Case Number: 2205601/2020

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr F Gaynes		**Third Space Holdings Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 21-24 September 2021; 1 December 2021 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr D Shaw, Ms T Shaah**

On hearing Ms M Aarons, lay representative, on behalf of the Claimant and Mr T Perry, counsel, on behalf of the Respondents, the Tribunal determines that:

(1) The Claimant's complaints of:
   (a) harassment related to race and/or age;
   (b) direct discrimination because of race and/or age; and
   (c) indirect race and/or age discrimination

   are not well-founded.
(2) All complaints brought by the Claimant other than that identified in para 4.13 of the Respondents' amended grounds of resistance were in any event presented out of time and the Tribunal has no jurisdiction to consider them.
(3) The proceedings as a whole are accordingly dismissed.

REASONS

Introduction and Procedural History

1 The Respondents own and operate seven luxury fitness clubs located in central London. They employ about 440 people.

2 The Claimant, Mr Fitzroy Gaynes, a black British man of Caribbean descent now 64 years of age, started working part-time for the Respondents with the job

title of Personal Trainer on 3 April 2001 and remains so employed. He has enjoyed a long and successful career in fitness training and has an international reputation in his field. At the time with which this case is concerned he was located at their Soho club ('the club').

3 By a claim form presented on 23 August 2020, the Claimant brought complaints of age and race discrimination and a claim for 'other payments', all of which the Respondents disputed.

4 Further details of the claim were supplied in a document prepared on the Claimant's behalf dated 14 January 2021.

5 In a document dated 1 April 2021 issued following a private preliminary hearing for case management the same day, Employment Judge Elliott recorded that the Claimant's claims were for direct race and/or age discrimination, harassment related to race and/or age and indirect age and/or race discrimination. She identified the issues to which the claims identifiable in the 'pleadings' gave rise and directed delivery of further information relating to the discrimination and harassment claims and thereafter, supply of an amended response form. She also listed a final 'in-person' hearing for 21-24 September 2021.

6 The further information was provided in a document prepared on the Claimant's behalf dated 23 April 2021. The Respondents duly supplied amended grounds of response (the document is not dated). To this, the Claimant volunteered a reply dated 9 July 2021.

7 The final hearing came before us. The Claimant was ably represented by Ms M Aaron, who had been involved on his behalf throughout the preparatory stages of the case. The Respondents were represented by Mr T Perry, counsel. A large bundle of documents was produced. Having read into the case for most of day one, we heard evidence from the Claimant and, on the Respondents' side, Mr William Pate, Group Exercise Manager and the Claimant's line manager, Ms Fiona Jenkinson, Fitness Manager, Mr Daren Darby, General Manager and Ms Tamantha Nugent, People Partner. We also read witness statements produced by the Respondents in the names of Mr Antony Stewart, Head of Group Exercise and Ms Laura Wigley, People Director. Ms Aaron complained that the Respondents' decision (taken part-way through the hearing) not to call Mr Stewart and Ms Wigley had deprived her of the chance to challenge them in cross-examination. We explained that (a) it was for the parties to choose which witnesses to call, (b) it was open to either party to comment on the other party's choice of witnesses, and (c) evidence adduced in written form generally carried very little weight.

8 It is necessary to mention one other matter concerning the procedural handling of the hearing. The trial was held at Victory House but by agreement a video link was established to enable one witness, Ms Wigley, to attend remotely. She requested that the link be set up to enable her to watch the proceedings from the start, which was agreed. After the lunchtime break on day three, Ms Wigley very properly reported that she had overheard three comments made by a member of the Tribunal after the parties had left the hearing room at the start of the

lunchtime adjournment. This happened because the judge omitted to mute the microphone is as soon as the parties left. He accepts full responsibility for the oversight. Ms Wigley explained that (a) the first comment had been about the number of pages still to be covered in the witness statement of the witness then being cross-examined My Ms Aaron; (b) the second comment had been about a question which it might be appropriate to put to the witness concerning the difference between formal and informal meetings; (c) the third comment had been to the effect that it was "not always important" to get HR involved.

9 The parties were invited to make representations as to whether Ms Wigley overhearing three comments should have any bearing on the further conduct of the hearing. After taking instructions, Ms Aarons argued that the hearing had been "derailed" and that the Tribunal must now recuse itself. She felt that the remarks, and in particular the third remark, demonstrated bias or apparent bias. In particular, it suggested a view that HR's function was unimportant. Ms Aarons made submissions in relation to the other remarks but later made it clear that her recusal application rested only on the third.

10 Mr Perry submitted that there was no ground for recusal. There was no basis for supposing that a fair-minded person would consider, in the circumstances, that there was a real risk of bias. He reminded us of the leading authorities and in particular the stricture that courts and tribunals should be wary of guarding against too easily acceding to recusal applications.

11 We refused the application for recusal. We did not accept that the comment concerning HR could reasonably be interpreted as significant. It did not point to any settled view concerning any particular point in issue in the case. Any fair-minded observer would reject the notion that the comment pointed to a real risk of bias. Accordingly, the hearing proceeded.

12 Closing argument was presented by Mr Perry on the afternoon of day four. Ms Aaron, however, did not feel ready to do likewise and asked for more time. After some discussion it was agreed that she would be allowed to present her closing argument in written form, subject to a 5,000 word limit. Her document, delivered on time and within the word limit, duly followed.

13 We met in private on 1 December and reached the decisions summarised in our Judgment above.

The Claims and Issues

14 At the start of the hearing, we discussed the scope of the dispute. Mr Perry told us that the Respondents understood the claims and issues to be fairly captured in the amended grounds of resistance. Ms Aaron agreed but said that the Claimant wished the Tribunal to consider one further claim. When this was discussed it became apparent that the proposed new claim was nowhere signalled or foreshadowed in the claim form or in the subsequent reformulations of the Claimant's case. Moreover, the subject-matter was (not surprisingly) not covered in the witness evidence and there had been no disclosure of documents relating to it.

We explained that, in the circumstances, the proposed new claim could only be entertained if a successful application to amend the claim form had first been made. We also observed that, on the face of it, it was hard to see how the hearing could proceed if an amendment application were made and granted. It was agreed that Ms Aaron and the Claimant would consider the matter overnight and decide how they wished to proceed. On the morning of day two Ms Aaron told us that, with some regret, the Claimant had decided against seeking permission to amend the claim form. On that basis, she was prepared to agree that the amended grounds of resistance correctly recorded the matters on which the Tribunal's decision was required.

15 The Claimant pursued 13 allegations of harassment related to race and/or age, identifed in the amended grounds of resistance as follows.

4.1 The meeting of 2 October 2019 in which William Pate allegedly told the Claimant "he would be saying several things that the Claimant may not like, and if he showed any signs of aggression he would be placed on disciplinary".

4.2 The meeting of 2 October 2019 in which William Pate used the term "fed and watered".

4.3 On 8 October 2019 when William Pate allegedly followed the Claimant and accused him of drinking coffee in the workout studio.

4.4 On 9 October 2019 when William Pate allegedly followed the Claimant to his class to ensure he was 15 minutes early.

4.5 The meeting of 9 October 2019 with Ben Woodall when the Claimant was allegedly told he could not be accompanied to the meeting.

4.6 The meeting of 9 October 2019 with Ben Woodall when the Claimant was allegedly under duress to sign the handwritten meeting notes.

4.7 The meeting of 9 October 2019 with Ben Woodall when he allegedly informed the Claimant that the matter of lateness would be proceeding to a disciplinary.

4.8 on 10 October 2019 when William Pate allegedly checked on whether the Claimant had left the building.

4.9 the meeting on 28 January 2020 with William Pate when the Claimant was allegedly informed his classes 'Strong and Sculpted' and 'LGA' would be dropped from the timetable from 1 July and replaced with brand signature classes.

4.10 The meeting on 28 January 2020 with William Pate in which the Claimant was allegedly informed that if he did not accept the changes to the class timetable he would be in breach of contract.

4.11 In January 2020 when Daren Darby allegedly asked Ben Woodall to carry out an investigation into the Claimant's non-compliance with uniform [rules].

4.12 When the Claimant was invited to a disciplinary meeting on 11 February 2020 with Ben Woodall regarding his failure to wear uniform.

4.13 When on 29 June 2020 the Claimant was asked to outline his work availability in preparation for the ease in lockdown and the Claimant's requests were allegedly ignored by William Pate.

We will refer to the claims as "Allegation 4.1" and so on.

16 In addition, the Claimant pursued five allegations put as complaints of both harassment and direct discrimination, noted in the amended grounds of resistance as follows.

> **5.1 Attempts to make the Claimant wear uniform following the meeting on 27 July 2019[1] in which William Pate raised the issue of non-compliance with uniform and brand standards and allegedly advised the Claimant a continued failure to wear uniform may result in formal escalation in line with the disciplinary procedure …**
> **5.2 Accusations from William Pate, Daren Darby, Ben Woodall and Fiona Jenkinson about the Claimant not wearing uniform, wearing sunglasses and wearing boots instead of trainers at work.**
> **5.3 The meeting of 2 October 2019 being communicated as an informal meeting when the Claimant felt ambushed by the presence of both Daren Darby and William Pate.**
> **5.4 The meeting of 2 October 2019 being attended by Daren Darby.**
> **5.5 The issuing of the improvement note dated 3 October 2019 to the Claimant by William Pate which raised issues with whistling, eating, drinking and rubbish.**

17 In the amended grounds of resistance the complaint of indirect age and/or race discrimination is summarised in these terms.

> **6.1 The Respondent understands the Claimant is alleging he was indirectly discriminated against by the practice that no music used in studio classes when teaching is to be over 18 months old.**
> **6.2 The Claimant alleges he was at a particular disadvantage as he is 64 years old, does not go clubbing or listen to Radio 1 and he has a leaning towards genres that are black based …**
> **6.3 The Claimant has not stated the disadvantage caused to other people of the Claimant's age and/or racial group as compared with persons who are younger or of a different racial group.**
> **6.4 The Claimant alleges this put him at a disadvantage, but does not specifically state what that disadvantage is.**

18 The Respondents resisted the claims on their merits. They also plead (amended grounds of resistance, paras 11-16) are claims in respect of any act or omission occurring before 13 February 2020 are out of time and the Tribunal has no jurisdiction to entertain them.

The Legal Framework

Direct discrimination and harassment

19 The Equality Act 2010 protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include age.

20 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her

[1] This seems to be an error for 26 July 2019.

comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

21 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

22 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (1)(b), each of the following must be taken into account –**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(4) The relevant protected characteristics are –**
>
> **age**
> **…**
> **race …**

23 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

24 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the Claimant must show that the conduct was unwanted. Some claims will fail on the Tribunal's finding that he or she was a willing participant in the activity complained of. Moreover, it seems to us self-evident and necessarily implicit that any behaviour on which a claim rests must be (a) of a sort to which a reasonable objection can be raised and (b) voluntary, or at the very least such that the Respondent can properly and lawfully bring it to an end.

25 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

26 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

Indirect discrimination

27 The 2010 Act, s19 includes:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**

> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

The relevant protected characteristics include age and race.

Protection against discrimination and harassment

28 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

29 Employees enjoy parallel protection against harassment by the 2010 Act, s40(1)(a).

30 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

31 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful

discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

32 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). Now, under the Early Conciliation provisions, the period is further extended by the time taken up by the conciliation process. The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

The Primary Facts

33 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision we find as follows.

Background

34 The Respondents regard themselves as a "cutting edge" organisation in the competitive fitness clubs market. They cultivate a "modern" look and invest in the latest technology. Image is seen as critically important. They require their staff to be smartly turned out and to adhere to their rules concerning uniform. They also stress the importance of keeping club premises clean and tidy at all times. Staff are prohibited from eating and drinking in areas frequented by clients. These standards and rules are set out in the staff handbook.

35 The emphasis on image and presentation has been an increasing priority for the Respondents' senior management in recent years, a trend which appears to be associated with a change in the ownership of the business some five or six years ago.

36 The Claimant was at all relevant times a member of the Group Training Department. As such, he was required when carrying out his duties to wear a black uniform of a particular brand bearing the company logo, and training shoes. The Respondents provided uniform free of charge. It was for staff members to place their orders as and when required. For trainers carrying out personal trainer work the regime was, it seems, somewhat more relaxed, but black kit was specified.

37 Until about 2018 the Claimant undertook, alongside his group training duties, a 'Master Trainer' role for two hours per week. For that work he was not required to wear the Group Training Department uniform.

38 Timekeeping was also seen by the Respondents as of critical importance. They operated a '15 minute rule', which required trainers to be in their studios ready to welcome members a quarter of an hour before the time scheduled for the

start of any group exercise class. The rule was not in doubt but, as we will explain, it appears that it was not always applied consistently.

39 The Respondents' emphasis on image and modernity was also reflected in their Music Brand Standards Policy, which stipulates that any music played in the club must have been produced and released in the last 18 months. To be clear, there is no bar on playing 'old' music: the requirement is simply that anything played must be a recent recording or a recent remix of an earlier recording. Mr Stewart, who has a background in the music industry, told us (witness statement, para 6):

> **Music production has advanced significantly and with time this has meant that songs that were produced years ago do not sound as good when played on new sound systems in comparison to new music which has been produced and designed to be played with the current technology. This is one of the reasons why we request that songs that are used are no older than 18 months old, to ensure that members of our clubs have the best listening experience which will feed into their overall experience.**

This evidence was not tested in cross-examination but we have no reason to doubt its accuracy.

40 The Claimant reported to Mr Pate, who in turn reported to Mr Darby. Mr Pate is white; Mr Darby is black. Both joined the Respondents in 2017. Both are many years younger than the Claimant.

The main narrative

41 Unfortunately, the Claimant was for a substantial period prone to breaching the Respondents' rules concerning staff presentation and behaviour, most notably those to do with uniform. Mr Pate spoke to him on the subject more than once but his intervention did not bring about any sustained improvement. Eventually, at a meeting on 26 July 2019, Mr Pate confronted him more directly about uniform and a separate matter and warned of possible disciplinary action in the event of recurrence (about which warning he complains in Allegation 5.1). The Claimant became bad-tempered and at one stage banged the table.

42 Following the meeting, on 5 August 2019, Mr Pate issued the Claimant with an 'improvement note', drawing attention to the behaviour which required to be improved and suggesting that he contact Ms Jenkinson, through whom uniform could be ordered as required. The improvement note does not amount under the Respondents' procedures to a disciplinary sanction. Rather, it serves as a 'shot across the bows'.

43 On 7 August the Claimant sent an email to Mr Pate in which he claimed that Mr Stewart had told him that he did not need to wear uniform. Mr Stewart may have passed some such comment at an earlier time about dress requirements for those conducting Master Trainer sessions. We do not accept that the Claimant was ever told (by Mr Stewart or anyone else) that he did not need to wear uniform for group exercise work. The rules for those giving group exercise classes were never in question. Mr Pate offered to assist the Claimant to order any kit that he required.

44 On 14 August the Claimant sent an email to Mr Pate saying that he needed tops. Mr Pate told the Claimant that he would pass the information on to Ms Jenkinson, who had responsibility for the uniform store and for placing external orders where necessary. We find it more likely than not that he did so. We also accept her evidence that she spoke to the Claimant directly on a number of occasions, attempting to encourage him to wear the uniform. We are not in a position to make a finding as to whether the Claimant had any or sufficient uniform tops. If he did not, we are quite satisfied that he knew very well that he only had to approach Ms Jenkinson in order to be provided with whatever he needed, either at once from from the club's store or, if necessary, following her placing an order with the relevant supplier.

45 The Claimant was seen appearing to commit further breaches of the Respondents' rules and standards and in consequence was invited to a further, informal meeting with Mr Pate on 2 October 2019. Allegations 4.1, 4.2, 5.2 and 5.3 concern this meeting. We find that Mr Pate and Mr Darby agreed that both should attend because of the somewhat hostile way in which the Claimant had responded to Mr Pate at the earlier meeting on 26 July. The Claimant was not told in advance that Mr Darby would be present. Mr Pate opened the meeting by explaining that he was going to raise some matters relating to the Claimant's conduct. The Claimant appeared not to be listening and was using his mobile phone. Mr Pate attempted to engage his attention whereupon he became bad-tempered and raised his voice. Mr Darby then intervened, warning him that he needed to calm down, failing which the meeting would be abandoned and he (Mr Darby) would then have to invite him to a separate meeting. Mr Darby meant, and the Claimant understood, that the separate meeting would be disciplinary. This had the effect of bringing the Claimant to order and the meeting proceeded without further incident.

46 In the course of the meeting Mr Pate at one stage remarked that it was important for trainers to be "fed and watered" before coming to work (see Allegation 4.2). The context was a discussion about the Claimant bringing a coffee into the studio, a practice not in keeping with the Respondents' rules and standards.

47 On 3 October 2019**,** Mr Pate issued the Claimant with a second improvement note (see Allegation 5.5) which drew attention to shortcomings in his performance discussed the day before, specifically in the areas of attendance and timekeeping (the Claimant had admitted two instances of lateness in the preceding fortnight), logging annual leave, and behaviour in exercise classes (in particular whistling, consuming food in the studios and leaving rubbish there after classes).

48 On 8 October 2019 (see Allegation 4.3) Mr Pate was walking around the club (it was his normal practice to carry out a 'pre-peak club tour') when he noticed the Claimant collecting a coffee from the fitness food bar a few minutes before he was due to take an exercise class. Mr Pate later sent him an email as a "gentle reminder" in light of the conversation of 2 October about taking food into the studios. The Claimant replied that he had not taken the coffee into the studio. Mr Pate wrote back: "That is fine. I am just saying what it looked like that's all …". He

accepted in evidence before us that he had not seen the Claimant consuming anything in the studio.

49 Also on 8 October Mr Pate sent another email to the Claimant, asking him to update his annual leave details on the IT system and offering help if that was required. The Claimant did not respond and Mr Pate renewed his request, and offer of help, on 22 October.

50 We do not accept the complaint (Allegation 4.4) that Mr Pate followed the Claimant around the club on 9 October, but we do find that he was keeping a close eye on him at that time, given the matters of concern which had been discussed the week before. As a consequence, he believed that the Claimant was continuing to arrive late to work. Accordingly, he instructed Mr Ben Woodall, Operations Manager, to carry out an investigation into his timekeeping. Mr Woodall was new to the business and had had no prior contact with the Claimant.

51 Mr Woodall duly investigated. He started the very day he was instructed (9 October) by speaking to the Claimant. The Claimant admitted being late for classes on six recent occasions[2]. He blamed travel delays. There were also two instances of non-attendance. Without consulting HR, Mr Woodall decided to instigate disciplinary action. The disciplinary exercise was eventually abandoned following advice from Ms Nugent (already mentioned) that the matters on which Mr Woodall was relying predated the meeting of 2 October on which the slate had been wiped clean, and that it would therefore be unfair to proceed.

52 The Claimant complains (Allegation 4.5) that Mr Woodall told him on 9 October that he was not allowed to be accompanied at the investigatory interview. We accept that account as true.

53 The Claimant also complained (Allegation 4.6) that he was placed under duress to sign the notes of the 9 October meeting. In his evidence he did not appear inclined to press this point. At all events, we do not accept that he was placed under duress. He wished to leave the meeting as soon as possible and so signed and left.

54 The Claimant's third claim based on the encounter with Mr Woodall on 9 October (Allegation 4.7) is that Mr Woodall told him that the timekeeping matter would be taken forward to a disciplinary hearing. We accept that he said that. We have already recounted the story of what followed.

55 Allegation 4.8 is a complaint that, on 10 October 2019, Mr Perry checked whether the Claimant had left the club building. On the poor evidence presented, we find that this allegation is not proved in fact.

56 On 22 October Mr Pate saw the Claimant purchasing a coffee some 10 minutes before his class was due to start and then sitting with a club member for a further five minutes. He wrote an email to the Claimant the same day, expressing

[2] 'Late' meaning that he was not in the studio with music on ready to welcome members at least 15 minutes before the class was scheduled to start.

disappointment and referring to the conversation of 2 October. The Claimant replied that he had "set up" his class in advance and that it had started on time. Mr Pate responded that the expectation was that the trainer would be in the studio 15 minutes before the class time, to welcome members as they arrived.

57 On 27 October the Claimant raised a grievance against Mr Pate concerning various events between 2 and 22 October and alleging bullying, harassment and, seemingly, age, race and sex discrimination. He said that he felt he was being "targeted" and that "this is reinforced when WP young enough to be my grandson talks to me as if I was something rotten on the bottom of his shoe." Mr Seb James, Fitness Manager of the Islington club, was asked to investigate. He did so, following which, by a letter of 16 December 2019, he dismissed the grievance but made a number of recommendations intended to reflect some of the concerns which the Claimant had raised. These included suggestions to "fine-tune" the procedure for ordering uniform and "update" the "15-minute rule". Mr James also recommended mediation as a possible means of rebuilding the relationship between the Claimant and Mr Pate. The Claimant's appeal was not successful but did result in one further recommendation. He did not take up the opportunity offered to him to pursue matters raised in the appeal through a fresh grievance procedure.

58 On 16 January 2020 Mr Darby, having formed the view that the Claimant was again breaching the Respondents' rules concerning uniform, sent an email to colleagues inviting their comments. Mr Pate and Ms Jenkinson responded with first-hand evidence appearing to support Mr Darby's perception. Mr Darby then asked Mr Woodall to carry out a fresh investigation (see Allegation 4.11).

59 Allegations 4.9 and 4.10 are both concerned with a meeting between Mr Pate and the Claimant on 28 January 2020. In the course of the meeting, Mr Pate informed the Claimant that a regular class which he was giving, 'Strong and Sculpted', was to be discontinued with effect from July of the same year and replaced by a 'brand signature' class.[3] The catalyst for this decision was a policy in implementation since around 2017 to reduce the large number of different group exercise classes and 'concepts' offered by the organisation and to limit those retained to 'signature' classes offered at all the clubs. The thinking was that this would ensure consistency and flexibility, so that members attending any of the clubs would be able to enjoy a class to which they were suited. 'Strong and Sculpted' was a popular and successful class which the Claimant had devised and which he alone delivered. It seems that at some earlier point there had been a discussion about the possibility of making 'Strong and Sculpted' a signature class but for one reason or another nothing had come of it. Pursuant to the policy, the number of 'concepts' on offer by the time of the hearing before us had been cut by more than 50%, from 87 to 38, resulting in a reduction in the range of classes offered by a number of other trainers besides the Claimant.

[3] The amended grounds of resistance, para 4.9 refer to a second class, 'LGA', but the Claimant did not press any complaint in respect of that. Mr Pate's unchallenged evidence was that the LGA classes were not discontinued.

60 Allegation 4.10 rests on a comment made by Mr Pate at the meeting on 28 January 2020 to the effect that the Claimant would need to engage with the timetable changes coming into effect in July since otherwise he would put himself in breach of his contract of employment, under which he was obliged to offer 13 classes per week.

61 Mr Woodall completed his investigation and concluded that there was a case for the Claimant to answer in relation to alleged breach of the rules concerning uniform. Accordingly, on 4 February 2020 the Claimant was invited to attend a disciplinary hearing to be held on 11 February to answer that charge (see Allegation 4.12). The Claimant did not attend. In the event, the Respondents did not proceed with the disciplinary case because Mr Pate reported that there had been some confusion about dates and the decision was taken to abandon the matter. That decision was communicated to the Claimant by Ms Nugent on or around 14 February. She intended to confirm it in an email of 25 February 2020 but unfortunately added to the confusion by referring to disciplinary proceedings about timekeeping rather than uniform.

62 The exchanges between Mr Pate and the Claimant in June and July 2020 concerning timetable changes were the subject of Allegation 4.13, by which the Claimant complaints that Mr Pate ignored his representations. We reject this on the facts. It is evident to us that Mr Pate went to considerable trouble to attempt to accommodate the Claimant's preferences. He needed, of course, to take account of the needs and interests of all affected staff.

Miscellaneous matters

63 The Claimant presented a second grievance on 27 September 2020 alleging that Mr Pate, Ms Jenkinson, Mr Darby and Mr Woodall were conspiring to cause him to be disciplined and to damage his reputation. Their behaviour was described as racist and ageist. The matter was entrusted to the Respondents' external HR consultant, Ms Leonie Goodman. By a report dated 22 December 2020 Ms Goodman dismissed the grievance, finding that the Claimant's allegations could not be substantiated and that there was no evidence of him having been treated less favourably than anyone else. She found that Mr Pate in particular had gone beyond what might reasonably have been expected in seeking to accommodate him. The Claimant did not accept Ms Goodman's decision but elected not to appeal against it.

64 On 5 October 2020 the Claimant transferred by agreement to the Respondents' Islington club and it appears that he makes no complaint about his treatment there. It seems that that club is better placed than the Soho club to offer him a timetable to his liking.

65 In relation to the Respondents' enforcement of the uniform rules the Claimant cites as a comparator Ms Alice Liveing. She has been described before us as performing a 'brand ambassador' role for the Respondents. We were told without challenge that she was at all material times self-employed and accordingly not governed by the rules applicable to employed staff. We accept the Claimant's

evidence that Ms Liveing was often to be seen around the Soho club and was conspicuous in not being turned out in uniform.

66 The Claimant also appeared to say that his case should be compared to that of Mr Adrien Lambert. Mr Lambert, who is white and many years younger than the Claimant, was on occasion in breach of the rules concerning uniform. He was taken up on the matter by Mr Pate and rectified his behaviour (it seems that there was a delay in the supply of uniform at one point, but no delay in placing the order).

Secondary Findings and Conclusions

Rationale for primary findings

67 In arriving at our primary findings we have had careful regard to all the evidence put before us. We have considered the coherence, internal consistency and general plausibility of the witness evidence. We have also attached particular importance to contemporary documents. We find that all witnesses were sincere and did their best to give us a true and unvarnished account of the facts. On certain points, we have been unable to accept evidence given by the Claimant. We think that on occasions his recall was less than perfect and it may be that strength of feeling has in one or two instances precluded a balanced perception of events.

Harassment

68 It is convenient to start by considering whether the acts on which the harassment claims rest were capable of satisfying the statutory test for harassment, regardless of whether they were "related to" any protected characteristic. We are prepared to proceed on the assumption that all conduct complained about of which the Claimant was aware at the relevant time was "unwanted".

Harassment – treatment capable in principle of constituting harassment?

69 Three of the complaints concerning the meeting of 2 October 2019, Allegations 4.1, 5.3 and 5.4, disclose no potentially arguable claim for harassment. It was not, and could not be, harassment for Mr Darby to attend the informal meeting. We accept that the Claimant may have been slightly surprised to see him present, but we cannot accept that he had a sense of being "ambushed". The purpose of the meeting was to do nothing more than to convey, in an informal setting, some concerns which his managers wished him to address. Mr Darby's intervention when the Claimant became somewhat heated was also, obviously, incapable of amounting to harassment. It was simply a proportionate exercise of authority to ensure that the meeting proceeded in an orderly and constructive manner.

70 As for the reference to "fed and watered" (Allegation 4.2), we prefer to consider this compendiously under the *"Harassment – treatment related to a*

protected characteristic?" heading below, because the Claimant here appears to complain of behaviour which was inherently offensive to him on cultural grounds.

71 Issuing the improvement note of 3 October 2019 to the Claimant (Allegation 5.5) was, in the circumstances, incapable of amounting to harassment. He had breached the rules and disregarded reminders. The gentle measure of an improvement note was entirely unobjectionable and the strong language of s26 wholly inapplicable.

72 Allegation 4.3 inevitably fails as an allegation of harassment on our primary findings. There was no treatment capable of amounting to harassment.

73 Allegation 4.4 suffers the same fate. There was no behaviour on the part of Mr Pate capable of amounting to harassment. He was simply keeping an eye on the Claimant who, over an extended period, had appeared to flout instructions given to him.

74 Two of the complaints concerning the meeting of 9 October 2019 with Mr Woodall, Allegations 4.5 and 4.6, also disclose no arguable complaint of harassment. The Claimant was quite properly told that he was not entitled to be accompanied at an investigatory meeting. And there was no possible harassment in relation to the notes: the Claimant simply signed them without discussion for his own reasons.

75 As to Allegation 4.7, Mr Woodall informing the Claimant that the case would proceed to a disciplinary hearing was, it seems to us, treatment which might be seen as having the effect of creating an intimidating or hostile environment for him. (There is no evidential basis for supposing that it had that purpose.)

76 Allegation 4.8 has fallen away on our primary findings. In any event, it is obviously incapable of supporting any complaint of harassment.

77 The same goes for Allegation 4.9. Mr Pate's communication to the Claimant of the news that the 'Strong and Sculpted' class was to be discontinued could not possibly constitute an act of harassment. The fact that the news was unwelcome could not make it such.

78 As to Allegation 4.10, we are satisfied that no remotely arguable complaint of harassment arises. Mr Pate was seeking to impress upon the Claimant the importance of him engaging with the conversation concerning the revised timetable to be introduced from July 2020. Whether or not his reference to the contract of employment was uncomfortably direct, it fell a long way short of conduct capable of satisfying the language of s26,

79 Allegation 4.11 discloses no possible complaint of harassment. It is concerned with a decision, taken on reasonable grounds, to initiate an investigation into further non-compliance by the Claimant with the rules concerning uniform. Such a decision, however unwelcome, was entirely permissible. In any event, it was a decision taken in private and not shared with the Claimant. As such,

it did not violate his dignity or create for him an environment capable of meeting the statutory test of harassment.

80 Allegation 4.12 is different. Being invited to attend an investigatory meeting to enquire into a disciplinary matter was treatment which was, in principle, capable of constituting harassment.

81 Allegation 4.13 is untenable as a complaint of harassment. Mr Pate's attempts to engage the Claimant on the subject of the revised timetable was self-evidently not an act of harassment. It was simply an ordinary, unobjectionable, managerial act. The second element of the allegation falls away on our primary findings. Mr Pate did not ignore or disregard the Claimant's preferences.

82 We have taken the harassment complaints largely in sequence. We now turn to Allegations 5.1 and 5.2, which we read (in the Claimant's favour) as extending over the entire period between July 2019 and February 2020. In so far as Allegation 5.1 complains that, in July 2019 and thereafter, Mr Pate attempted to prevail upon the Claimant to adhere to the uniform rules, no arguable complaint of harassment arises. Mr Pate was simply doing his job. His action, which was reasonable and proportionate, was necessitated by the Claimant's non-compliance. In so far as Allegation 5.2 raises the complaint, ventilated before us, of "collusion" and even a conspiracy between Mr Pate, Mr Darby, Ms Jenkinson and Mr Woodall to make allegations against the Claimant that he had breached the uniform rules, we are satisfied that the complaint is unfounded. There was no collusion or conspiracy. Mr Darby requested information from his colleagues and they supplied it. There was ample evidence of the Claimant's breaches (or apparent breaches). Generally, we are satisfied that the Claimant raises nothing in relation to the question of uniform about which any sensible complaint could be made, let alone any complaint of harassment.

Harassment – treatment related to a protected characteristic?

83 It may help to recapitulate. We have found that all complaints put as acts of harassment other than those under Allegations 4.2, 4.7 and 4.12 fail because, whether or not they identify "unwelcome" conduct, they do not disclose treatment capable of meeting the demanding language of s26. The next question is whether, if and in so far as treatment capable in principle of satisfying s26 is shown (or assumed), it was treatment "related to" either of the protected characteristics on which the Claimant relies. We will not perform the analysis in respect of those complaints which have already signally failed the harassment test. Here it is sufficient to say that there is in any event simply nothing that points to either relevant protected characteristic having had any connection with the treatment complained of. For reasons given below in relation to direct discrimination, we find that any detriment applied to the Claimant was not so applied 'because of' either of his relevant protected characteristics. There is no possible reason, in our view, to think otherwise in relation to the (failed) harassment claims.

84 Turning to Allegation 4.2, we have given very careful consideration to the evidence of the Claimant. In the end, it seems to us that his principal complaint

was not (as seemed initially to be suggested) that there was something culturally offensive to him, as a black man of Caribbean origin, in the words used, but rather that it was culturally offensive to him, as a black man of Caribbean origin in his sixties, to be instructed by someone less than half his age about when he should take food and drink. Whether or not our reading of his evidence is correct, we are very clear that the complaint of harassment cannot prevail. In the first place, it cannot sensibly be said to be "related to" race or age. If and to the extent that the Claimant finds the words used culturally offensive, that reaction by itself cannot create the necessary linkage. Further and in any event, Mr Pate's comment falls well short of the standard which the demanding language of the 2010 Act, s26 sets. The Claimant's dignity was not violated and the words used did not have a purpose or effect capable of being characterised by any of the five powerful statutory adjectives ("intimidating" etc). And if they did have such an effect, the Claimant's perception of it was a long way from being reasonable. It appears that, at root, he is offended by finding himself being given instructions by someone much younger than himself. He has no reasonable ground for that sentiment. The experience inevitably arises from time to time in any hierarchical organisation.

85 As for Allegation 4.7, we repeat what we have said above and below concerning the dearth of any evidence pointing to any link between the Claimant's protected characteristics and the treatment about which he complains. It is true that we have not had the benefit of hearing from Mr Woodall but we find nothing in the undisputed facts suggesting any nefarious purpose or agenda on his part. His conduct appears in keeping with that of the other central figures in the story. He may have jumped the gun somewhat in saying or implying on 9 October 2019 that the case would proceed to a disciplinary hearing, but whether or not he spoke out of turn or prematurely, there is in our view no reason to attach an unlawful motivation to his remark. On the face of it, it merely conveyed the unsurprising expectation of an investigator who had ample evidence that the matter under investigation disclosed a case to answer.

86 Whether or not the unwelcome conduct complained of in Allegation 4.12 was theoretically capable of grounding a complaint of harassment, it is plain and obvious to us that no unlawful motivation underlay it. The investigation of January and February 2020 again disclosed an arguable case of misconduct and that, self-evidently, was the reason for the invitation to the disciplinary hearing being issued. Again, we find no possible basis for inferring any link with either of the relevant protected characteristics.

Harassment – summary

87 For the reasons stated, all complaints of harassment are untenable. To the very limited extent that any act relied upon was in principle capable of sustaining a claim for harassment, it was not related to either of his relevant protected characteristics and accordingly cannot found a s26 claim.

Direct discrimination

88 The direct discrimination complaints (Allegations 5.1-5.5) are confined to the enforcement of the uniform policy and the meeting of 2 October 2019 and its immediate aftermath. We will consider them in turn, adopting a similar structure to our analysis of the harassment claims.

Direct discrimination – detrimental treatment?

89 We refer to, but will not repeat, our analysis above under the heading *Harassment – treatment capable in principle of constituting harassment?* We are mindful that the requirement for a detriment sets a much lower standard than the harassment provisions. Nonetheless, we arrive at the same conclusions here for substantially the reasons given in relation to harassment.

90 As we have said, in relation to the enforcement of the uniform policy (Allegations 5.1 and 5.2), the Claimant has simply no sensible grounds for complaining. It was no detriment for him to be visited with the (notably ineffectual) measures taken in order to prevail upon him to comply with the rules. If he has a sense of grievance on that score, it is not justified one.

91 Turning to the meeting of 2 October 2019 (Allegations 5.3-5.5), we find again no arguable detriment. Including Mr Darby in the meeting did not disadvantage the Claimant. Nor did Mr Darby's intervention at one point to bring him to order. And the improvement note issued the following day was likewise proper and entirely unobjectionable. Here too, if there is any real sense of grievance on the Claimant's part, it is unjustified.

Direct discrimination – less favourable treatment because of a protected characteristic?

92 The comparator relied on by the Claimant, Ms Liveing, is not a valid comparator. Her circumstances were not the same as his, or even similar. Quite simply, she was not an employee of the Respondents and it was not open to them to seek to control her behaviour as they could his.

93 The evidence concerning Mr Lambert is consistent with the Respondents' case. The difference in treatment as explained by the fact that Mr Lambert responded when spoken to about complying with the uniform rules. Unfortunately, the Claimant did not.

94 On the comparator material presented, we find that there is no basis for supposing that, in like circumstances, any employee not sharing one or other or both of the Claimant's relevant protected characteristics would in any respect have been treated more favourably than he was.

95 Where no 'like-for-like' comparator is shown, the authorities remind us that it is often best, rather than grappling with the concept of the hypothetical comparator, simply to ask the question why the Claimant was treated as he was. Addressing

that question, we have considered whether there is any aspect of the story which we have explored, or any background material, tending to support the Claimant's theory that the Respondents' treatment of him may have been in any way materially influenced by considerations of race and/or age. In our judgment there is none. The Respondents' treatment of the Claimant is consistent with, and explained by, the events as they unfolded. That treatment involved errors at various points but we see nothing in the errors suggestive of an unlawful motivation. As for wider evidence, the difficulty for the Claimant is that there is nothing before us that points to black or older employees of the Respondents suffering disadvantageous treatment or any other trend or practice suggestive of a discriminatory culture at work.

96 We can well understand why the Claimant sees himself as, in some respects, a marginal figure in the workplace. Racially, he is in a minority (we understand that this is not in question although we do not have ethnicity distribution figures). And in terms of age he is, without question, exceptional, performing at a very high level alongside peers many or most of whom are half his age or younger. But these facts by themselves, although they may lead to or reinforce a sense of isolation, do not serve to support a theory of discrimination.

Direct discrimination – summary

97 For the reasons stated, we find that none of the alleged detriments is made out and that, in any event, there is no ground for inferring that any act about which he complains was done because of (that is to say, was materially influenced by) his race and/or age. It follows that the direct discrimination claims must be rejected.

Indirect discrimination

98 The relevant 'provision, criterion or practice' ('PCP') was the Music Brand Standards Policy.

99 Did application of the policy put the Claimant, and those with whom he shared his relevant protected characteristics at a particular disadvantage in comparison with persons who did not share those characteristics? It seems to us on the scant information supplied that the Claimant fails to make out this two-part element of the statutory test. We have no information as to the amount and range of music newly recorded or released as a re-mix in any rolling 18-month period. We also have no information (statistical or otherwise) concerning the musical preferences of persons sharing the Claimant's personal characteristics of race and age. And we have precious little information as to the Claimant's own musical tastes. He tells us only that he does not go clubbing, does not listen to Capital Radio or Radio One and leans towards music "affected by" his "race, preference and exposure." In the circumstances, we find it impossible to make an assessment as to whether those who share the Claimant's personal characteristics are put at a particular disadvantage by the policy or whether he is put at such a disadvantage. It is for the Claimant to establish the discriminatory effect of the PCP. He fails to do so and the indirect discrimination claim is accordingly unsustainable.

100 Had our analysis up to this point been favourable to the Claimant, his complaint of indirect discrimination would in any event have failed on the ground that the policy constituted a proportionate means of achieving a legitimate aim. We are satisfied that the Respondents had the aim of providing in their clubs the latest and best music production technology in order to enhance the experience of their members. We are further satisfied that the policy served that aim in a proportionate way.

101 As to the aim, we bear in mind (as perhaps the Claimant did not) that the music played in the Respondents' studios is rightly intended to enhance the pleasure and satisfaction of members receiving fitness training. It is not intended to serve as a fringe benefit for employees. Subject to reasonable limits, it must be for an employer striving for market share in a competitive, public-facing industry to decide on its own style and image and to make its own judgements as to how to provide its members with an experience most likely to appeal to them. It would not help for us to debate here how eccentric an aim would have to be before it ceased to be 'legitimate' for the purposes of the 2010 Act, s19(2)(d). The Respondents plainly make out the legitimacy of the aim on which they rely.

102 As to the means, we accept the technical justification for the policy offered by Mr Stewart (see our primary findings above), namely the fact that recent recordings and re-mixes played on the latest sound systems ensure high levels of sound quality which older releases played on the same systems cannot match. Given that the policy does not exclude 'old' music but only older releases, the Respondents clearly demonstrate that the policy is proportionate.

103 For all of these reasons, the complaint of indirect discrimination is also unsustainable and must be dismissed.

Jurisdiction – time

104 Our reasoning thus far that all claims fail faces us with a new question. Given that there has been no unlawful treatment of the Claimant it necessarily follows that there has not been any unlawful 'conduct extending over a period' and accordingly the 2010 Act, s123(3)(a) cannot operate to bring any claim presented outside the primary three-month period (as extended by the early conciliation provisions) within time. The necessary consequence is that all claims other than that contained in Allegation 4.13 and the indirect discrimination complaint are out of time. That is subject to the Tribunal's power to substitute for the three-month period some longer period. But it would be idle to consider taking that course in circumstances where all claims are found to be without merit.

105 It follows that all claims apart from that under Allegation 4.13 and the indirect discrimination complaint fail on the further ground that they were presented out of time and the Tribunal has no jurisdiction to consider them.

Outcome and Postscript

106 For the reasons given, the claims are dismissed.

107 We would not wish to leave this case without saying that it is one which we have heard with regret. It is sad that the Claimant, at a late stage in his illustrious career, should find himself expending great emotional energy on recriminations and bitterness. We cannot help thinking that he would have benefited from reflecting a little more on his own conduct and the impression which that conduct had upon those around him and those responsible for managing him. We regret the serious allegations which he has made and been unable to defend.

108 The Respondents should also learn lessons from this unhappy story. If they do not, they must expect this experience to repeat itself. They should reflect on the evident need for much better equality and diversity training and general managerial training, better processes for handling disciplinary and quasi-disciplinary situations and better communication with those involved in such processes.

109 Despite these observations, we are glad that the Claimant appears to be well settled at the Islington club and is, as we would expect, being appreciated for the skill and experience which he brings to his work and taking justified satisfaction from it.

110 Finally, we wish to thank Mr Perry for his assistance on behalf of the Respondent's and to pay particular tribute to Ms Aarons for her conscientious and dedicated representation of the Claimant.

Employment Judge Snelson

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20th Dec 2021

Judgment entered in the Register and copies sent to the parties on …20/12/2021……

For Office of the Tribunals