QA procedures, including adding in 4 eye checks before they released reports. He had conversations with Mr McMillan about how the team operated including the idea of having a team lead.
125. On 25 September 2019, Ms Trivedi wrote to Mr McMillan with a draft email about interviews for the functional lead post:
- Following on from our discussion yesterday, please can you confirm you are happy for me to send the below to BB and GG: '*
- Hi Bastian and George,*
- Since the establishment of the FinCrime QA team in July 2018, the remit of the team has been through considerable development and continues to evolve. In recent months it has become clear that the team could benefit from a functional manager to co-ordinate the work of the team and manage priorities effectively. In a team of this size (3 FTE in total) it is not possible to have a formal manager (ML4), however it is possible to nominate the most appropriate team member as the functional head. This person would have*

*functional responsibility for day to day issues, however disciplinary responsibilities will remain with Rob.*

*As you are both VPs Rob would like to arrange a meeting with you both to discuss whether you would be interested in putting yourselves forward additional function.*

126. On 30 September 2019, Ms Trivedi sent calendar invitations to the claimant and Mr Buhlmann to discuss the appointment of a functional lead.

127. On 1 October 2019, Mr Buhlmann wrote to Ms Jackson copying in Mr McMillan, asking about the process for restructuring:

*Rob is thinking about restructuring the reporting lines of our team and asked me reach out to you on a fact finding mission. I also briefly chatted to Jaisreet on the same topic:*

*FCT hired myself and two other VPs about one year ago into a newly formed QA team. All three VPs reported directly into Rob. One of the VP3 has since moved on internally and was replaced by an AVP (i.e our team consists of 2 VPs and 1 AVP, all report into Rob, MD).*

*For different reasons Rob would like to change the reporting lines of the team and was wondering how this could work in practice. One of the reasons that Rob is considering to appoint a manager is that the team is currently taking on more responsibility and will potentially grow in size. A capacity model is currently being drafted. Ideally Rob would like to transfer all managerial responsibility to one individual and create a layer of middle management to assist with the development of the team as well as day-to-day responsibilities.*

*His main questions are:*

*1. Is there a minimum size of a team to have a formal manager? If yes, what is the size of the team?*

*2. What process does Rob need to follow to:*

*a) Appoint a formal manager for the team (preference), or*

*b) Appoint a functional manager for the team*

*Rob would like to follow the applicable process closely, he just isn't quite sure what that is and he has heard different advice so far. Your input would be much appreciated.*

128. Ms Jackson then responded to Mr McMillan asking him for a discussion.

129. There was some ambiguity in the evidence we heard as to whether, as the email suggested, Mr Buhlmann was asking questions on Mr McMillan's behalf, or was making his own independent enquiries.

130. Mr McMillan accepted in cross examination that Mr Buhlmann's enquiries were to some extent being made in his interests as well as Mr Buhlmann's.
131. Mr Buhlmann in his witness statement said that Mr McMillan asked him to reach out to HR to enquire about the possibility to establish a middle layer of management. In oral evidence, he said that that after he received the invitation he wanted to understand more about the functional lead role. He approached Mr McMillan and Mr McMillan did not have the answers. Mr McMillan said 'if you want to know more you can ask Hope Jackson'. His purpose was to understand what the responsibilities for a functional lead were and how they differed from a director role / formal manager role.
132. It seemed to us that Mr Buhlmann was keen to get a more senior role and preferably a manager role if possible. Mr McMillan was aware from his previous enquiries that that was probably not possible, but he was willing for Mr Buhlmann to make further enquiries and Mr Buhlmann no doubt thought that HR would engage with his questions with more alacrity if they appeared to come from Mr McMillan.
133. However the email came about, it certainly gave the impression that Mr Buhlmann was too intimately involved in the process, given that he was going to be a candidate for whatever the role was. Mr McMillan was allowing that impression to be created. No doubt Ms Jackson responded directly to Mr McMillan because she could see that the impression created was that Mr Buhlmann was too closely involved.
134. On 2 October 2019, the claimant expressed an interest in an external role through Taylor Root recruitment agency.
135. On 4 October 2019, Mr Buhlmann was one of a number of people copied into an invitation to a meeting to 'discuss and plan Jan Iken's visit': 'where we will get him in front of JMLIT, NFIU JMSLG etc and generally present our achievements as a team for this year.' Jan Iken was the Global Head of Financial Crime.
136. The claimant gave evidence that he heard Mr McMillan asking his PA, Ms Montalbano, to invite 'the usual people'. We did not hear any more detail about this occasion.
137. Mr McMillan gave evidence that the meeting was to prepare a presentation for Mr Iken. Mr Iken was working with the German government to set up public/private partnerships to share intelligence. Members from relevant government agencies were invited to give Mr Iken oversight of what was being done in the UK. The internal invitees were the most senior people in the group plus members of various relevant working groups including the Joint Money Laundering Intelligence Taskforce tax expert working group, which Mr

Buhlmann was a member of. The claimant was not invited as he did not cover a relevant area and was not a member of a relevant working group. There were similarly placed white employees who were not invited for similar reasons: Alex Denley and Charlie MacLean.

138. Mr McMillan was not challenged on the detailed evidence he gave about how the attendees of the meeting were selected, although it was suggested to him that Mr Buhlmann was invited as he was already the functional lead / going to be appointed to that role and therefore he was being involved in presenting the team's achievements. He denied that.
139. We had no good reason to reject Mr McMillan's evidence on this point. The email was consistent with his evidence that the purpose of the visit was largely if not solely for Mr Iken to see those agencies. The claimant's evidence about the reference to the 'usual people' was insufficient to shift our view. It was a snippet of dialogue with no context – Ms Montalbano may have known who was relevant to ask to this meeting or she and Mr McMillan may have had other discussions. Without more, it did not undermine Mr McMillan's evidence as to who was invited to the meeting and why.

*Mr McMillan's interviews with the claimant and Mr Buhlmann for the functional lead role: 4 October 2019*

140. Ms Trivedi had told Mr McMillan that he should have specific selection criteria if there was more than one candidate for the functional lead role and Ms Jackson agreed in cross examination that there should be criteria in these circumstances.
141. Mr McMillan's evidence when cross examined about selection criteria was that he 'did not produce any but obviously considered them when doing interviews'. He said that he did not share them with anyone but he made clear in the interviews and write up what qualities he was looking for.
142. In answer to questions about what the criteria were, he said: 'competent in terms of abilities and appropriate leadership qualities to take ownership of issues and responsibility which would give me a sense of confidence in that individual to perform independently with appropriate competence and leadership'.
143. When asked how he communicated the criteria to the candidates, Mr McMillan said he explained what he was looking for broadly in terms of the qualities he was looking for in the meetings with the candidates.

144. The claimant said that during his interview, Mr McMillan's questions centred around how he would feel if Mr Buhlmann were appointed to the role. He said there were no questions about his own capability to do the role or any opportunity to discuss the role. The claimant said it was odd that there was no second interviewer and that it was a sham process, it being clear that Mr Buhlmann was the favourite. He said people were led to believe Mr Buhlmann was the team lead after 1 June 2019 when Mr Arevalo left the QA team. The claimant said that Mr Buhlmann's inclusion in the Iken meeting shows that the outcome was predetermined.
145. Mr McMillan's evidence was that he went into the interviews with an open mind although he had a concern about the claimant's performance in relation to the KYC QA report. He said that in the interview they discussed the claimant's strengths and weaknesses and reached agreement on these. They discussed the fact that Mr McMillan thought the claimant had exercised poor judgment in relation to the KYC QA report and the claimant agreed with him.
146. He said that he asked each of the claimant and Mr Buhlmann in interview how they would feel if the other were appointed.
147. Mr Buhlmann said that in his interview he answered competency based questions. He then asked some questions about the potential benefits of the role. We accept that is how his interview went.
148. No notes were taken of the interviews and there were no written criteria. Ms Jackson took no action to check that McMillan applied criteria and did not later seem to pick up any issues with his feedback on his decision, which we consider below.
149. Mr McMillan said that he chose Mr McMillan for the role because:
- The claimant had admitted he had exercised poor judgment
  - He disagreed that the claimant was more experienced and qualified than Mr Buhlmann
  - Mr Buhlmann had demonstrated leadership qualities and very good judgment
  - Mr Buhlmann had shown an interest in the role and advancement of his career
  - The claimant had refused to discuss the controversial KYC QA report and had not taken responsibility for it.
150. Mr McMillan, when cross examined on his reasons, said that the KYC QA report issue was a key factor 'as it rightfully should be'.
151. On 8 October 2019, Mr McMillan wrote to Ms Trivedi about his process:
- I met with George and Bastian separately last week*

*In summary the outcome was as follows;*

*George*

*(self-assessed by George) (agreed by both RM and GG)*

*Strengths Opportunities*

*Broad Financial crime knowledge Needs to make better judgment calls*

*Fraud CSA. Needs to know when to escalate issues*

*Policies Quality of reporting*

*Stakeholder management*

*Bastian*

*Broad FC knowledge needs to provide even more updates in eg JMLIT working group*

*Thinks holistically across issues needs to be more proactive and strategic*

*Good Communicator*

*CRA Process managed well*

*Chaired JMLIT EWG*

*Result — George has recently exercised poor judgment in a situation where he ought to have escalated a report namely the Q1 KYC/EDD review where his report was not robust and rated correctly*

*Bastian is demonstrating the right leadership potential and therefore I am offering Bastian a team lead role in QA*

152. We concluded that Mr McMillan had some discussion with the claimant and Mr Buhlmann about their strengths and weaknesses; what he said to Ms Trivedi broadly reflected what had happened at the interviews.
153. We considered however that the comments about the KYC QA report did not reflect something which Mr McMillan brought up with the claimant but a view which Mr McMillan had gone into the interview with. Had this been explicitly brought up with the claimant, we think he would have raised it in his grievance. The reference to the KYC QA report is not in the section of the email where it is said to be 'self assessed by George' but in the 'result' part of the email.
154. Mr McMillan had not had training in how to conduct the recruitment process. This was a role which carried no salary rise and was not at least structurally a promotion. Even in that context, we think the process was poor. Mr McMillan was not transparent, he did not have clearly defined criteria as he had been

advised to have, he did not take notes. His account of the criteria was incoherent and his outcome did not reflect any very clear application of criteria. We concluded that he did go into the interview with a strong view that that Mr Buhlmann should be appointed and he went through an informal process which he probably thought complied with what HR had told him but which did not; he had not taken great care to ensure he complied. We think that in circumstances where he did have a strong view as to who should be appointed, he was not treating the process very seriously because it was an appointment to a position involving no formal change of status or salary.

155. Also on 4 October 2019, Mr McMillan asked the claimant to cease providing support to the anti fraud lead, which was an ad hoc role the claimant had taken on. Mr McMillan said this was because he wanted the claimant to concentrate on his core work of QA reports. There was a backlog which was an issue for the whole team.
156. The claimant said that he was not provided with any justification for this. He had been the main contact for anti fraud queries in the first quarter of 2019 and he had supported the anti fraud lead from April to October 2019.
157. The claimant disagreed that it made sense for him to cease this role to have more time, as he had other activities which required more time than the anti fraud role. Mr McMillan did not say stop all the other activities, just the anti fraud role. A project for CRA took most of their time and they were short staffed. The claimant said Mr Buhlmann's backlog was affecting the department's productivity but Mr Buhlmann was allowed to continue to provide support to an external anti tax evasion project. This raised Mr Buhlmann's profile with external peers and senior management.
158. Mr McMillan said more generally that he was hands off about people doing development but if core responsibilities were no longer adequately met then he would intervene. He said this was reasonable and clearly understood by the claimant at the time. When he was pressed on whether he discussed the reasoning with the claimant at the time, he said: 'I told him'. We were not convinced by that evidence as it was clear that the main thrust of Mr McMillan's evidence was that the claimant would or should have known why he asked him to cease doing the work.
159. When we compared Mr Buhlmann's circumstances and the claimant's at this time, they were to some extent similar. The whole team had a backlog of QA reports, which was their core work. However, unlike the claimant, Mr Buhlmann had not had a significant issue about the quality of a piece of work.
160. On 7 October 2019, the claimant sent his CV to Bank of America.

161. On 8 October 2019, the claimant said he spoke to Darryl Turner, a member of the Financial Crime Enhanced Due Diligence team. The claimant mentioned being interviewed for the functional lead role. Mr Turner said that he had been made aware by senior members of his team that Mr Buhlmann was the functional lead and that there was a document which showed this. The claimant asked Mr Turner to share that document with him. This was the new starter induction pack which named Mr Buhlmann as the team lead; the version the claimant saw was dated 1 October 2019.
162. Mr McMillan's evidence was that he could not explain the new starter induction pack. He had not seen it at the time; it was an unfortunate mistake, he had nothing to do with it. He did not instruct Mr Turner to put Mr Buhlmann's name in the pack nor did he instruct anyone else so to instruct Mr Turner.
163. We did not hear evidence from Mr Turner but there were a variety of communications in the bundle which were relevant for us to consider.
165. On 09 February 2021 Mr Turner messaged the claimant: *I'm happy to put something in writing to say I referred to Shairon Hill and Charlie Maclean before adding QA Team lead name to structure chart and that bank didn't allow me access to systems when I was asked to provide evidence.*
166. On 14 April 2021: Mr Turner sent an email to Mr Clapham, who was conducting the claimant's grievance appeal:

*During our conversation regarding George Gyimah's grievance appeal, you asked how it was that the Compliance EDD Induction Training document that I had prepared identified Bastian Buhlmann as the team lead. I explained to you at the time that I could not honestly recollect why I had done that. I want the record to be clear so that there can be no suggestion of misconduct or dishonesty on my part.*

*I am writing to provide you with my account as to why George Gyimah received the Compliance EDD Induction Training document and as to why Bastian Buhlmann was annotated as the, 'QA Team Lead' within a team structure included in said document.*

*On behalf of the Compliance EDD Team, I developed and produced an 'Induction' training pack for new joiners to the team. As part of this document, I made reference to other functions within Compliance to provide an overview of the department as a whole, which included team structures. George Gyimah was interested in this piece of work and requested a copy once the document was complete, so that he may look to replicate a similar induction training pack but for the Compliance QA Team.*

*With regards to the addition of Bastian Buhlmann as QA Team Lead, I cannot honestly recollect why I inserted his name within the QA team structure as the QA Team Lead. This could have been an oversight on my part but as already mentioned, due to the time that has passed, I do not recall the reason for inserting Bastian's name. However, I can confirm that I had no interaction with Robert McMillan on this matter and was not, at any point, directed by or advised by Robert McMillan to insert Bastian's name as QA Team Lead. Furthermore, I cannot recall being advised or directed by any other individual within the Compliance department.*

167. On 2 May 2021 Mr Turner wrote to Saju Jacob, a lawyer at the respondent:

*Following our call last week I can confirm that I no longer hold a record of the WhatsApp conversations between George and I. This is the only platform through which we had corresponded.*

*However, I can recollect that George shared an extract of his Annual Appraisal via this platform. He also put me in contact with a recruiter and informed me of the birth of his daughter.*

*I did offer to provide a statement to the effect that I spoke to Shairon Hill and/or Charlie MacLean implying one of these individuals may have advised me to insert Bastian's name in the org chart. At the time, I was taking strong medication, was angry toward the bank but do now regret comments made. However, as I recently stated, I have no honest recollection to why Bastian's name was marked as QA Team Lead.*

*I believe the last WhatsApp communication I had with George was late January or early February. I am not willing to be a witness for George nor have I received any correspondence from his solicitor requesting I appear as witness on his behalf.*

*I have since blocked George Gyimah on WhatsApp and LinkedIn given the abhorrent behaviour he is now displaying.*

168. Shairon Hill is head of EDD / AML Advisory and the new starter induction pack was for her team.
169. Some further evidence existed in the form of emails reflecting other enquiries made by Mr Clapham:
170. On 4 June 2020, Ms Trivedi wrote to Mr Clapham:

*As far as I can see having checked mailboxes (mine and Rob McMillan's mail box), this document was not approved by Robert McMillan (RM) or Compliance Business Management.*

*I am currently just checking to see if it was formally approved by Head of EDD team, (Shairon Hill). Once I have received confirmation of this I will let you know.*

*Just as a bit of background, we have a central new starter pack that I sent out by Business Management to all new starters. We have advised individual teams to not have team induction packs as Business Management do not have visibility over these / if information is added incorrectly etc eg in this case noting that Bastian Buhlmann (BB) was Team Lead QA.*

*BB was not appointed Functional Head of QA team until 24 October 2020 (email attached) which was sent to QA team and then later to all of Financial Crime team. The QA team does not appear on any formal org charts etc as the team does not have a formal L4 manager position. BB was just appointed as functional team head. RM is still the overall head of team and performs appraisals etc*

*In October RM interviewed both BB and George Gyimah for the "functional team head" role....*

171. Ms Hill wrote to Mr Clapham the same day. She said that Mr Turner had been given the role of working on the induction pack as a 'soft' job on his return from extended medical leave. He had circulated a version for comments to her and others for feedback in September and it had been forwarded to Mr McMillan and Mr Lowther on 25 October 2019. There was no approval prior to that date. She thought no one had noticed the reference to Mr Buhlmann being team lead. She said, however, that it was widely assumed that Mr Buhlmann was stepping in as team lead after Mr Arevalo's departure. Mr Arevalo had not formally been the lead but seemed to take the lead more and attend more meetings. She could find no other emails which cast any light.
172. We note that the evidence of the respondents was that people did assume that Mr Buhlmann was acting as team lead and that if anyone noticed the role he was assigned in the new starter induction pack, they did not correct it.
173. Returning to the chronology, on 8 October 2019, the claimant also emailed the final\_ KYC QA report to Mr Clancey which reflected Mr Buhlmann's changes. The claimant's oral evidence was that he did not agree that pass rate but he was scared of Mr McMillan so did not challenge the report.
174. At this time Mr McMillan directed that all QA reports should have 4 eye checks and that the claimant should have his reports checked by Mr Buhlmann.
175. That same day, Mr Buhlmann gave feedback to Ms Trivedi on the functional lead interviews, as described above.

176. On 9 October 2019, the claimant was invited to a Bank of America interview and sent a job description by the recruiter for another role.
177. On 10 October 2019, the claimant provided his availability for the Bank of America interview.
178. At some point between mid and late October, the claimant said that Mr Buhlmann made a remark about fried chicken, to the effect – ‘I bet you want to go somewhere that sells fried chicken’ - in the context of a discussion about where to go for a team lunch. This evidence reflected the account he gave to Mr Clapham during the course of the grievance appeal.
179. Mr Buhlmann said in evidence that there was a proposal to have a team lunch; there were large queues at restaurants near the office except Nando’s. He suggested going there because the claimant liked chicken. He said words to the effect of: “Why don’t we go to Nando’s, George, you like chicken”.
180. The claimant denied that version of events.
181. The notes of Mr Buhlmann’s interview by Mr Clapham record that Mr Buhlmann remembered the occasion as having been a lunch before Christmas and that they had wanted to eat at Wahaca but that restaurant was busy, so Mr Buhlmann suggested Nando’s as he knew the claimant liked chicken. There was no reference to ‘fried chicken’.
182. Ms Ruci was interviewed about this matter by Mr Clapham. The notes record: *WR explained that she had just joined the team and they decided to go for a welcome lunch where a reference to GG and chicken was made by BB.*
183. Ms Ruci’s evidence was that she was not aware of any stereotype about Black people and chicken or fried chicken.
184. Later in the notes, it is recorded that:  
*DC asked if WR remembered a direct reference to fried chicken and WR thought she could remember such a reference.*
185. It was not clear whether that second reference was to this occasion or the further occasion when Ms Ruci said chicken was referred to.
186. The claimant was cross examined about the fact that in some documents he said there was a reference to ‘chicken’ and others ‘fried chicken’. In essence he said that chicken simpliciter was a racial stereotype connected with Black people.

187. On 15 October 2019 there was correspondence between Ms Trivedi and Ms Jackson about informing the team about the functional lead appointment.
188. On 17 October 2019 the claimant was interviewed for a role at Bank of America.
189. On 24 October 2019: there was an announcement of the functional lead appointment by Ms Trivedi to the team:
- I am delighted to announce that going forwards Bastian will be functionally responsible for the QA team.*
- Please join me in supporting Bastian in this role.*
190. Mr Buhlmann said that the claimant congratulated him and said that he knew Mr Buhlmann was the better candidate but that he applied for the role as he thought he owed it to his role as diversity champion.
191. The claimant denied that he said Mr Buhlmann was the better candidate.
192. We were unable to accept that Mr Buhlmann, whom we found a straightforward and candid witness, would have simply invented this conversation. We concluded that, in the wake of the KYC QA report issue, the claimant was 'keeping his head down' to some extent and seeking to maintain a convivial relationship with Mr Buhlmann. The reference to the claimant's role as diversity lead was consistent with other references the claimant made in documents to the role – it was clearly something that was important to him.
193. On 5 November 2019, Derrick Anim, an employee in another part of the respondent's business, sent an email to Mr McMillan and others requesting the claimant produce an overview of the financial crime department for an external Nigerian bank.
194. The claimant said that Mr Anim asked for him as the claimant had previously provided a trainee on Mr Anim's team with an overview which received positive feedback. The claimant said that he made Mr McMillan aware of the request and Mr McMillan nominated Alex Denley to carry out the overview. Mr Denley is white. The claimant said that Mr McMillan also overlooked Robert Tongo, a black employee the claimant said was leading on that workstream.
195. Mr McMillan's evidence on this incident was that:
- he wanted the claimant to concentrate on his core work

- Mr Denley's job was to do due diligence on financial institutions and he was leading this workstream. He had relevant experience with African financial institutions. "I wanted people to do their jobs. This was Denley's role. This was his job."
  - Mr Tongo later took this over this work.
196. In oral evidence, the claimant accepted that Mr Denley was appropriately qualified for the task; he said that he was not aware that Mr Tongo took over later. He said that Mr Tongo would have been the correct person to take over as he was responsible for financial institutions in the department.
197. As to whether he explained the position to the claimant, Mr McMillan said: "I just said in an email that Mr Denley was available. The claimant knew it was Mr Denley's role. He was in that role. I think it was self explanatory. I think I explained it to him as well."
198. On 6 November 2019, the claimant applied to Bank of America for an EME AML post.
199. On 7 November 2019, there was an incident which the claimant alleged constituted bullying behaviour by Mr McMillan.
200. The claimant said that he was on a phone call when Mr McMillan was looking for Mr Buhlmann to join a meeting. Mr McMillan aggressively ordered him to end his call to find Mr Buhlmann. He shouted at the claimant. When the claimant later saw Mr McMillan and Mr Buhlmann, they were laughing and joking about Mr Buhlmann missing the meeting.
201. Mr McMillan's evidence was that he might have come across as 'direct' because he needed Mr Buhlmann in the meeting urgently. He denied shouting. He accepted that the claimant was on a call but a meeting was about to commence so that call must have been about to come to an end. He did not look for Mr Buhlmann himself as he was chairing a meeting and attendees were already assembled in the room. The meeting could not go on without him and the claimant was the one person likely to know where Mr Buhlmann was.
202. In terms of his treatment of Mr Buhlmann about his non attendance, he said that the meeting time had changed and some people were caught out by the change of timing, including Mr Buhlmann. It had been important that Mr Buhlmann be in the meeting but when it turned out that the change of time had put people out, that was not something to remonstrate with people about; it was sub optimal but not Mr Buhlmann's fault.

203. The claimant said that that his race claim was about the difference in treatment as compared with Mr Buhlmann. Mr Buhlmann had not turned up to the meeting but was not shouted at and embarrassed as the claimant was.
204. In answer to Tribunal questions about whether he had seen Mr McMillan behave aggressively on other occasions, the claimant said that he had seen Mr McMillan be aggressive at the financial crimes forum which was held on Fridays. He had been angry about the members of the transaction monitoring team not doing enough hours and raised this angrily with the head of the team, a white European person, at the forum.
205. Dr Gelemerova gave evidence that she and others had asked to postpone this meeting and Mr McMillan refused. Mr McMillan went to find Mr Buhlmann and Mr Buhlmann arrived shortly before the meeting finished but Mr McMillan showed no sign of dissatisfaction with him.
206. After the meeting Dr Gelemerova saw the claimant, who was distressed and said Mr McMillan had come to him demanding that the claimant find Mr Buhlmann. He could not find Mr Buhlmann, who later said he had been in the gym.
207. We concluded that Mr McMillan was abrupt and peremptory with the claimant and offended the claimant. There was a contrast with his attitude and behaviour towards Mr Buhlmann.
208. On 7 November 2019, there were email instructions about an office move the following day which seems to have given rise to the further chicken-related incident described below.
209. On 14 November 2019, the claimant had his Bank of America EMEA AML first round interview.
210. On 15 November 2019, the claimant said that Mr Buhlmann made a further remark about chicken: 'Give me your desk and I will give you chicken.' The claimant had been allocated a seat with a view in the move and this was in the context of other team members wishing to swap their seats for his.
211. In his grievance the claimant described the incident in this way:  
*Bastian Buhlmann offered me chicken in a jovial manner when the team were having a discussion about our new desk location.*
212. Ms Ruci in her interview with Mr Clapham is recorded as giving this different account:

*DC went back to the question of the Compliance office move. WR confirmed that GG's new seat was positioned by the window and BB mentioned that GG would be able to sit by the window where he may be able to see a restaurant that served chicken*

213. Neither Mr Buhlmann nor the claimant supported this account of events. The claimant said there was no such restaurant in the vicinity of the office.
214. Mr Buhlmann also denied making the remark described by the claimant.
215. He said that he had on another occasion he told a different colleague, Mr Wilson Yeung, that he would take him to Five Guys and buy him a burger if he moved a training session for him. This was a jokey remark because Mr Yeung was known to be fond of burgers.
216. The claimant said in support of his account that Mr Buhlmann, when confronted by him about this incident in January 2020, said that Mr Buhlmann said that he joked with Mr Yeung about liking Chinese food or noodles and Mr Yeung was not offended. We return to that assertion and that conversation when we consider our findings about that discussion.
217. We accepted the claimant's account of this discussion. It was consistent with the fact that Ms Ruci recalled some reference to chicken at the time and with the evidence that Mr Buhlmann had made a jokey food bribe to Mr Yeung. Ms Ruci clearly misunderstood or misremembered the conversation but she did remember the connection with the view from the claimant's seat and his alleged liking for chicken. We did not conclude that Mr Buhlmann was misleading the Tribunal given his acceptance that he made an earlier remark about chicken, but concluded that the conversation had been sufficiently inconsequential that he did not remember it.
218. On 3 December 2019, Ms Trivedi announced Mr Buhlmann's functional lead appointment to the wider financial crime team by email.
219. On 11 December 2019, the claimant had his Bank of America EMEA / AML second round interview.
220. Between 13 and 16 December 2019, there was further correspondence between the claimant and recruiters about external roles.
221. We saw a letter dated 20 November 2020 which confirmed that the claimant had telephone appointments with the Employee Assistance Programme on 30 December 2019 and 6 April 2020:

*The contents of these appointments were*

- the difficult and sometimes conflictual situation especially with two colleagues*

- the feeling of diversity issues and stereotypes (towards the client) within the team*
- conflicts with the team lead*

The letter did not make clear which issues were raised at which of the two appointments.

222. On 6 January 2020, Mr Buhlmann said that the claimant scheduled a meeting with him at which he said that work had been on his mind throughout the holiday period. He said that work had been a topic of intense conversation with friends and family at Christmas lunch. He reported that a colleague from that Compliance Review Team said that Mr McMillan asked for the claimant to be trained by one of them. The claimant seemed very stressed and Mr Buhlmann suggested that he raise that matter with Mr McMillan. He told the claimant to come to him if he needed any support. The claimant spoke about the London Bridge terrorist attack saying bystanders were 'lucky bastards' as they could claim PTSD which might get them signed off work. Mr Buhlmann was concerned about the claimant's state of mind.
223. The claimant denied that he made those remarks about the London Bridge attacks.
224. We accepted that the conversation occurred as described by Mr Buhlmann. We could see no reason why he would have invented it. It was not of enormous significance to the issues in the case so it would be a perplexing detail to concoct if Mr Buhlmann had been seeking to mislead. It was consistent with what appeared to us to be the case – that the claimant was becoming more agitated about his position at work and this was having some effect on his wellbeing and possibly his mental health.
225. On 7 January 2020 the claimant had contact with recruiters about a role at DMB.
226. On 8 January 2020 the claimant had an interview for an external role.
227. On 10 January 2020 there was a series of emails with the recruiter about why the claimant wanted to move role and the notice requirements in his current job.

### *Appraisal process*

228. In January 2020, the claimant was due to have his appraisal. Mr McMillan's evidence to us was that he wanted to include Mr Buhlmann in the process or delegate to him if possible. He had seven reports and therefore a large number of appraisals to do.

229. We note that Mr McMillan had been informed that he remained the 'disciplinary manager' for members of the QA team so should have been well aware he could not delegate appraisals for the rest of the QA team to Mr Buhlmann. The impression created was that Mr McMillan was nonetheless trying to divest himself of the responsibility. Mr Buhlmann was ambitious to take on more responsibilities.

230. On 14 January 2020, there were various emails about Mr Buhlmann's efforts to divest himself of some part of the appraisal process.

231. Mr McMillan's evidence was that he wanted the functional lead to assist in managing the team; he was still learning what was possible. Mr Buhlmann saw what the team did on a day to day basis. Mr McMillan managed 30 people. He would only see the tip of the iceberg and wanted all the 'positive stuff' that Mr Buhlmann could bring. Mr Buhlmann was fully aware of the targets and whether they were achieved.

232. Mr McMillan sent the following email to various of his reports, not including the claimant:

*I have now set a date for each of you to hold a one-to-one appraisal conversation with me and I now need to populate the target achievements section of the Opera process.*

*In order to do so can you please send me a word doc with the agreed achievements we discussed in our one to ones (only send to me)*

*I will then put these into the target achievements doc and send back to you for your agreement.*

*I need this asap please!*

233. Mr Buhlmann then wrote to Ms Trivedi:

*Could you please let us know how the performance review process for George and Weronika has to look like? I believe Rob would like to delegate the review and objective setting process to myself as functional lead, however we're not sure if this is possible.*

234. Ms Trivedi wrote:

*RM will have to fill out the online part on success factors as he is their disciplinary manager, however would you like to see WR and GG's objectives?*

235. Mr Buhlmann replied:

*Who is making the assessment if objectives were hit and who will set objectives for 2020? I believe Rob would like my input in this and I'd like to know to what degree I can assist.*

236. Ms Trivedi said:

*Rob will have to paste WR and GG's objectives from his HR dashboard to you so that you can see them.*

*In regards to 2020 objectives normally we base this on Group objectives, which as far as I am aware have not been sent out yet.*

237. Mr Buhlmann asked:

*Thanks, so you're saying that Rob can delegate the performance review process to me and I can be involved in assessing their 2019 performance?*

*I believe that both George and Weronika expect their performance to be reviewed by Rob only as per the communication sent when appointing me as functional lead. I believe they both expect a meeting with Rob similar to the once scheduled with myself (and other direct reports of Rob's) next Wednesday.*

*If I can assist Rob in the performance review process, should I get in touch with George and Weronika to set up meetings, prepare the OPERA input with them etc.? I believe so far nothing has been communicated to them or prepared.*

238. Ms Trivedi then clarified:

*No RM has to perform this in system and should be conducting their appraisals.*

*He can paste you their objectives so you can see them and help him prep for the meetings next week.*

239. Also on 14 January 2020, the claimant was interviewed for a role at DMB.

240. After the exchange between Mr Buhlmann and Ms Trivedi, Mr McMillan's evidence was that he asked Mr Buhlmann to work with the claimant and Ms Ruci to prepare their appraisal forms.

241. Mr Buhlmann said he spoke with Ms Ruci and the claimant and they were happy to follow this approach as they had worked closely together and achievements were team achievements.

242. It was then decided that Ms Ruci would be appraised by Dr Gelemerova as Ms Ruci had spent most of 2019 working in Dr Gelemerova's team and Mr Buhlmann could not feed into that process.
243. Mr McMillan said that there was a discussion between him and the claimant in which he said that he wanted the claimant and Mr Buhlmann to have a discussion to prepare for the appraisal and agree some remedial objectives due to the KYC QA report.
244. Mr Buhlmann said that he agreed with the claimant and Ms Ruci in any event that they should all prepare their achievements together. This was not uncommon and was not necessarily to do with him being the functional lead; they had almost identical objectives. They were going to prepare the achievements together and put them in the right format.
245. On 16 January 2020, the claimant took some psychometric tests for the DMB role and arranged a meeting with Ms Evans from DMB.
246. On 17 January 2020 Mr McMillan wrote to the claimant and Ms Ruci:  
*I have now set a date for each of you to hold a one-to-one appraisal conversation with me and I now need to populate the target achievements section of the Opera process.*  
*In order to do so can you please send me a word doc with the agreed achievements we discussed in our one to ones (only send to me)*  
*I will then put these into the target achievements doc and send back to you for your agreement.*  
*I need this asap please!*
247. On 20 January 2020: the claimant had a meeting with Ms Evans at DMB. He also emailed Ms Montalbano saying that he would work on the appraisal document and send it over that day. In fact the appraisal document was not sent that day.
248. On 21 January 2020 the claimant attended an interview with DMB and scheduled an appraisal preparation meeting with Mr Buhlmann.
249. On 22 January 2020 the claimant received an offer letter for the DMB role at a gross salary of £100,000. The claimant accepted the offer that day.
250. Ms Montalbano wrote to Mr Buhlmann:  
*Rob has asked whether both George and Weronika have supplied you with their appraisals.*

*Same format as you did with Rob. He will then look to sit with you to discuss both appraisals before entering in the diaries.*

251. The pre-meeting between Mr Buhlmann and the claimant to discuss the claimant's appraisal had been set for 23 January 2020 but early that morning the claimant told Mr Buhlmann that he did not feel comfortable with Mr Buhlmann being involved.

252. Mr Buhlmann wrote to Ms Montalbano:

*My appraisal meeting with George was scheduled for today. George informed me just now that he doesn't feel comfortable with me doing his review anymore and would like this to be done by Rob. He spoke to someone in HR who confirmed to George that this is the correct process.*

*George will reach out to Rob separately and schedule a meeting*

253. We note that this email could be read as suggesting that Mr Buhlmann's role in the claimant's appraisal was planned to be rather more extensive than the respondents otherwise told us had been arranged, had Ms Montalbano's earlier email not made clear that Mr Buhlmann was meeting with the claimant prior to Mr McMillan meeting with the claimant.

254. Ms Montalbano and Mr McMillan chased the claimant for his 'achievements against objectives' document and Ms Trivedi indicated that all appraisals must be done by following day and entered into the system by the manager. This was in accordance with the respondent's timescales for appraisals.

255. The claimant's appraisal meeting with Mr McMillan was ultimately schedule for 15:30 that day. Mr Buhlmann was present at the meeting. Mr Buhlmann said that Mr: McMillan asked him to be present in the appraisal meeting to feed into it as he had not had the document with the claimant's achievements. He said that he was never going to be doing the appraisal of the claimant himself.

256. We had various accounts of the appraisal meeting.

257. Mr McMillan made a note of the meeting:

*Appraisal of George Gyimah 23/01/330pm – present RM BB and GG*

*Asked George how the year had gone and key achievement for the year.*

*GG explained that he was involved in Fraud Risk assessment for part of the year ABC as back up for Ghazala whilst on vacation*

*QA work was involved on 10 QA report as listed on the attached.*

*George said that he tries to help team members on various projects including CRR changes*

*George stated that he works overtime and very long hours including weekends.*

*RM asked GG if he sees his QA work as his main focus. He said yes however he tries to help the team where possible.*

*RM asked how did you prioritise knowing there was a backlog in QA*

*George said there was no backlog that he was aware of until September and made sure we were not in a backlog in his controls*

*RM and BB noted that there had generally been backlog on QA all year and since the departure of Tony Forbes*

*RM asked was there anything that could have been done better this year. GM said he could have highlighted earlier that he was doing Jose's work since he had left*

*GG said there was pressure on him from Risk appetite MI to get work done.*

*RM mentioned the mid-year QA where the report was presented to RM for sign off which as was later determined was not of satisfactory quality and had fundamental and major shortcomings. George has subsequently accepted that the report which he rated as 98 percent was in reality 13 percent pass rate*

*RM then asked why had he allowed Veronica to check his latest report on the same topic based upon the fact that she is junior and still under training and also that BB is your functional manager and RM had asked that he get BB to review his work.*

*GG said he thought Veronica is a full member of team and adequately qualified or skilled to QA the report.*

*RM challenged that view and reminded that he should have had BB review it*

*GG said I don't like the way this conversation is going asked for separate meeting on the topic because the incident should not be part of the performance review.*

*RM asked why can't we talk about your performance in your performance review.*

*GG then he preferred to talk about what his achievements were rather than that point*

*RM said that this was relevant and as it was a significant failure of judgment for a VP in the team*

*GG then said that he refused to comment to any questions that were subsequently asked*

*RM tried to bring him back to continuing the conversation*

*GG then said that he wished to leave*

258. The claimant also made a note of the meeting which included the following section:

*RM stated that he had invited BB to the meeting due to his position as Functional Lead of the Financial Crime Quality Assurance (QA) team.*

*GG provided a high level summary of his 2019 achievements which focussed on;*

- *Covering two thirds of the QA team's reviews from June 2019 up until the team's new control were implemented towards the end of the year.*
- *Implementing new QA ABC Key controls*
- *Supporting the Fraud Programme Lead with the Regulatory Obligations and other tasks.*
- *Covering the Programme Leads for AB&C and Fraud while they were on holiday.*
- *Advising on the CRR queries.*
- *Stepping in for the vacate AML Programme Lead for the CRA 2019 Project*
- *Working on the Risk Dimension List Project in Frankfurt*
- *Working on the Legal Entity List Project*
- *Implementing new QA controls and supporting with the drafting of the QA procedure.*

259. The claimant's complaints about this meeting to the Tribunal related in particular to the following:

- The presence of Mr Buhlmann at the appraisal meeting;
- Mr McMillan not making positive comments or acknowledging his many achievements;
- Mr McMillan he alleged again saying that he was 'useless' and 'not vice president material'
- Mr McMillan criticising the claimant for the team's backlog.

260. Mr Buhlmann's account of the meeting was that it opened with Mr McMillan asking the claimant to talk about his achievements. The claimant refused to talk about the KYC QA report and asked for a separate meeting. His account essentially agreed with that of Mr McMillan.

261. The claimant said in oral evidence that he had objected to Mr Buhlmann's presence, but his own notes of the meeting did not show any such objection and there was no good reason put forward by the claimant as to why they did

not record his objection if it had in fact occurred. Mr McMillan said that he explained why Mr Buhlmann was present and the claimant was fine with it. We did not accept the claimant objected; we considered that the claimant probably was taken aback by Mr Buhlmann's presence but did not raise his discomfort, possibly because he wanted to see how the meeting panned out and whether Mr Buhlmann in fact was a supportive presence.

262. As to the claimant's opportunity to discuss his achievements, it was clear from both sets of notes that the claimant was given the opportunity to set out his achievements and did so but that in due course Mr McMillan did move on to issues such as the backlog. The oral evidence of Mr McMillan was that he asked the claimant to speak about his achievements, the claimant spent a lot of time talking about them and they were reflected in the written appraisal. It may well be that Mr McMillan did not give much positive feedback before moving on to performance concerns.
263. Mr McMillan said he did not say the claimant was useless and not vice president material. The claimant was cross examined on the fact that he did not make this allegation in his grievance.
264. In fact the grievance document said:
- Robert McMillan declining my request to explain the points above implied that he was accusing me over these matters without giving me the right to provide an explanation. His behaviour reminded me of the wording "useless" and "not Vice President material" that he described me as in September 2019.*
265. Questioned about this, the claimant said that it took a lot of confidence to raise the grievance, his approach was to try and resolve it and ensure he had another meeting. He did not think putting in those remarks would make things better. The claimant said he implied it in the grievance document; the grievance document was a long document and he was stressed. He was rushing to meet the deadline to get the document to HR. He was trying to say it happened again.
266. Mr McMillan said that they discussed the backlog but he did not blame the claimant for the backlog. It was clear from Mr McMillan's own notes that the backlog was discussed in the context of the claimant taking on other tasks. The claimant would reasonably have felt that he was being implicated in the backlog.
267. So far as the QA KYC report was concerned, Mr McMillan said that the claimant did not want to talk about it. He asked the claimant why he had asked Ms Ruci to do a 4 eye check on a subsequent report when he had asked for Mr Buhlmann to review all of his work. The claimant said he did not

consider there to be any difference in seniority and competence between Mr Buhlmann and Ms Ruci.

268. The claimant said he did not like the way the conversation was going and asked for a separate meeting about it. Mr McMillan asked why he did not want to talk about his performance in a performance review meeting. The claimant replied that he preferred to talk about his achievements, He said he wanted to leave and left although Mr McMillan tried to persuade him to stay.
269. So far as Mr McMillan's reasons for raising these issues were concerned, he said that he questioned a second level review being carried out by Ms Ruci and not Mr Buhlmann as Ms Ruci had only joined the team about a month before and was still undergoing a training process. The KYC QA report was a relevant part of the claimant's performance and his objectives and the appraisal needed to reflect that issue. He had not started any kind of formal performance management process at the time but decided to give the claimant a second chance, working with Mr Buhlmann to 4 eye his work, instead of initiating a formal process.
270. We concluded that Mr Buhlmann should not have been in the meeting without the claimant having been asked in advance whether he was happy for him to attend. It was unsurprising that the claimant had not felt it was expedient to object to his presence, however, when confronted with it. The fact that performance concerns were raised – about the KYC QA report, the claimant's involvement in the backlog, his decision to ask Ms Ruci to 4 eye a report – would have been more uncomfortable for the claimant due to the presence of Mr Buhlmann, who had until recently been his peer and in many respects still was.
271. We could also understand why Mr Buhlmann was asked to join the meeting and felt the claimant was to some extent the author of his own misfortune. The claimant had not sent in the document setting out his achievements in the relevant timescale or at all and he had at the last minute said he would not meet with Mr Buhlmann. So Mr McMillan, who was hard against the appraisal deadline by this point, was missing information he required from the claimant and from Mr Buhlmann about the claimant. We could entirely understand why he invited Mr Buhlmann to attend the meeting.
272. We concluded that the claimant felt threatened in the meeting for various reasons – he had hoped to put the KYC QA report behind him and it was cropping up again, he had disregarded an instruction about who was to 4 eye reports and was being challenged about it. And these matters were being aired in front of Mr Buhlmann.
273. That same day the claimant complained to Ms Jackson about the appraisal. He came to see her after the meeting late in the day and said that he was not

happy about his appraisal. He said he wanted to have a meeting with her. She had to leave to pick her son up from school but told the claimant to put some time in the diary for them to catch up the following day. The claimant did not then make an appointment with Ms Jackson.

274. Ms Jackson tried to ring the claimant and he did not return her calls.
275. On 24 January 2020 Mr McMillan entered the claimant's appraisal on the respondent's system; he gave the claimant an overall grading of 'partially meets expectations'. He said that he had to complete the form by the HR deadline and the claimant had walked out. He told Ms Jackson what had happened and she encouraged him to follow up and try have another meeting with the claimant but ultimately that did not happen because of the claimant's sickness absence.
276. It was suggested to Ms Jackson in cross examination that something more should have been done by the respondent because the claimant had registered a 'dissent' to the appraisal on the respondent's system. Ultimately we had no clear evidence as to what processes the respondent had for dealing with such a dissent and it was clear that both sides understood, after the claimant had submitted his grievance, that his objections to the appraisal were being dealt with under that process.
277. On 27 January 2020, Mr Buhlmann said that he brought up the claimant's apparent unhappiness in a meeting with the claimant and the claimant said he intended to bring a grievance. He said that he was going to bring up a comment Mr Buhlmann made about him liking chicken. The claimant said he did not want to do this and although he did not think it was racist he had been advised by his network that he was being naïve to think that and he should use it. Mr Buhlmann said that he said that he was unaware that his comment had had any effect on the claimant and he had not intended to make him feel uncomfortable. He said that he was sorry that the claimant felt that way.
278. The claimant's account of this discussion is that he said that he was going to report Mr Buhlmann about the previous chicken comments but he did not say that he did not want to do it and that he did not think it was a racist comment. He did not refer to his 'network'.
279. The claimant said Mr Buhlmann went on to say that he had joked with Mr Yeung about eating noodles and Mr Yeung did not get upset so he could not understand why the claimant would be upset when he joked about him loving chicken.
280. When considering which account to accept, we bore in mind that, had Mr Buhlmann made the remark about Mr Yeung, it would have been a striking piece of evidence in support of the claimant's contention that Mr Buhlmann

used racial stereotypes. The claimant did not include this piece of evidence in his grievance, did not mention it during his 3 March 2020 meeting with Mr Biggs and did not raise it in his written grievance appeal. The first appearance of this material is during Mr Clapham's grievance appeal meeting with the claimant when Mr Clapham asked the claimant about what Mr Buhlmann had said about the meeting on 27 January 2020:

*So, I only approached Bastian about the chicken thing, and it was not early January, it was after he had done the Rob... it was after I had had the meeting with Rob - it was to do with my appraisal meeting and he was sat there and he knew the truth about some of the matters and he did not say a word. What I said to him was that the continuous behaviour of him sitting there watching my career go down, because it's very important we are all here for our careers and him not saying the truth — I feel like there was a racial motivation behind it. Because what he said about the chicken was racist – I didn't act at the time as I was really angry so I didn't want to say anything straight away - so for the very first time for team harmony I didn't act because of that and I said to him that — if you watch the news and everything that is going on at the moment and I gave the example of Meghan Markle and people complaining about these things — I said you have to be watching what you say and you have to be politically correct.*

*What he said to me that day was that he does not think what he said was racist because he even jokes about Chinese food with a guy called Wilson on the team and he doesn't take it that personally.*

*Then I said to him that, well that is Wilson, but I've had conversations with my friends, because before I got angry because I thought it was racist but I also spoke to my colleagues who also found it racist. I wasn't acting on just what they had said, what I did say to him was that my colleagues said to me that I should have reported him earlier, because this incident with the report issue where he sat there saying nothing wouldn't have happened if I'd reported him - that's what I said to him. So it wasn't my colleagues influencing me, or them saying it's racist and that's why I thought that - I did think it was racist, especially when he raised it as an incentive, specifically as an incentive for the second time as well. Even my close friends don't say that to me, but we're not that close for him to use that kind of I'll use the word 'banter' with me, and I do not see the reason for him saying that because I've never expressed any like for that food to him. So that is what I said to him at the meeting.*

281. Perhaps most strikingly of all, the claimant made no reference to these comments in the email he sent to Mr Buhlmann on 7 February 2020 which we refer to below.
282. The claimant was also referred to some WhatsApp messages between himself and Mr Yeung between December 2019 and June 2020. The messages were friendly and included some chat about football. There was no

reference to any suggestion that Mr Buhlmann spoke to Mr Yeung about liking noodles. The claimant said that Mr Yeung was not a very close friend but was someone he talked about football with.

283. We noted that the claimant had not suggested that Mr Yeung be interviewed as part of his grievance or grievance appeal or asked Mr Yeung to provide a statement to the grievance. If he had tried to get Mr Yeung to provide a statement for the Tribunal proceedings, we were not provided with any information about why there was no such statement.
284. We concluded for all of these reasons that there had been no such statement by Mr Buhlmann and therefore there was no evidence that he engaged in 'banter' with Mr Yeung about a liking for Chinese food or noodles.
285. On 3 February 2020, the claimant was absent from work with a temperature. HireRight contacted the first respondent with an employee verification request in respect of the DMB role. Ms Everest in HR wrote to the claimant to ask if he was going to resign and the claimant replied that he had not considered resigning.
286. On 4 February 2020 the claimant emailed the respondent to say that he was still unwell. DMB wrote to the recruiter to say it was keen to get a start date for the claimant. The claimant emailed stakeholders for feedback for his appraisal.
287. On 5 February 2020, Ms Everest wrote to the claimant to say that the respondent would only provide a reference once they had a leaving date for an employee and asked the claimant why he wanted a reference. The claimant continued to seek feedback for his appraisal.
288. On 7 February 2020, the claimant sent an email to Ms Ruci:

*Can you please confirm whether you recall Bastian Buhlmann made the following comments;*

- *“referring to my choice of requiring a place that served fried chicken for a team lunch” and*
- *“the offer of chicken as a reward in a jovial manner”.*

*The comments were made when deciding a location for our team lunch and during a discussion of on our team’s new seating arrangements respectively.*

*Please let me know if I have missed anything.*

289. Ms Ruci replied that she recalled both situations and the comments were accurate.

290. The claimant also emailed Mr Buhlmann:

*I just thought that I will take this opportunity to thank you for your time for our chat on 27th January 2020.*

*I refer particularly to the discussion, on the impact of “referring to my choice of requiring a place that served fried chicken for a team lunch” and “the offer of chicken as a reward in a jovial manner”. Both incidents occurred in the presence of Weronika Ruci made me feel very uncomfortable.*

*These comments bothered me a lot and it is taking some time for me to come to terms with it. My pain is more especially due to the fact that you uttered both comments a few weeks apart. The comment as I stated to you has a derogatory meaning, one that brings a lot of pain due to the countless struggles that I have experience in my career most recently at Commerzbank.*

*I am glad that I had the opportunity to talk to you about it.*

291. Mr Buhlmann forwarded the email to Mr McMillan:

*Just making you aware of the below in case it comes up.*

*From my point of view I discussed the below with George and explained that I was unaware of the effects my comment had on him. It was never my attention to cause George pain or make him feel uncomfortable.*

*I believe the comments George is referring to were made in regards to finding a place for a team lunch and were not made to bring up stereotypes. However, I told George that I was sorry if he felt that way.*

292. We saw a GP fit note for the claimant dated 7 February 2020 in which the reason for his continuing absence was said to be ‘multiple stressors causing depression’.

293. On 10 February 2020 the claimant submitted his grievance, which largely mirrors the complaints he has presented to this Tribunal insofar as those predate submission of the grievance:

*My grievance relates to the following issues that have occurred over a period of time;*

*Issues raised against Robert McMillan*

*Qt CLM KYC 2019 Draft Report Issue*

*Appointment of a Financial Crime Quality Assurance Functional Lead*

*Supporting the Fraud Programme Lead and Bastian Buhlmann's External Work*

*Robert McMillan's approach to errors made by Bastian Buhlmann*

*Being overlooked for meetings in the Financial Crime Department*

*Robert McMillan understanding, awareness and practice of Diversity and Inclusion*

*Phone call incident*

*Request to provide an overview to the Treasury Team of Access Bank*

*Handling of my end of year appraisal process*

*End of year Appraisal comments made by Robert McMillan*

*Issues raised against Bastian Buhlmann*

*Racial comments made towards me by Bastian Buhlmann*

*Request from Bastian Buhlmann to carry out reviews without Weronika Ruci*

*End of Year Appraisal Meeting: Team Backlog and Second Level Review issue*

*Understaffed Financial Crime Quality Assurance Team*

*Meeting to discuss issue relating to the Compliance Reviews team*

*Request for support and on the Compliance Risk Analysis 2019*

*Q4 2019 Financial Crime Quality Assurance Testing Deadlines*

*On two occasions within the last 4 months, Bastian Buhlmann has used comments that have a derogatory meaning towards me. Refer to appendix 19 for further detail. Bastian Buhlmann made the following comments which were racist and stereotype;*

*Bastian Buhlmann referred to my choice of requiring a place that served fried chicken for a team lunch when the team when deciding on a venue for our team lunch.*

*Bastian Buhlmann offered me chicken as a reward in a jovial manner when the team were having a discussion about our new desk location*

294. There followed correspondence between the claimant and Ms Jackson about the grievance.
295. There were various messages passing between the claimant and the recruitment agency. In one message, the claimant said to the recruiter: *I just came out of an exam centre.*
296. The claimant was studying for some additional qualifications at the time but in cross examination said that he had not been taking any exams whilst he was off sick. The thrust of the questioning had been to suggest that the claimant

was not legitimately signed off work or at any event was not as unwell as he purported to be if he was taking an exam.

297. The claimant said in oral evidence that in fact he was at a soft play centre with his son and he wrote 'exam centre' by mistake. He might have written 'exam' because his wife was about to have a medical examination as she had recently found out she was pregnant.
298. The respondent in submissions said that the claimant's evidence on this point reflected very poorly on his credibility.
299. We found the claimant's explanation for what he had written contrived and unconvincing. It appeared to us that he was concerned that his case would be damaged if he admitted either that he was in fact at an exam centre whilst signed off sick, or that he had misled the recruiter about where he had been.
300. The claimant agreed a start date of 1 July 2020 with DMB. He was required to give three months' notice to the respondent.
301. On 14 February 2020, there was a telephone discussion between the claimant and Ms Jackson about the grievance. The claimant's evidence was that Ms Jackson asked him why he would want to raise a grievance if he was leaving the Bank.
302. In his claim form, the claimant had put it in this way:  
*HR also asked C to consider withdrawing his grievance if he might be leaving R1 in the near future.*
303. The claimant emailed Ms Jackson after the telephone call:  
*Your second question was relating to an external reference request that Commerzbank had received for me. You asked why I would want to proceed with a grievance when I am potentially leaving the bank. My response was that there is more to this than you are currently aware of. I stated that I had had an internal interview with a team in Frankfurt which would have resulted in me being based in both Frankfurt and West Africa in a non-compliance related role; this was solely to get away from the issues raised in my grievance letter. I further went on to elaborate that in regards to the external reference request it was due to a decision that I made because of the issues highlighted in my grievance letter; this also being pushed out of my role. I had attempted to resolve this issue without it resulting in the current circumstances.*

...

*Finally, I mentioned to you that I have been made aware that one of the parties who my grievance is related to is informing colleagues in the department that I am off due to "mental issues". This is not creating an environment in which is supporting employees to return to work or supporting equal rights.*

304. Ms Jackson wrote back to the claimant:

*Your comments are noted.*

*My question relating to the reference, was merely to confirm that you wished to continue with the grievance despite your potential resignation; it is normal to ask this question in this circumstance.*

*Finally, and to clarify, my question you refer to at the end of your email was not meant to cause offence. It is not unusual for the HR BP to reach out to the employee to ask what their desired outcome is when a grievance is raised particularly when we are aware that you may be leaving the bank.*

*That said, I will be in touch in due course in relation to next steps.*

305. Ms Jackson's evidence was that she did not ask the claimant to withdraw his grievance; she asked him if he wanted to proceed with it if he was leaving the Bank. They had received a reference request and it was an entirely normal question.

306. The claimant's evidence was that he felt the respondent did not want to 'push' his grievance although there was a diversity issue. They should have looked at it. He was disappointed as a diversity champion. HR was saying drop it, cover it up if he was leaving. There should have been no tolerance to racism.

307. We accepted Ms Jackson's account of what was said which was consistent with her email. We took into account the fact that the claimant had given more than one version of what was said and we concluded that his sloppiness about the words used reflected the fact that what he was reporting was not what had actually been said but the impression he formed about the motive for saying it. We concluded that he was highly sensitised by this point and put the worst construction on what Ms Jackson had said to him.

308. There was a further complaint made in the email that a colleague, whom he said in evidence was Mr Buhlmann, had been telling members of the department that the claimant was off work off due to 'mental issues'.

309. Mr Buhlmann's evidence, which was not challenged in cross examination, was that he had not done this.

310. Ms Jackson's witness statement had been drafted on the basis of a misunderstanding which had been clarified by the time of the hearing as to when the claimant was said to have complained about this matter. She had said little about the issue in her statement.
311. Ms Jackson had little evidence to give on the matter in any event. She could not recall the claimant suggesting that it was Mr Buhlmann who was saying he had mental issues. She said that she could not recall any action she had taken but said that she 'would have' spoken to the business about how people should not be discussing the reasons for the claimant's absence. She said that the grievance process then started and she then handed over the grievance and related issues to a colleague. There was no tangible evidence before us that she had taken any action in response to the claimant's concern.
312. Ms Jackson summarised her involvement in the grievance for a colleague on 8 April 2020:
- Following our conversation around George, please see below a short summary of my Initial conversation with him:*
- We received the original grievance from George back in February 2020, just after his appraisal meeting.*
- *.Around the same time the Services team also received a employment reference for George (Katie will know the exact date of the request).*
  - *.Katie confirmed to George at the time that she was unable to respond to the request without a confirmed leaving date.*
  - *I called George on 14 February 2020 to talk about his preferred outcomes for the grievance (which is normal practice).*
  - *I also asked George whether he was resigning as we had received an employment reference.*
  - *George refused to divulge whether he was leaving or not and stated that my question was irrelevant.*
313. On 17 February 2020 the claimant was told that Julia Hassheider would be taking over management of his grievance and would be appointing a hearing manager.
314. On 24 February 2020, the recruiter wrote to the claimant about references and indicated that it would wait for a reference from the first respondent until the claimant had resigned.
315. On 25 February 2020 Ms Hassheider wrote to the claimant to say that Mr Biggs had been appointed hearing manager and to discuss possible dates for the hearing.

316. On 27 February 2020 the claimant wrote to Ms Hassheider:

*My grievance is linked to my end of year performance rating which I rejected on the 10th February. Our performance rating is linked to our annual bonuses (subject to the bank's performance). As my grievance is being reviewed closer to annual bonus announcements; how would HR ensure that I receive a bonus which is aligned to my performance considering I have challenged my line manager's end of year grading?*

317. Ms Hassheider responded:

*In terms of your questions on variable compensation, please note that bonuses are fully discretionary and not linked to the performance rating.*

318. The claimant then said:

*On the subject of discretionary bonus; my understanding is that this is a monetary reward that a line manager or supervisor bestows on an employee purely by choice. On the basis that I have raised a grievance against my line manager which include bullying, discrimination and victimisation would it be convenient and fair for this individual to be involved or influential on any reward processes relating to me? I ask this because my grievance is still open and is currently being investigated.*

#### *Bonus awarded*

319. We saw no documents which set out the detail of how the bonus scheme operated. Mr McMillan said in evidence that a maximum bonus for an individual was calculated based on a formula which included factors such as performance of the Bank and length of service. The discretionary element for a manager was to assess what proportion of the maximum should be awarded based on individual performance.

320. Mr McMillan exercised his discretion to reduce the claimant's bonus by 50%, he said because of KYC QA report. He said that this was a fundamental performance issue – to create a reliable QA report, to be able to discuss the learnings and move forward. The claimant's unwillingness to discuss the issue in his appraisal meant that there was no resolution.

321. Mr McMillan accepted that he knew about the claimant's grievance at this point; he said that it did not influence his decision on the claimant's bonus.

322. In evidence the claimant rated his performance as 8/10 and said that he should have had 80% of full bonus. He said individuals in the department who had been off for 6 months got more than he did. From the figures provided in the documents, it appeared that Mr Buhlmann had received 106.3% of the calculated bonus and Ms Ruci 100%. Only one other person in Mr McMillan's reporting line received less than 95% and it was said that that individual did not receive as little as the claimant.
323. We were not shown a document which explained the calculations or the process or indeed how a dissatisfied individual could challenge his or her bonus. There was not a great deal of transparency or any very clear correlation between appraisal marks and bonus which was explained to us. The lay members observed that some companies might have had a system of moderation by HR to ensure consistency.
324. We noted however the following sections of the claimant's appraisal document, which followed on from some narrative sections:

*Overall Results (Objectives and Competencies)*

*Here, the overall results with regard to objectives and competencies are assessed and presented in an overall value for each category. The manager determines the final ratings ("Overall Assessment Objectives" and "Overall Assessment Competencies") by selecting a value from the drop down menu. When determining the objective achievement, the manager takes into account both compliance-relevant behavior and the employee's orientation towards the Bank's cultural values. If necessary, this leads to an adequate adjustment of the evaluation rate of the overall assessment of the objectives (after individual preliminary examination with the respective HR Advisor).*

*Overall Assessment Objectives 2.0 - Partially meets expectations*

*Calculated Objective Rating 1.7 | 6.0*

*Overall Assessment Competencies 2.0 - Partially meets expectations*

*Calculated Competency Rating 2.17 / 6.0*

*Manager's Comments*

*Whilst George has performed some useful work and tried hard this year he has fallen significantly short in achieving a reliable QA product which is his core role and has not been willing to move on from a mid year issue where he was asked to report his work in Bastian Buhlmann as a functional manger. Unfortunately I am not able to rely on him to operate independently and effectively due to the overall performance.*

325. We note that the figures assessed on this document at least on their face seem to correlate with a decision to award the claimant no more than 50% of a full bonus. The scores are less than 50% of a possible maximum score.
326. On 28 February 2020, the claimant was notified of a meeting with Mr Biggs about his grievance to be held on 3 March 2020.
327. On 2 March 2020 the claimant indicated that he would be represented at that meeting by Dr Gelemerova.
328. On 3 March 2020, the claimant attended the scheduled grievance hearing with Mr Biggs. The respondents produced notes of the meeting which included the following relevant passages:

*GG said that the appraisal meeting started with RM saying that GG had done a good job but also asked GG what he could have done differently so GG reflected on that. GG said that RM then started to go through the feedback and that the first point was that there was a backlog due to GG not doing the work he was supposed to do. GG advised that he was very shocked about that feedback as RM had never mentioned that before and that from GG's perspective he was doing two thirds of the work and had always been dedicated*

...

*[In reference to the 'not vice president material' comments] The first time was in a meeting in front of BB and the second time was straight afterwards after GG had asked BB to leave the room so that he could have a one to one with RM. Please see grievance letter p.7 for details. AB asked if RM had ever acknowledged that the language used in that meeting had been inappropriate. GG responded that RM had never shown any regret and that such language was RM's typical way of intimidating and belittling people. GG then remembered that the language was used a third time which was at the appraisal meeting where RM said that he could not trust GG and that GG was not VP material.*

329. Mr Biggs explained to the claimant that he had organised his complaints into a number of themes and the claimant did not indicate any dissatisfaction with that approach.
330. On 4 March 2020, Mr Biggs was in correspondence with Ms Hassheider about issues to do with the calculation of the claimant's bonus. Ms Hassheider confirmed the allocation of bonus to Mr Buhlmann and Ms Ruci and the fact that the other person, out of 25 in Mr McMillan's team, who received a significantly reduced bonus had been absent for half the year. Mr Biggs also requested and was provided with the claimant's appraisal document.

331. We were not provided with any kind breakdown of the race (in any sense of that word) of people in Mr McMillan's team, but we had some limited evidence of there being some diversity in Financial Crime. Mr Yeung we understood to be ethnically Chinese, Ms Ruci Polish, Mr Tongo Black African. We were not told the ethnicity of the person who had only been in for half the year and received a substantially reduced bonus.

332. On 4 March 2020 Mr Biggs wrote further to Ms Hassheider:

*So I will need to meet with RM, BB and WR as a consequence to question them (WR as a witness to events), but I have a ½ day vacation tomorrow afternoon and WFH on Friday's so this will have to be in the week beginning 16th March 2020 – should we wait to book these that week so as not to give too much of a heads up?*

*This will also ensure that we get any response from GG in relation to his variable pay award that can also be added to this grievance and therefore we will be more efficient; if such a grievance is added I will need comparables to see if reducing by 50% is high compared to any other cases within the bank and if such a reduction is high to reductions made for cases of disciplinary action.*

333. We note in passing that Mr Pertusini does not seem to have pursued that particular issue ('comparables' on the bonus issue) once he took over the grievance. However, it was not put to Mr Pertusini that he had failed in his investigation in this respect nor was it suggested in submissions that this was a failing and we therefore say no more about this aspect of the grievance investigation.

334. On 6 March 2020: the claimant's bonus letter was prepared:

*In view of the Bank's business results and in recognition of your performance we are pleased to inform you that you will be paid variable remuneration for the 2019 financial year subject to the conditions of this letter. Your variable remuneration for the financial year 2019 is £5,635.70*

...

*Entitlement to, and payment of. any award is subject to the condition that neither the Bank nor eligible employee has given notice of termination of employment by the date of payment.*

335. On 9 March 2020, Mr McMillan telephoned the claimant, who remained on sick leave, on his personal mobile to inform him of his bonus. Mr McMillan said that this was standard practice where an employee is off sick and HR told him this was the policy. He believed he had spoken to Ms Jackson. The

idea was to tell everyone on the same day. People in the office would be told and handed a letter. It was equitable for everyone to be told on the same day.

336. On 10 March 2020, the claimant emailed Ms Jackson and Ms Hassheider to complain about Mr McMillan telephoning him. He said that he was unhappy about the bonus figure and disappointed that someone he had raised a grievance of bullying, discrimination and harassment about had been allowed to contact him whilst he was signed off sick. He said that he had made it clear in discussions with HR that Mr McMillan's actions had contributed to his condition. The incident had been shocking and upsetting.
337. Ms Jackson wrote back to say that Mr McMillan was the claimant's overall manager and responsible for conveying the bonus information to the claimant. She had provided Mr McMillan with the claimant's personal mobile number. She said that in hindsight she recognised that she should have asked the claimant's permission to provide the number and she apologised for that. She said that it was company practice and common courtesy for a manager to call employees, if they were out of the office, before bonuses were communicated.
338. The claimant requested to add his complaint about his discretionary bonus to his grievance.
339. On 16 March 2020, the claimant confirmed to the recruiter that he had received his bonus and that there was no change to his agreed start date at DMB of 1 July 2020. He was also sent the grievance hearing minutes.
340. On 31 March 2020, Mr Pertusini was asked and agreed to take over the claimant's grievance from Mr Biggs due to Mr Biggs' workload. We take judicial notice of the fact that by this point the first lockdown in response to the pandemic had commenced and that this would have been a very busy and uncertain time for some employees, including those in an HR function.
341. Ms Hassheider wrote to the claimant:  
*Unfortunately Andy Biggs has informed me that he currently doesn't have the capacity to take this process forward. This is due to the Coronavirus situation and the substantial increase in workload on his side. The options are to either put it on hold for another month or to find a different hearing manager.*
342. On 1 April 2020, Mr Pertusini was sent the claimant's grievance documents.
343. On 3 April 2020, an occupational health report was produced. The physician concluded that the claimant would be less stressed when the grievance process concluded and that the doctor hoped he would then be able to return to work.

344. Also on 3 April 2020, there was a message from an employee of DMB to the claimant :

*I understand you have now resigned and will join us on the 1<sup>st</sup> July*

The claimant replied: *I look to joining in July*

345. The claimant wrote to Ms Hassheider to ask whether he would have to have another hearing due to the change of hearing manager. He said that he did not think that would help with his current condition. He also raised a potential conflict of interest in that he had worked on projects with Mr Pertusini and Mr Pertusini had worked with managers in the financial crime department.
346. Ms Hassheider replied essentially saying that she did not believe there to be a conflict of interest and that there was no need for there to be another hearing. She had shown Mr Pertusini the summary of the meeting and the claimant's comments. If Mr Pertusini had any questions, they could be dealt with by email or telephone.
347. On 6 April 2020, the claimant submitted a further GP fit note which again described 'multiple stressors causing depression'.
348. On 8 April 2020, the claimant sent an email to the respondent's board. He complained inter alia about his treatment by HR since submitting his grievance, what he said was a need for a whistleblowing policy in relation to non-financial crime matters, and issues about diversity at the respondent.
349. On 16 April 2020, Mr Pertusini discussed the claimant's grievance with Mr Biggs and interviewed Mr Buhlmann. The notes included the following passage:

*From memory I do remember a conversation re chicken which is based on a past experience. GG, JA and I joined the Bank at around the same time and we all went on a business trip to Frankfurt to meet stakeholders and colleagues. JA and GG stayed in a hotel whilst we were there but I stayed with a friend as I am from near Frankfurt so have friends/family in the area. One evening after work we went out with some colleagues for a drink and GG and JA returned to the hotel they were staying in to get some dinner. GG didn't like the look of the menu in the hotel so they ordered a delivery and GG had a chicken burger. The next day we caught up and they told me that they had ended up getting a takeaway as GG didn't like anything on the hotel menu and said to me that he had ordered a chicken burger as he loves chicken. GG has made comments before about chicken being his favourite food, not just to me but other colleagues also. I was (until now) very unaware of this being a racial stereotype. I would not have referred to fried chicken as it's not something I would say with English being my second language. The comment I made was simply because I knew he liked chicken. Before*

*Christmas a few of us went to the local shopping centre and due to the time of year there were a lot of queues, apart from Nando's. I then suggested we go to Nando's as I know GG likes chicken. Again, this was not intended as a racial statement, just a fact that I know GG loves chicken.*

350. On 17 April 2020, Mr Pertusini held a grievance interview with Mr McMillan. The notes record Mr McMillan saying the following about the appraisal and bonus issues:

*RM: GG was given an interview along with BB. He didn't contest the outcome of the review when the score was changed from 80% to 20% and said he was comfortable with the change. This gave me the impression that he would not be the right choice to lead a team. He didn't defend his position and I wanted somebody who would show strong judgement. BB had been leading the second review of the report and had come up with the discrepancies that GG later accepted.*

*RM: His overall rating of 2 was not satisfactory and as a result of that he did not get a full bonus. He received 50% which was quite generous in my opinion. Bonuses are discretionary and performance related.*

*MP: Did you have a particular way of deciding on this proportion?*

*RM: My thinking was very straightforward. His job is QA and he didn't meet the standard. He was given a second chance but he didn't want to adhere to what that entailed. He got some bonus for the extra work he does but no bonus for the QA part. My goal was to recognise his good work on diversity and the other bits and pieces he did. so I gave him 50% for that and discounted the other 50% due to the QA work.*

351. On 23 April 2020 the respondent received its first ACAS notification in respect of the claimant's complaints.
352. On 29 April 2020, the claimant was notified by Ms Jackson that he would be going on to Statutory Sick Pay from 1 May 2020. The claimant had previously been receiving company sick pay. That same day we saw an email showing that Ms Jackson notified payroll that the claimant and another employee, whose name was redacted, would be going on to SSP.
353. Ms Jackson's evidence about this was that at the start of 2020 the respondent started to look at its processes in relation to sick pay. It appeared that there had been a practice of continuing to pay company sick pay (full pay) in circumstances where the respondent had little information about reasons for absence, prognosis and likely return date. It was decided that as a general rule the respondent would pay four weeks' full pay and after that

any extension of full pay would be at the discretion of the respondent in accordance with the document we have cited at paragraph 23 above.

354. Ms Jackson said that the discretion might be exercised in an employee's favour if, for example, an employee was having treatment or had a return to work plan. She said that they had no information that the claimant was seeking any kind of specialist treatment or had a return to work plan. She said that this was an HR decision, made by her in conjunction with talking to peers and the benefits manager and her line manager. Mr McMillan's evidence was that he played no role in this decision.

355. Ms Jackson's email to the claimant said:

*Statutory Sick Pay*

*This is to confirm that whilst you remain off work you will continue to be entitled to receive Statutory Sick Pay subject to Statutory requirements. However, with effect from 1 May 2020 (from the May 2020 payroll), the Bank will no longer exercise its discretion to pay company sick pay (ie at the full salary rate). As per the Company's Sick Pay policy as stated in the Employment Handbook, company sick pay is paid entirely at the discretion of the bank and is not an automatic entitlement.*

*I have copied an extract of the wording from the Employment Handbook on Sickness and Injury below for your information:*

356. We considered that this matter was badly handled; the respondent did not wait until end of his existing fit note or provide adequate notice to the claimant of a significant diminution in his pay. It was entirely understandable that the claimant was upset about the situation and looking for an explanation.

357. From 1 May 2020, the claimant's pay was reduced to SSP.

358. On 7 May 2020, Mr Pertusini produced his grievance outcome letter. It is a fairly concise document covering about 4 ½ sides of A4. The following extracts in particular are relevant to the issues we have to consider:

*Unfair Bonus Allocation*

*Given Robert McMillan's assessment of the seriousness of the discrepancies in the QA report which formed a key part of your role as documented in the 2019 appraisal, he was exercising appropriate judgement in setting your bonus to approximately 50% of the budgeted amount.*

*The bonus scheme at Commerzbank is fully discretionary and discretion has been applied in this case.*

*For the avoidance of doubt, it is not appropriate for me to discuss the bonus allocation of other employees within the team as bonus is discretionary and based on performance.*

...

*Harassment by Bastian Buhlmann Based on your Ethnicity*

*I refer to the definition of harassment used by Commerzbank in its Employee Handbook for London as follows:*

*“Harassment is conduct that is unwanted by the recipient and which: has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person; and it is reasonable to consider would have the effect of violating their dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them, even if this effect was not intended by the person responsible for the conduct.*

*I appreciate that Bastian Buhlmann's reference to your preference for chicken could have been based on an ethnic stereotype. It could also be based on Bastian Buhlmann believing that you did have a preference for chicken unrelated to an ethnic stereotype. I understand from him that, on a business trip in Frankfurt, you expressed a preference towards chicken. I am satisfied that it is in this context that the remarks were made and that they do not represent harassment. I consider that the complaint was caused by a misunderstanding and that the complaint was made in good faith by you.*

*Furthermore, the lack of understanding in this particular ethnic stereotype may be a cultural one and I do not believe any comment related to the preference of chicken was intended as an insult towards you.*

359. The claimant said in evidence that there was racial bias by Mr Pertusini evidenced by him not interviewing witnesses to the alleged fried chicken comments, the fact that he referred to 'culture' without speaking to the claimant and did not do an in depth investigation but was very 'light touch'. He said that Mr Pertusini should have come back to the claimant to see if the claimant accepted what Mr Buhlmann said the claimant had said about chicken.
360. Mr Pertusini was cross examined on whether he had properly investigated the claimant's complaints about his treatment in relation to the KYC QA report.
361. He said he adopted the categories articulated by Mr Biggs which he understood the claimant to have agreed with and fitted the complaints into those categories.

362. He spoke to Mr Buhlmann and Mr McMillan. He had some things to raise with the claimant but HR told him the claimant was off sick and he thought that his proposed enquiries would not change things much.
363. He said that he understood the claimant had accepted the critique of his KYC QA report without significant pushback. If he had strong feelings, he should have expressed them. It was hard to see why there would be such a big swing from the first to the second report. He said that 'If you had strong reasons why you thought your report was correct, you would express them forcefully'.
364. In resolving the disputes, he said he found it helpful that the objective position was that the results had flipped so substantially and that seemed to support Mr McMillan's account.
365. He understood that the allegation about the functional lead role was that the appointment had been made unfairly and prejudged ahead of the interviews. He accepted that he did not expressly refer to the issue of prejudgement and said that he could have set out more detail in his letter. He was trying to produce something that was easily digestible. His view was that the recruitment process was fair but it had been influenced by the KYC QA report.
366. On the chicken issue, Mr Pertusini said that he was aware of an ethnic stereotype about fried chicken and had initially thought it possible that Mr Buhlmann had been referring to that stereotype in mentioning chicken to the claimant; however Mr Buhlmann gave an explanation that the remarks arose from the claimant's liking for chicken and not from the stereotype, which he had been unaware of.
367. In explaining the way he had expressed his findings, Mr Pertusini said that he had had a concern about whether the claimant's complaint was made in good faith because of the Frankfurt discussion. He thought the claimant should have understood that this was the context in which Mr Buhlmann had made any chicken comments. He had however persuaded himself that the complaint was made in good faith.
368. He said that Ms Hassheider and Mr Buhlmann (both German speakers) had said they were not aware of a stereotype about Black people and fried chicken, so he wondered how widespread awareness of it was. He thought he himself might have been exposed to it through US films and thought that Germans might not have the same exposure. He spoke to another German person who was not aware of the stereotype. He was trying to convey in his outcome that if Mr Buhlmann had been aware of the stereotype he would have been more careful when referring to a liking for chicken. His conclusion

was that the claimant should not reasonably have been offended by the remark, knowing he had expressed a liking for chicken.

369. By this point the claimant was being advised by Ms Onwukwe, who is a retired lawyer, and he confirmed in evidence that he was aware of the time limits for bringing employment tribunal claims at this stage.

370. On 15 May 2020, the claimant submitted an appeal against Mr Pertusini's grievance outcome. He set out some brief grounds which raised inter alia issues about conflicts of interest and failure to investigate points in his grievance.

371. On 19 May 2020, ACAS certificates were issued against a number of the respondents.

372. On 1 June 2020, Ms Onwukwe wrote to Ms Lowe, Head of HR, and Mr Benson, Head of Legal, setting out the claimant's complaints including his allegations of discrimination. She finished:

*Your urgent and constructive response is awaited. Mr Gyimah has taken this approach in a genuine plea for the Bank to seek a swift and informal resolution to this matter. Please do call me in the first instance if a conversation would be helpful.*

373. It is not necessary to quote this letter in its entirety but the Tribunal was satisfied that the letter raised serious issues in perfectly moderate and appropriate language. The respondent might not accept the truth of the assertions but the way in which they were raised was in no way unprofessional or remarkable for a letter of this type.

374. It is also relevant to observe that the letter was sent at a point when the grievance appeal was ongoing and that the letter reflected at the very least a misunderstanding of Mr Pertusini's grievance outcome letter and the application of the law to his findings. The letter also exaggerated the number of 'adverse employment tribunal judgments' there had been against the respondent.

375. On 8 June 2020, Mr Clapham interviewed Mr McMillan.

376. On 9 June 2020 Mr Clapham interviewed Mr Buhlmann. The section on chicken comments is relevant to quote in full:

*BB also confirmed that last Christmas, the team went out for a Christmas lunch in the One New Change area. Many restaurants were busy. They wanted to eat at Wahacas, but as it was busy, BB suggested Nandos for GG as he knew GG liked chicken. BB is aware that GG refers to fried chicken, but BB confirmed that he himself never referred to GG liking fried chicken.*

*BB confirmed that after the appraisal meeting, GG appeared distressed and BB tried to support him with his concerns and issues. In one conversation, GG apologised to BB but said that the references BB had made to GG liking chicken had racist connotations even though he did not believe that BB had made them with racist intent, that he had spoken to his network, who had told him that he was naive and would be stupid not to address this issue and therefore had to clear his name. GG said that he hoped he and BB could remain friends and maintain their professional relationship despite the allegations he was going to make, but that he had no choice to raise this as an issue.*

*DC asked BB if he offered chicken to GG as a reward in connection with their office move. BB could not recall this occurring. DC confirmed that GG had made reference to BB's comment about BB offering GG chicken as a reward in an email to BB; DC asked why BB had not responded to this email from GG if BB considered it factually incorrect.*

*BB confirmed that he had received multiple emails from GG on this subject where GG had appeared to minute his recollection of events. BB did not necessarily agree with GG and it was clear to BB that GG had a hidden agenda. BB informed RMc. BB felt these were sensitive allegations. BB had not sought legal or HR advice on this matter, however it was his personal decision not to respond to the chicken allegations, particularly as BB firmly believes he was not harassing GG or making racial comments towards him. BB confirmed he did not want to be associated with such comments.*

*DC went back to the point mentioning that WR had stated to DC earlier that BB's comment to GG was around the view of a restaurant that serves chicken from GG's new seat as part of the office move. BB confirmed Compliance had moved to the 3rd floor. BB confirmed that he made a comment to another colleague (Wilson who works beside them) who likes burgers, that he would take him to Five Guys for a burger in return for a favour of prioritising BB's work from a queue. The other colleague did not take offence.*

377. Ms Ruci was also interviewed that day:

*WR confirmed that she joined the QA team in 2019. Comments that were made formed part of the typical conversations that took part in the team. For example, the Compliance team moved from the ground floor to the 3rd floor. BB made a comment to GG that as GG has a preference for chicken, perhaps his seat on the 3rd floor will have a view of a chicken restaurant.*

*WR went on to explain that she moved to London 2.5 years ago from Poland and was not aware that a reference to chicken could be connected to the colour of one's skin.*

*DC asked about the conversation that referred to the discussions as to what restaurant they should go to for lunch. WR explained that she had just joined the team and they decided to go for a welcome lunch where a reference to GG and chicken was made by BB. Again WR confirmed that she did not*

*connect the reference to chicken to the colour of GG's skin and that she did not believe the comment was intentional, that it was a general conversation. DC clarified with WR that BB therefore asked the question whether GG would like to go to a restaurant where chicken was served; WR confirmed this was correct.*

*DC went back to the question of the Compliance office move. WR confirmed that GG's new seat was positioned by the window and BB mentioned that GG would be able to sit by the window where he may be able to see a restaurant that served chicken.*

*DC made the point that fried chicken could be construed as a racial stereotype and that GG said in an email to her, seeking her confirmation, that BB had made a reference to fried chicken; DC asked if WR recalled such an email. WR confirmed she did, but not in relation to anyone in particular. If BB made a joke, it was not to WR, but if it was to GG, then WR could understand why GG could be offended.*

*DC asked if WR remembered a direct reference to fried chicken and WR thought she could remember such a reference. Again, WR did not believe such a reference could be directed to the colour of one's skin, nor did she think the reference was inappropriate or offensive.*

378. Ms Messmer was also interviewed as described at paragraph 50 above.

379. On 10 June 2020, Mr Arevalo was interviewed by Mr Clapham:

*I provided background about case and there being a suggestion of racist comments in particular by Bastian about George's liking for chicken. Asked Jose what his recollection was and whether George had ever referenced liking chicken.*

*JA replied Yes in short and expanded on two occasions whether GG referenced his liking for chicken.*

*Firstly, when discussing what was planned, or what has occurred, at the weekend JA said that for his birthday his friends has organised an all "you can eat" visit to a restaurant that served fried chicken and a specific beer. JA stated that he loved chicken as well. GG responded that he loved chicken and wanted the name of this restaurant. Secondly, JA referenced the trip to FFT where both he and GG ordered chicken burgers and this was discussed with Bastian afterwards.*

*With the first discussion J could not recall whether Bastian was directly part of the conversation but said it was an open plan office and they all sat closely together. JA also stated that there was an understanding that George liked chicken. Finally, that they were an open team and discussed non work matters.*

380. On 11 June 2020 Mr Philip Cameron, a solicitor from GQ Littler, acting on behalf of the respondent wrote a letter to Ms Onwukwe. That letter contained the following sections about which the claimant has made complaint:

*We consider it is important to correct the misleading and inaccurate statements that you make in that letter...*

...

*There is a fourth distortion in your letter. You state: "Occupational Health has advised the Bank that Mr Gyimah's absence is entirely related to the on-going grievance process."*

*The report says no such thing. Dr Love states: "it is my professional view that Mr Gyimah's current sickness absence and health concern is related to his work." You are putting words into the doctor's mouth and distorting what the report says. The word "entirely" is not there.*

*We very much hope that this will be the last time you make inaccurate, distorted and misleading statements.*

The claimant says the tone of the letter was insulting, dismissive and demeaning.

381. The members of the Tribunal have seen a lot of inter partes correspondence and observe there is a range of styles. It is perfectly possible to point out inaccuracies as to facts and misunderstanding or misrepresentation of the law in a tone of scrupulous politeness. It is possible and sadly not uncommon to couch correspondence in a way which is unnecessarily inflammatory. It is our observation that there are some representatives who rightly or wrongly feel that their clients value a degree of robustness or even aggression in correspondence. We are conscious also that tone is a famously slippery concept – what is received tonally by the reader may not be what the writer has intended.
382. Looking at the letter in its entirety, it seemed to us that tonally the language was a bit unnecessarily inflated and marginally overstepped the line of what we would consider to be reasonably robust.
383. Mr Clapham also conducted a telephone call with Mr Turner on 11 June 2020 and Ms Jackson made a file note:
- *When questioned about the induction training document as to why BB's name was entered as the functional lead for QA. DT was uncertain as to why he had put BB's name as functional lead but felt that he had put it there for a reason and he would have been told or checked that its was correct. However DT could not actually recall why he put BB's name in the box.*
  - *DT mentioned that he had recently undergone a disciplinary process which had now concluded with no sanction on his part and that he was now able to return to the office.*

*Upon his return, DT confirmed to DC that he would be able to search his Inbox in order to jog his memory and answer DC's questions.*

- DC asked why DT sent the document to George Gyimah (GG). DT responded by confirming that he believes it was following a conversation with GG and that he sent it on as a FYI to provide GG with clarity on the topic. However again, DT indicated, he would be able to clarify once he had access to his systems upon his return to work.*
- DC asked DT whether he could have assumed BB was the functional lead which explains why BB's name was on the desk; DT said he could not recall.*

384. We observe that in the face of the various different written accounts given by Mr Turner, and without having heard evidence from Mr Turner, it was impossible for us to determine which account reflected his truthful best recollection of how he came to include Mr Buhlmann's name as the functional lead in the induction material.
385. On 12 June 2020: the claimant sent his email of resignation to Ms Lowe and Hans-Christian Edenharder. Global Manager for HR in International Locations.
386. In that email, the claimant complained that he had been victimised since raising his grievance. He said that the respondent had deliberately conducted itself in a manner designed to undermine trust and confidence because of his race or because he had complained of race discrimination in his grievance. He complained inter alia that the grievance investigation had been inadequate and the outcome biased and incomplete.

*Taking the above into consideration it is clear that I can have no trust or confidence that the Bank will provide me with a dignified place of work free of race discrimination or harassment in the future, or that my grievance will be considered fairly. The Bank's treatment of me since I complained of race harassment and bias has greatly exacerbated, compounded and extended the discrimination I complained about in my grievance, and has absolutely undermined the contractual duty of trust and confidence.*

*I therefore resign my employment with immediate effect. I am willing to attend any meetings relating to the appeal to assist with the process.*

387. The claimant was cross examined on the fact that the response to Ms Onwukwe's letter, which was said in his claim to be the last straw for the purposes of his constructive dismissal complaint, was not identified in this letter as a reason for his resignation or a last straw. The claimant said that there was no reason why he had not included the complaint. He said that he wrote the letter himself without advice from Ms Onwukwe. He denied that he was 'confecting' a reason to resign because by this point he needed to leave the employment of the respondent without giving the three months' notice

required under his contract if he was to start employment with DMB on 1 July 2020.

388. The claimant also wrote that day to the respondent's board, raising issues about race discrimination in the respondent by reference to the global situation of Black people, white privilege and specifically the murder of George Floyd.
389. On 15 June 2020 Mr Clapham held a remote grievance appeal meeting with the claimant. The claimant covertly recorded the meeting and we saw a transcript. Mr Clapham was supported by Ms Jackson as by this time Ms Hassheider had left the respondent's employment.
390. The claimant said that questions asked by Mr Clapham - in particular as to whether the second chicken comment complained of could have arisen because there was a fried chicken shop visible from the premises – must have been sarcastic and harassing because Mr Clapham would have been well aware there was no such chicken shop. He said Mr Clapham's questions were absurd.
391. We could identify from the transcript the questions which had been asked. Mr Clapham asked some questions about the induction document including how the claimant had received the document from Mr Turner. He moved on to open questions about the chicken comments. He then put to the claimant what had been said by Ms Ruci about it being suggested that the claimant had a good seat because there was a view of a chicken restaurant. He asked the claimant about Mr Buhlmann's account of their conversation in January 2020. He asked a question about the claimant seeking further evidence for his appraisal.
392. The claimant said that the appeal was predetermined; Mr Buhlmann and Mr Arevalo had said that the claimant's love of fried chicken was known to colleagues but Mr Clapham only interviewed Ms Ruci and Mr Arevalo. Ms Ruci had only been there a short time. The claimant said that Mr Clapham should have interviewed more individuals in the department.
393. The claimant also seemed to be questioning the genuineness of the account of Ms Ruci's interview. He did not believe that she would have said that a chicken shop could be seen from the window as Ms Ruci had been in the bank for two years and would know that was not the case. The claimant said that the question about the appraisal meeting and seeking feedback from people other than line manager was unnecessary if Mr Pertusini had read and understood the grievance as the claimant had said in that document that he challenged the points in the appraisal.

394. Mr Clapham described the meeting as not being a formal appeal hearing. He said that he was gathering evidence to get clarity and then speaking to the claimant to get further clarity. It was part of his appeal process. He said that maybe he used the wrong terminology. He considered the meeting to be part of his investigation.
395. Ms Jackson attended as the HR representative. Mr Clapham said he was not aware of her involvement in the claimant's complaint about his appraisal. He did not agree that the meeting focussed on questions relating to the claimant's liking for chicken. He said that he raised a number of issues which needed clarification. He interviewed Ms Ruci and Mr Arevalo as Mr Buhlmann had said it was well known the claimant liked chicken and the claimant said that he had not said this; there was a dispute of fact to be resolved.
396. It seemed to us that the meeting was conducted courteously and sensibly and the questions asked by Mr Clapham were perfectly reasonable. It was entirely appropriate to test the evidence of other witnesses and give the claimant an opportunity to comment on it.
397. There was however at the very least a failure to properly advise Mr Clapham of the fact that he was required to conduct a formal appeal hearing as part of the grievance process.
398. On 18 June 2020, the claimant contacted ACAS again.
399. On 30 June 2020, the Mr Clapham sent the claimant the grievance appeal outcome. We considered that he made a detailed and thorough analysis of the evidence he had gathered and reached reasonable and coherent conclusions on the matters raised by the claimant in his appeal.
400. So far as the chicken remarks were concerned, he set out the evidence of the various people interviewed then said:

*My Analysis*

*BB, when discussing the choice of a restaurant, made a remark to you-and WR that they should go to a particular restaurant because you liked chicken.*

*You and WR support the accusation that BB made a remark to you referencing chicken on a second occasion. You reference BB offering you chicken for your window seat. WR references BB as saying that you would like to sit somewhere -from where a restaurant that serves chicken can be seen.*

*JA Confirms that on two occasions there-were discussions where you mentioned your liking of chicken. '*

*JA is of the opinion that there was an understanding that you liked chicken.*

*BB denies ever referring to "fried chicken". However, you claim that BB did reference "fried chicken".*

*You deny ever having discussed your liking for chicken with BB. BB states that you discussed your liking for chicken in his presence.*

*BB does not recall the second incident where he is alleged to have referred to chicken as a reward.*

401. He then analysed what had occurred against the framework of the respondent's definition of harassment, which we observe is modelled on the Equality Act definition. His conclusion in essence was that the comments were not related to race because they had been made because the claimant was known to like chicken and not in order to refer to a stereotype of Black people liking chicken. He was not persuaded that the comments were made with a harassing purpose or that they had a harassing effect.
402. On 1 July 2020, the claimant commenced employment at DMB.
403. On 20 August 2020, the claim form was presented.

## **Law**

### Direct race discrimination

404. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
405. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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. "
406. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

*(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*

*(2) If the claimant does not prove such facts he or she will fail.*

*(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

*(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

*(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

*(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

*(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

*(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

*(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*

*(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

*(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

*(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

*(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*

407. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
408. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
409. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.
410. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: '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.'

411. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.
412. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

### Harassment

413. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.
414. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.
415. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so.....Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by

racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

416. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

### Victimisation

417. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.
418. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.
419. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.
420. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.
421. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

### Credibility and reliability

422. We bore in mind when assessing different accounts of the same events and any inferences about credibility which we might draw, that memory is fluid, memories are rewritten when recalled and the process of reducing them to a witness statement further distorts memory and crystallises the version presented in the witness statement, a version which may have been influenced

by reading documents and discussing the events with others. We bore in mind the guidance provided in case law that we should base factual findings on inferences drawn from the documents and known or probable facts where possible. Confidence in recollection is not an indicator of the truth of that recollection. We had regard to the guidance given by Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm).

## **Submissions**

423. We received detailed written and oral submissions from both parties. We have carefully considered these submissions but refer to them below only insofar as is necessary to explain our conclusions.

## **Conclusions**

### Some observations on credibility

#### *Dr Gelemerova*

424. Having given a detailed witness statement which did not make allegations that Mr McMillan acted in a discriminatory fashion, Dr Gelemerova in oral evidence told the Tribunal that Mr McMillan discriminated against people with the wrong social status, with strong accents or who were not German. There were no particulars of these general allegations.
425. Dr Gelemerova was then cross examined about the circumstances in which she left the respondent's employment. This was not a matter on which we could or should make any findings but what was clear to us was that Dr Gelemerova had for her own personal reasons a very strong animus against Mr McMillan. Her determination to express very general damaging opinions in oral evidence about Mr McMillan which had not been mentioned in her witness statement and her very evident hostility towards him caused us to treat her evidence with very significant caution.

#### *Claimant*

426. We concluded that the claimant had misled the Tribunal in relation to the 'exam centre' email. We also identified a number of occasions where the claimant gave an account of a document or a discussion which was a

misrepresentation or misinterpretation by him – some examples are his account of what Ms Jackson said about whether he wanted to continue with his grievance and his account of what Mr Clapham said in the appeal hearing. Inevitably that had some effect on our assessments of disputed events although we looked at all of the evidence we had in relation to each such event carefully.

Direct race discrimination (Equality Act 2010 section 13)

427. We looked at the allegations individually and then holistically when considering what inferences it was appropriate to draw.

*1.2 Did the respondent do the following things:*

*And in relation to each of the things alleged:*

*1.3 Was that less favourable treatment?*

*The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.*

*If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.*

*1.4 If so, was it because of race?*

*Issue: 1.2.1 In Sept 2019 Robert McMillan and Bastian Buhlmann reviewing C's QA Know Your Customer report against the Q12019 Skilled Person Report and disregarding C's objections to Mr Bulhmann's criticisms.*

428. The first question was whether this claim or any aspect of it had been struck out as a result of Employment Judge Hodgson's deposit order.

429. It was clear that when the matter came before Employment Judge Hodgson, the issues were inchoate. He identified the matters in respect of which he was making a deposit order as 'arguments', one of which was:

*Argument one – that on 9 July 2019 the claimant produced a quality assurance review of the KYC files relating to the first quarter of 2019 (the report) which was not capable of being reasonably criticised.*

430. The following paragraph of Employment Judge Hodgson's analysis further elucidates the area of the claim which was regarded as having little reasonable prospect of success:

*The argument as drafted is key to understanding the treatment the claimant received. Even in a situation where an individual is right, it may be appropriate for there to be an investigation when there is such stark, apparently independent, evidence of inadequacy. There appears to be no dispute that the evidence existed in the form of the initial observations of the skilled person. It is difficult to understand why the claimant believes this report was not capable of criticism. There appears to be no reasonable or logical basis for the assertion. At the very least, there is little reasonable prospect argument one succeeding. There should be a deposit order in relation to it.*

431. A further argument in respect of which a deposit order was made was: *Argument two - that the report should not have been reviewed by Mr Bastian Buhlmann.*
432. It was clear to us that the ambit of the deposit order and hence the subsequent strike out clearly included the complaint about Mr McMillan and Mr Buhlmann reviewing the KYC QA report against the Skilled Person report. The only part of this issue which seemed to us not to have been struck out was the complaint that Mr McMillan and Mr Buhlmann had disregarded the claimant's objections to Mr Buhlmann's criticisms.
433. On the findings of fact we have made, the claimant did not object to Mr Buhlmann's findings and this complaint fails at the first hurdle.
434. If the objections are intended to encompass remarks made by way of a general critique of Mr Buhlmann in the part of the meeting on 10 September 2019 when Mr Buhlmann had left the room, we find there are no facts on the basis of which we could reasonably conclude that the claimant was treated less favourably than a white employee would have been so as to cause the burden of proof to shift. Any manager presented with the discrepancy in findings would expect detailed reasons as to why one version should be preferred. We could see no evidence that Mr McMillan would have taken a different attitude had the general critique without specific engagement with the points of dispute come from a white employee. It would not have been rational to have preferred the claimant's review in circumstances where he had failed to engage with Mr Buhlmann's review.

*Issue: 1.2.2 Jul-Oct 2019 Robert McMillan excluding C from all senior management communications and meetings whereas BB was invited*

435. As will be apparent from our findings of fact, there were a handful of matters we were referred to:
- The meeting to plan Mr Iken's visit;

- A couple of chains of emails. It was not obvious to us that the claimant should have been included in one chain; in respect of the other chain the claimant was not included by Ms Messmer, who plays no other role in the events the subject of this claim and who explained in writing why she thought she had not copied in the claimant.
436. We bore in mind that over this period there must have been hundreds of emails. The claimant did not identify any regular meeting in which he should have been but was not included. He identified a single specialist meeting (the Iken meeting). Mr McMillan gave a cogent explanation of why the claimant was not required at that meeting.
437. Whether we treat Mr Buhlmann as an actual comparator or posit a hypothetical comparator, we found no facts from which we could reasonably conclude that the claimant was treated less favourably than a white employee because of his race. In particular there were no facts that suggested the claimant should have been included in these particular emails and this meeting.

*Issue: 1.2.3 4.10.19 Robert McMillan purporting to interview C for the position (promotion) of Functional Lead (Head of Team) when R1's records show that Bastian Buhlmann had already been given this role*

438. There was evidence which showed that there was a widespread perception that Mr Buhlmann was leading the QA team and that Mr Arevalo had been the lead before that. Ultimately it seemed to us that this was the likely explanation for the appearance of Mr Buhlmann's name in the induction document prepared by Mr Turner.
439. We also concluded that Mr McMillan had a strong preference for appointing Mr Buhlmann going into the interviews. The reason for that preference, we accepted, was the claimant's KYC QA report and his failure to engage with the review of it.
440. We did not find however that Mr Buhlmann had been given the position prior to the interviews, although he was the favoured candidate.
441. Factually this allegation is therefore not made out. We went on to consider whether, in any event, Mr McMillan's strong preference for Mr Buhlmann was less favourable treatment because of the claimant's race.
442. It is certainly true that not being the favoured candidate is less favourable treatment and that there was a difference in race between the claimant and Mr Buhlmann, who is a white German man.

443. We looked carefully at whether there were additional facts from which we could reasonably conclude that the preference for Mr Buhlmann was because of race. We looked in particular at the problems with the process pursued by Mr McMillan which we have identified in our findings of fact. There were no properly developed or advertised criteria and no reasoned application of any such criteria.
444. However, even at the first stage we have to look at what we can *reasonably* infer from the facts we have found. There was an overwhelming reason to prefer Mr Buhlmann as a candidate: the claimant's performance in relation to the KYC QA report. Mr Buhlmann's procedural sloppiness, the natural inference seems to us to be, arises from the fact that he had one candidate who was the obvious choice for a role which was only a functional promotion, carrying with it no change of rank or change of salary.
445. We did not find that the burden of proof shifted.

*Issue: 1.2.4 4.10.19 Robert McMillan told C without explanation, to cease providing support to R1's Anti-Fraud Lead, which detrimentally restricted C's range of work duties and restricted his ability to develop his work profile*

446. As a matter of fact, Mr McMillan did tell the claimant to stop carrying out this role and did not give him an express explanation.
447. It seemed to us that the appropriate comparator would be another employee in respect of whose core role a significant performance concern had been raised and in respect of which role there was a backlog.
448. We could see no evidence at all from which we could reasonably conclude that such a comparator would have been treated differently from the claimant. Mr Buhlmann had not had a significant performance issue raised.
449. Even if the burden had shifted, the perceived need for the claimant to focus on his core role in circumstances where there had been a major issue with the KYC QA report seemed to us to be a complete and compelling explanation.

*Issue: 1.2.5 5.11.19 Robert McMillan nominated Alex Denley (white) to complete an overview of the Financial Crime Department for an external bank, despite C having personally been requested by the Business Unit to do this task.*

450. There was no dispute that this occurred and there was a difference in treatment between the claimant and Mr Denley.
451. Were there any facts which would cause the burden to shift? It seemed to us that there were two ways of looking at this. Either what Mr McMillan told us about this being part of Mr Denley's role (and not the claimant's), which was not challenged in evidence, was part of the factual context which we could look at when considering whether the burden shifted, in which case there were no facts from which we could reasonably conclude that the claimant was replaced on this task by Mr Denley because of his race.
452. Or, if the proper analysis is that these facts are the respondent's explanation and we have to set them aside at the first stage, we were still unable to find facts from which we could reasonably conclude that the burden had shifted. There was a difference in treatment and a difference in race but also evidence, which we had no reason to reject, that Mr Tongo, who is also Black, had later performed the role.
453. Even if we had found the burden had shifted, we would have found that the respondent had shown that the treatment was in no way because of race but was because the work was allocated to a more appropriate individual.

*Issue: 1.2.6 7.11.19 Robert McMillan aggressively and loudly shouting at C to locate Bastian Buhlmann for a management meeting despite C being in the middle of a call*

454. We have found as a fact that Mr McMillan spoke to the claimant in a peremptory way, which offended the claimant. That treatment was less favourable than that meted out to Mr Buhlmann who is an evidential comparator. We concluded he was not a true comparator because there was a material difference in circumstances. When Mr McMillan spoke to the claimant there was some urgency to start the meeting. By the time he spoke to Mr Buhlmann the urgency had passed and there had been an explanation in the course of the meeting as to his absence.
455. We looked carefully at all of the evidence that seemed to us relevant to any inference we might draw as to whether Mr McMillan would have spoken less peremptorily and more politely to a white employee in the claimant's circumstances.
456. It was natural that Mr McMillan spoke to the claimant in the circumstances – he was the person most likely to know where Mr Buhlmann was.
457. The claimant's evidence was that he had seen Mr McMillan be aggressive to another person, who was a white European man.

458. Dr Gelemerova gave evidence or at least an opinion that Mr McMillan treated whole classes of people less favourably than other classes of people but we did not feel we could safely rely on her evidence, which was in any event unparticularised.
459. We also bore in mind the impression we gained as a Tribunal that Mr McMillan in his evidence at times tended towards the peremptory and gave an impression of being irritated by questions. We concluded that he might well lack insight into how his manner appeared to others, particularly in the context of a formal hearing.
460. Looking therefore at the evidence we had in the round, we could not see evidence from which we could reasonably conclude that his manner with the claimant in this occasion was anything other than his manner when rushed and irritated and speaking to any subordinate, whatever that subordinate's race.

*Issue: 1.2.7 January 2020 By Robert McMillan's departure from R's written appraisal procedure in relation to C, including involving Bastian Buhlmann in the process, failing to acknowledge the full range of C's achievements, disregarding C's representations and closing the process prematurely*

461. There were a number of factual parts to this allegation. Mr McMillan did involve Mr Buhlmann in the appraisal process in circumstances where the expectation in the respondent's procedure was that Mr McMillan would conduct the appraisal.
462. In terms of whether the claimant's achievements were acknowledged, it was very clear that the claimant had an opportunity both to set these out in the meeting and to include them in the appraisal document. This part of the complaint failed on the facts.
463. The disregarding of the claimant's representations pointed to by the claimant was the refusal to have a separate meeting about the KYC QA report rather than seeking to discuss it in the appraisal meeting.
464. The premature closing of the process was the entering of the appraisal on the respondent's system.
465. In terms of the involvement of Mr Buhlmann in the meeting, we accepted that the reason he was there was to provide input into the claimant's performance in circumstances where he was the functional manager, the claimant had not sent through the pre-appraisal document he had been asked for and the

claimant had declined to meet with Mr Buhlmann separately. In the very tight timescales that had developed, Mr Buhlmann was then brought into the meeting with the claimant to provide his input in that way. We felt able to make a positive finding as to the reason for Mr Buhlmann's involvement which had nothing to do with race. If we had resorted to the burden of proof, there were simply no facts from which we could reasonably conclude that race played a role.

466. In terms of the alleged disregard of the claimant's representations, it seemed to us that the claimant had serially failed to help himself in the appraisal process. He knew that there was a concern about his performance in relation to the KYC QA report and that this had fed into his failure to get the functional lead role. He failed to put together his achievements document ahead of the meeting and then refused to discuss the issue with the KYC QA report but instead became defensive. The KYC QA report was a performance issue properly to be discussed in an appraisal. It seemed to us that there was a full and complete and obvious explanation as to why Mr McMillan wanted to discuss it in the appraisal meeting which had no relationship with race.
467. As to the alleged premature closing of the process, Mr McMillan had hit the deadline for submitting the appraisal document. The claimant had left the meeting so there could be no further discussion with him before the deadline. That was a full and complete explanation for why the appraisal document was submitted which had no relationship with race. We note that even though the document was submitted the appraisal was still open to be challenged by way of grievance.

*Issue: 1.2.8 Jan 2020, 27.2.20, 3.3.20 HR's continuing failure to act in response to C's complaints about how he had not been allowed to challenge his appraisal marking in January 2020*

468. We did not find that there was not as a matter of fact any such failure. Ms Jackson asked the claimant to put time in her diary; he did not do that. She tried to ring him; he did not ring back.
469. By 3 February the claimant was on sick leave and it would not have been appropriate for Ms Jackson to continue pursuing him about the matter at home. By 10 February, he had commenced a grievance, which was in part about the appraisal and the issue was thereafter subsumed in that procedure. We did not find any relevant failure to act by HR.

*Issue: 1.2.9 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him*

- 470. Mr McMillan did reduce the claimant's bonus as a result of his performance, which was itself reflected in the appraisal rating, although there does not seem to have been some kind of formal algorithm for adjusting the bonus based on the appraisal rating.
- 471. If the complaint was the appraisal rating itself, it seemed to us that the appraisal rating was fully explained by the issue with the claimant's performance of his core role. Although there was no set algorithm for reducing the bonus, a reduction by 50% seemed to mirror the numerical grades the claimant had been given.
- 472. There was no actual comparator in materially the same circumstances, ie someone who had had a similar performance issue to the problematic KYC QA report.
- 473. We found that the appraisal grading and the reduction in bonus occurred because of the claimant's performance in respect of the KYC QA report. If we had to have recourse to the burden of proof, there were simply no facts from which we could reasonably conclude that the claimant's treatment in relation to the appraisal and bonus was in any way because of his race.

*Issue: 1.2.10 9.3.20 Robert McMillan telling C by phone of his reduced bonus whilst C was on sick leave, despite HR having indicated that this would be notified to C by email and post*

- 474. Ms Jackson and Mr McMillan gave consistent evidence that it was the respondent's practice to ensure that all employees were informed of the bonus on the same day, including any who might be absent from the workplace. There was no evidence to suggest that that was not the practice and we accepted that it was, furthermore that it was an entirely understandable practice given the importance placed on treating employees equitably in relation to matters concerning remuneration.
- 475. It seemed to us possible that some individuals working in HR might have considered it would be more sensitive to arrange for the telephone call to be made by someone other than the manager when there was an extant grievance against the line manager. Equally there was an existing and ongoing line management relationship in which Mr McMillan's role was to give the bonus news himself. The relationship had not terminated or apparently irretrievably broken down, so we considered a reasonable HR

professional could have taken the view it should still be Mr McMillan who delivered the news. As Ms Jackson acknowledged, it would have been sensible for her to have sought the claimant's permission in advance for use of his personal mobile number.

476. We could see no facts from which we could reasonably conclude that the claimant's race had played a role in this course of events.

*Issue: 1.2.11 7.5.20 Miro Pertusini sending the grievance outcome letter to C, yet it did not deal with most of the specific concerns or refer to the evidence or representations used. The dismissal of the 'chicken' comments as a 'cultural misunderstanding' was particularly offensive*

477. We did not find that Mr Pertusini did not deal with 'most' of the concerns. Presented with a sprawling grievance, he adopted Mr Biggs' approach of organising the complaints into themes, an approach the claimant had not objected to.
478. The only specific matter put to Mr Pertusini in cross examination that he had not explicitly referred to in his outcome was the suggestion that the appointment to the functional lead role had been prejudged. He accepted that he had not expressly referred to that and explained that he had tried to set out in his findings in a reasonably concise way.
479. We bear in mind that, as is true of most hearers of grievances, this was not Mr Pertusini's day job. Faced with a difficult forensic task, he seemed to us to have done a perfectly reasonable job. He made reasonable enquiries, conducted a reasonably balanced investigation and did a reasonably good job of analysing the material and setting it out in a compact way as conclusions. Was there evidence from which we could infer his relatively minor failures were connected with the claimant's race and that a white person would have been treated more favourably? We could see no such material.
480. We looked at his conclusions on the chicken remarks separately and also together with the other criticisms of Mr Pertusini's findings.
481. Mr Pertusini did not dismiss the chicken remarks as a cultural misunderstanding. What he said in the outcome and explained to us in evidence was that he did not find that Mr Buhlmann made the remarks because of a stereotype; he made the remarks because of the claimant's advertised liking for chicken. When he said that 'the complaint was caused by a misunderstanding' what he was referring to was the claimant's misunderstanding of why Mr Buhlmann was making the remarks. He was

giving the claimant the benefit of the doubt in accepting that the claimant genuinely thought the remarks were made because of the stereotype, although he was troubled in reaching that finding by his awareness that the claimant would have known that he had spoken of his liking for chicken.

482. When he then referred to 'The lack of understanding in this particular ethnic stereotype may be a cultural one' he told us and we accepted that he was referring to the fact that Mr Buhlmann did not know that there was a stereotype connecting Black people and chicken.
483. We understood the claimant's objection to Mr Pertusini's outcome in relation to the chicken remarks to be a suggestion, although this was never clearly articulated, that he had found that Mr Buhlmann *had* used the stereotype but that Mr Pertusini had simply characterised his use of an offensive stereotype as a cultural misunderstanding.
484. That is not what Mr Pertusini found. Those paragraphs of his decision are not written in the clearest prose but it is tolerably clear what they mean and Mr Pertusini's explanation to us in evidence of what they meant made sense to us and we accepted it. He had tried to express a number of separate conclusions in relation to the chicken remarks issue in slightly too small a compass.
485. We found that Mr Pertusini's conclusions on the chicken issue were entirely reasonable and open to him on the evidence. He was in fact being generous to the claimant and giving him the benefit of the doubt in finding that his allegations against Mr Buhlmann about the chicken remarks were made in good faith. Taking this aspect of his findings alone or in conjunction with the broader critique of his investigation and findings we could see no facts from which we could reasonably conclude that the claimant was treated less favourably than a white employee would have been because of his race.

*Issue: 1.2.12 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts*

486. Judgments about tone of written or oral communications are inherently subjective. As we have indicated above in our findings of fact, we judged the letter against the many other letters between parties to litigation or contemplated litigation we have seen.
487. We bore in mind that the letter was sent in response to a letter from a lawyer which was itself sent in the middle of the claimant's grievance process. Ms

Onwukwe's letter appears designed to influence the grievance process, outside of the procedure.

488. Ms Onwukwe's letter misstated the number of successful Tribunal claims the respondent had been subject to. It included misstatements about the applicable law and a misstatement about what the occupational health doctor had said.
489. In that context, we could understand why the response would be firm and would seek to correct the misstatements. We could see nothing inappropriate in the content of Mr Cameron's letter; it was only the choice of language which we felt was slightly over the line in terms of politeness.
490. It seemed to us that we would require some evidence to persuade us that a party's professional representative had adopted a slightly more inflammatory tone than we considered was necessary because of race. We had no other information about Mr Cameron and the way in which he conducts litigation on behalf of his clients. Although we can draw inferences from unexplained unreasonableness, in the circumstances of this very mild unreasonableness, it did not seem to us that we could properly draw any inference that Mr Cameron had been influenced by race. There was no actual comparator so the inference we would have to draw was that Mr Cameron's tone would have been marginally different (ie slightly more measured) had a very similar letter been sent on behalf of a white employee. We considered that such an inference was entirely unreasonable. There were many far more likely explanations for Mr Cameron's tone – that this is his habitual style, that this is the sort of robust approach he feels clients like the respondent require, that he was attempting to reflect the justifiable irritation of his client at the timing of and misstatements in Ms Onwukwe's letter.

*Issue 1.2.13 12.6.20 Dismissal: Did R1's actions culminating in the 'last straw' of PC's letter constitute a repudiatory breach of the implied term of trust and confidence, entitling C to treat himself as constructively dismissed and if so, was that repudiatory breach on the grounds of C's race?*

491. We have found no element of race in the treatment reading up to dismissal and accordingly the resignation cannot have been in response to a repudiatory breach of contract which included race discrimination. We have looked at the individual matters complained of holistically as well as individually and we have not found facts which would shift the burden of proof on either approach.
492. For completeness, we record that we would not in any event have found that there was a repudiatory breach of contract. We have set out some criticisms

of the respondent's approach above which we did not conclude came near to being conduct calculated or liked to destroy or seriously damage the relationship of trust and confidence.

*Issue 1.2.14 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment*

493. We did not find that Mr Clapham's questions were absurd. He was, in particular, seeking to give the claimant that opportunity to comment on the evidence obtained from other witnesses. This was an entirely fair way to proceed. It seemed to us that the claimant had misunderstood what Mr Clapham was doing – giving someone an opportunity to comment on what someone else has said is of course the process which occurs all the time in courts and tribunals in order to test the evidence. Putting those questions to the claimant did not mean that Mr Clapham was seeking to justify or support what other witnesses had said.
494. It seemed possible to us that the claimant was taken aback by the approach because he was expecting something that felt more like a formal appeal hearing, whereas Mr Clapham, who had not been advised to the contrary, thought he was conducting an investigative interview with the claimant before making his appeal findings. We bore in mind, in looking at this error by Ms Jackson that she had had to take over from Ms Hassheider because Ms Hassheider had left, against the background of an organisation coping with the early stages of the pandemic. It seemed to us that there was a failure in the HR support she provided to Mr Clapham but there was no material from which we could conclude that the failure arose because of the claimant's race. In particular, there was no evidence that the error arose because, as the claimant asserted in submissions, Mr Clapham was failing to take the appeal seriously. He conducted what we found to be a reasonable investigation and reached well reasoned conclusions.

*Issue: 1.2.15 30.6.20 David Clapham's letter dismissing C's grievance appeal, including that the chicken comments were reasonable because C had published his love of chicken to Bastian Buhlmann*

495. Mr Clapham had in front of him ample evidence to support his conclusion that the claimant had spoken of his liking for chicken. In particular, Mr Arevalo independently confirmed that that had occurred. His investigation was reasonable – he also spoke to Ms Ruci about this issue and he gave the

claimant the opportunity to comment on the evidence he had received from the witnesses. He concluded that Mr Buhlmann's remarks were not based on race, a conclusion which was entirely open to him on the evidence which he had obtained.

496. Again, there was no evidence from which we could reasonably conclude that race had played a material role in the outcome of the grievance appeal. The burden of proof did not shift.
497. Standing back and looking holistically at the matters the claimant has complained of, we have found some aspects of his treatment which he had reason to be unhappy about it: Mr McMillan's manner to him on 7 November 2019, Mr McMillan's failure to conduct a rigorous recruitment process for the functional lead role, some failures by HR in relation to the telephone call about the bonus and the mistake about the grievance appeal process. We have not found that there is evidence from which we could properly conclude that these individual matters were because of race, and looking at them in the round, we can perceive no pattern from which we could reasonably draw an inference that the claimant's race played a role in his treatment.
498. There was a theme of relatively minor mistakes made by Ms Jackson in a number of respects as when have identified above. We can see no evidence that these were other than errors by her.
499. We bore in mind in our overall assessment factors which pointed away from conclusion that the claimant was treated less favourably than an employee of a different race would have been – for example, the fact that Mr McMillan's response to serious concerns about the KYC QA report was to give the claimant an opportunity to establish that his report was correct and then, when the claimant failed to do that, his decision not to start any kind of formal capability process. Many of the matters which the claimant complained about reasonably flowed from Mr McMillan's response to the flawed KYC QA report - taking the claimant off non core work, giving him a less favourable appraisal, receiving a reduced bonus. We concluded on the facts in front of us that the respondent correctly identified a serious performance concern. The claimant's account that he was unfairly treated thereafter would only have narrative coherence if that performance concern was itself unfair. We have found that it was not.

Harassment related to race (Equality Act 2010 section 26)

*Issue: 2.1 Did the respondent do the following things:*

*2.1.1 7.11.19 Robert McMillan aggressively and loudly shouting at C to locate Bastian Buhlmann for a management meeting despite C being in the middle of a call*

2.2 *If so, was that unwanted conduct?*

2.3 *Did it relate to race?*

2.4 *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

2.5 *If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

*NB: We considered the various elements that make up harassment in relation to each of the individual complaints and, again, holistically.*

500. Our factual findings are as previously described above. The conduct was unwanted by the claimant, however we did not consider it had the prohibited purpose or effect. Mr McMillan's purpose was to find Mr Buhlmann quickly so he could commence the meeting. A single instance of managerial abruptness in a pressured environment did not seem to us to be reasonably to be regarded as having the proscribed effect. We do not say that if a manager regularly treated an employee in this way it would not be capable of being regarded as harassment, but even on the claimant's evidence, it was a one off incident.
501. We accept that the claimant was upset by the treatment but we considered that he was sensitive to what would otherwise have been a much more transient sense of offence we think because he had begun to feel insecure in his role as a result of the issues with the KYC QA report.
502. For the reasons we have explored more fully above, there was no evidence from which we could conclude in any event that that the treatment was related to race.

*Issue: 2.1.2 January 2020 By Robert McMillan's departure from R's written appraisal procedure in relation to C, including involving Bastian Buhlmann in the process, failing to acknowledge the full range of C's achievements, disregarding C's representations and closing the process prematurely*

503. We accept that the inclusion of Mr Buhlmann in the meeting and the failure to agree that the KYC QA report should not be discussed in the meeting were conduct that the claimant did not want.
504. We did not find there was any prohibited purpose. The purpose of having Mr Buhlmann there was to enable Mr McMillan to have more information

relevant to the appraisal process. The purpose of discussing the KYC QA report was to look at a relevant aspect of the claimant's performance.

505. We accept that the claimant was unhappy that Mr Buhlmann was present although the reason for his presence was explained to the claimant – he was there because he was the functional lead and in the context of the claimant refusing a separate meeting with him and not producing the document which had been requested. The claimant was also unhappy about having to discuss his performance in relation to the KYC QA report. We do not consider that the conduct could reasonably be regarded as having the proscribed effect. It is uncomfortable to have a colleague in an appraisal meeting but in circumstances where the presence is explained and has been caused by the actions of the person being appraised, it cannot reasonably be said to violate dignity or create the proscribed environment. Similarly no one wants to be confronted with performance issues but raising those issues in an appropriate environment cannot be said reasonably to give rise to the proscribed effect.
506. We could find no facts from which we could reasonably infer that the conduct related to race.

*Issue: 2.1.3 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him*

507. Being awarded a reduced bonus was clearly conduct unwanted by the claimant.
508. Mr McMillan's purpose was clearly to comply with the respondent's practice in relation to bonuses and award a sum which reflected his assessment of the claimant's performance.
509. We concluded that that conduct could not reasonably be regarded as having the proscribed effect. The award of a manifestly unfair bonus might be capable of violating dignity or creating the proscribed environment, depending on the facts and the context, but we did not find that there was any such unfairness.
510. We could find no facts from which we could reasonably infer that the conduct related to race.

*Issue: 2.1.4 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when*

*it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts*

511. We accepted that the conduct was unwanted by the claimant but we did not consider it had the proscribed purpose or effect. The purpose apparent on the face of the letter was to correct errors in Ms Onwukwe's letter and no doubt to deter further correspondence outside of the ongoing grievance process.
512. We did not consider the letter could reasonably be considered to have the proscribed effect. The somewhat immoderately expressed criticism was criticism of Ms Onwukwe and not of the claimant and even that criticism and the terms in which it was expressed did not seem to us to approach the level of seriousness required to be reasonably regarded as violating dignity or creating the proscribed environment.
513. In any event, for reasons already set out, we were unable to draw any inference that the tone of the letter was related to race.

*Issue: 2.1.5 14.10.19 and 15.11.19 On two separate occasions, Bastian Buhlmann using a racially offensive stereotype about C loving chicken (a derogatory caricature about black people) to C*

514. It was not clear to us whether the conduct was unwanted at the time of the incidents or whether the claimant was subsequently persuaded by friends that the remarks must have had a racial connotation. It may be that a subsequent sense of grievance about conduct is sufficient in any event to render that conduct 'unwanted' within the meaning of the statute.
515. We accepted as relevant background that there had been discussion of the claimant's liking for chicken: the Frankfurt chicken burger discussion, the claimant mentioning that he liked chicken and talking about his wife cooking chicken for him and the discussion with Mr Arevalo about the fried chicken restaurant.
516. Our factual findings as to the two incidents were:
- that on an occasion when a team lunch was being discussed, Mr Buhlmann suggested they go to Nando's because there were no queues and referred to the claimant's liking for chicken;
  - that on the occasion of the office move, he jokingly offered the claimant chicken as a bribe. We accept the offer was of chicken and not fried chicken because we accepted that the previous incidents and discussion had indicated to Mr Buhlmann that the claimant had a liking for chicken generally.

517. We find as a fact that Mr Buhlmann had no proscribed purpose. He was attempting on both occasions to be friendly to the claimant. We accepted his evidence that he was not aware of any stereotype about Black people and chicken or fried chicken. Ms Ruci, who like Mr Buhlmann was not a native English speaker, was also unaware of any such stereotype. One panel member was not aware there was a stereotype about Black people and fried chicken and none of the Tribunal panel were aware of a stereotype involving Black people and chicken generally.
518. Whether the conduct could nonetheless be regarded as having the proscribed effect seemed to us to be bound up with the question of whether a reasonable person could have understood Mr Buhlmann to be referring to racial stereotypes. It seemed to us that a reasonable person could not have done so because that reasonable person would have been aware of having repeatedly referred to a liking for chicken. Any stereotype about Black people and chicken (as opposed to fried chicken) is not so well known that a reasonable person could assume it was part of the context in which Mr Buhlmann twice referred to the claimant liking chicken.
519. As we have said, none of the Tribunal panel were aware of any stereotype about Black people and chicken per se as opposed to fried chicken. That does not mean that there is no such stereotype, but we considered that it is certainly not so well known that a reasonable person could conclude that Mr Buhlmann must have chosen to speak of the claimant's professed liking for chicken because it played into a stereotype about Black people.
520. We considered carefully the fact that Mr Arevalo also talked about his liking for chicken but had not been the recipient of the Nando's comment or the joke about exchanging a desk space for chicken and whether that could cause a reasonable person to believe that Mr Buhlmann was referring to the stereotype. However Mr Arevalo had long since left the team by the time of the Nando's lunch and the office move. When looking at the fact that there were a total of two remarks over the period when the claimant and Mr Buhlmann worked together, both occurring after Mr Arevalo had left the team, it did not seem to us that a reasonable person would have regarded the remarks differently because no such remarks had been made to Mr Arevalo.
521. Finally, we accepted that there was no relationship with race because Mr Buhlmann was not conscious of the stereotype about Black people liking chicken. He did not make the remarks because the claimant was Black but because he knew he liked chicken. Nor did he make the remarks because he thought that it was humorous to refer to the claimant's liking for chicken because there was a stereotype that Black people liked chicken.

*Issue: 2.1.6 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment*

522. We accept that the claimant did not want to be asked questions related to other people's accounts of the chicken remarks. We have found that the questions were perfectly proper and appropriate. Mr Clapham's purpose was to give the claimant a proper opportunity to comment on the evidence. The conduct of the grievance appeal meeting could not reasonably have had the proscribed effect in circumstances where the questions were proper.
523. There was no relationship with race.
524. Again, looking at these matters together does not change our analysis. The themes connecting Mr McMillan's conduct we have discussed above. We could see no contextual facts linking the allegations against Mr Buhlmann and Mr Clapham which overall constituted facts from which we could reasonably conclude there was a relationship with race or which changed our conclusions on whether the conduct had the proscribed effect.

Victimisation (Equality Act 2010 section 27)

*Issue: 3.1 Did the claimant do a protected act as follows:*

*3.1.1 grievance on 10 February 2020*

525. The grievance clearly made allegations of race discrimination and amounted to a protected act.

*Issue: 3.3 Did the respondent do the following things:*

*3.3.1 25.1.20 [incorrect date in list, should be 14 February 2020] When C complained to HR about Bastian Buhlmann having told members of the department that C was suffering from a mental illness, C received no reply from HR*

*3.4 By doing so, did it subject the claimant to detriment?*

*3.5 If so, was it because the claimant did a protected act?*

*3.6 Was it because the respondent believed the claimant had done, or might do, a protected act?*

*NB: Again we look at each of these elements in relation to each allegation,*

526. As a matter of fact, Ms Jackson did not respond to the claimant's complaint about an unnamed member of the team telling members of the department that the claimant was suffering from a mental illness.
527. The context was that the claimant had raised that complaint in the course of his email in which he was complaining about Ms Jackson's own conduct. She replied to what he had said about those allegations but did not take any action in relation to the further complaint about disclosure of his mental health condition.
528. Ms Jackson had passed the grievance over to Ms Hassheider by 17 February 2020. The claimant did not raise the matter with Ms Hassheider.
529. We concluded that the failure to respond to the claimant's complaint could reasonably be considered to be a disadvantage by the claimant and amounted to a detriment. Ms Jackson could have asked the claimant for further information about what he had heard and raised the matter with Mr McMillan.
530. Was there evidence from which we could reasonably conclude that a material part of the reasons why Ms Jackson did not deal with the complaint was the fact that the claimant had made allegations of race discrimination in his grievance?
531. We could not see any such evidence. Ms Jackson made a number of errors as an HR professional that we have identified in this Judgment. She also responded appropriately and provide appropriate support in relation to other matters. We could not see any reason why she would have failed to deal with this particular complaint because the claimant had made allegations of race discrimination against others, ie not against Ms Jackson. It seemed far more likely that she made occasional errors out of inadvertence, pressure of work or sloppiness rather than because she was choosing to do this one small matter badly because the claimant had made allegations of race discrimination which did not implicate or involve her. The claimant did not write to her again to point out that she had not dealt with this aspect of his email and we could see how the issue became 'lost'.

*Issue: 3.3.2 Jan 2020, 27.2.20, 3.3.20 HR's continuing failure to act in response to C's complaints about how he had not been allowed to challenge his appraisal marking in January 2020*

532. We did not find that there had been a failure to act by HR and these complaints in any event predate the protected act.

*Issue: 3.3.3 14.2.20 Hope Jackson asking the Claimant why he wanted to raise a grievance on race discrimination, harassment, bullying and victimisation if he might be leaving R1 soon.*

533. We did not accept the claimant's account of what Ms Jackson had said. We did accept her account and the reasons for it, which seemed to us to be unexceptionable. We accepted that it was her practice to ask whether an employee still wanted to pursue a grievance of whatever type in circumstances where it appeared the employee was leaving the respondent's employment.

*Issue: 3.3.4 March 2020 Robert McMillan reducing C's bonus as a result of the appraisal rating given by him*

534. We do not repeat the conclusions we have set out above in relation to this allegation framed as direct race discrimination, save to say that the appraisal itself predated the grievance and that the appraisal rating led to the reduction in bonus.

535. We could see no facts from which we could reasonably conclude that the protected act played a role in the reduction of the bonus.

*Issue: 3.3.6 9.3.20 Robert McMillan telling C by phone of his reduced bonus whilst C was on sick leave, despite HR having indicated that this would be notified to C by email and post*

536. Again we do not repeat the findings we made in respect of the direct race discrimination claim.

537. We could see no facts from which we could reasonably conclude that the protected act played a role in the manner in which the bonus was notified to the claimant.

*Issue: 3.3.7 1.5.20 HR reduced C's full pay whilst on sickness absence, to SSP. From 7.2.20 to 1.5.20, R had exercised its discretion to pay C full pay during his sickness absence*

538. We accepted the respondent's evidence, which was consistent with the contemporaneous documents, that there had been a change of policy and

that that change of policy was the reason for notifying the claimant that he would be receiving SSP only. We had no reason not to accept the respondent's evidence as to the reason why the discretion was not exercised in the claimant's favour. The underlying theme of the new policy was that the discretion would be exercised in favour of an employee who was likely to return in the foreseeable future. The evidence the respondent had about the claimant pointed entirely the other way. It appeared to the respondent that the claimant had a new job and was likely to be leaving the respondent's employment. There was no evidence to suggest he would soon be returning to work.

539. The emails we saw about the process showed that another employee received the same short notice as the claimant. It seemed to us far too much of an inferential leap to conclude that the unreasonableness demonstrated in giving such short notice to the claimant should lead us to a conclusion that the fact he had brought a grievance about race discrimination played a role in this decision. That was particularly so because we could see that another employee had been treated equally unreasonably in relation to notice.

*Issue: 3.3.8 7.5.20 Miro Pertusini sending the grievance outcome letter to C, yet it did not deal with most of the specific concerns or refer to the evidence or representations used. The dismissal of the 'chicken' comments as a 'cultural misunderstanding' was particularly offensive*

540. We do not repeat our previous findings about Mr Pertusini's report. We do not consider that the claimant was subjected to a detriment and we could find no evidence that Mr Pertusini was affected in terms of his approach and conclusions by the fact that the claimant had made a race claim.

*Issue: 3.3.9 11.6.20 R1's external solicitor's letter to Ms Onwukwe, C's solicitor being insulting, dismissive and demeaning in tone, as well as unjustified in its content when it accused Ms Onwukwe of being misleading, putting words in the doctor's mouth and distorting facts*

541. We do not repeat our previous findings. We could see no evidence on the basis on which we could reasonably conclude that the tone of the letter was affected by the nature of the complaints.

*Issue: 3.3.10 12.6.20 Dismissal: Did R1's actions culminating in the 'last straw' of PC's letter constitute a repudiatory breach of the implied term of trust and*

*confidence, entitling C to treat himself as constructively dismissed and if so, was that repudiatory breach an act of victimisation?*

542. In circumstances where we have not found any of the matters complained of to amount to victimisation, even if there had been a constructive dismissal, that constructive dismissal could not itself amount to victimisation.

*Issue: 3.3.11 June 2020 David Clapham's conduct of the virtual grievance appeal meeting in which absurd questions were asked, supposedly in an attempt to justify the chicken comment*

543. We have not accepted the claimant's characterisation of Mr Clapham's grievance meeting. There was no detriment and no evidence from which we could reasonably conclude that Mr Clapham adopted the approach he did because the claimant had made a complaint of race discrimination.

*Issue: 3.3.12 30.6.20 David Clapham's letter dismissing C's grievance appeal, including that the chicken comments were reasonable because C had published his love of chicken to Bastian Buhlmann*

544. We have concluded that Mr Clapham's view was a reasonable one. If there could properly be said to be a detriment to the claimant in being the recipient of an entirely reasonable outcome to the grievance appeal, we can see no evidence from which we could properly conclude that that reasonable outcome was influenced by the fact that the claimant had made a complaint of race discrimination.

#### Time points

545. We did not have to consider whether any of the complaints were presented out of time and whether it would be just and equitable to extend time because none of the claims were upheld on the merits.

#### **Conclusion**

546. For the reasons we have set out above, all of the claimant's claims are dismissed.

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Employment Judge Joffe  
London Central Region  
16/10/2021

Sent to the parties on:  
18/10/2021.

For the Tribunals Office