Case No: 2203027/19

EMPLOYMENT TRIBUNALS

Claimant: **Mr K. Osafo-Agyare**
Respondents: **Lloyds Bank plc**

London Central (CVP)

Employment Judge Goodman
Mr D. Clay
Ms N. Christofi

17- 19 January 2022
in chambers 20 January

Representation
Claimant: Mr R. Clement, counsel
Respondent : Mr S. Butler, counsel

JUDGEMEMT

1. The unfair dismissal claim succeeds. The respondent is ordered to pay the claimant a basic award of £2,362.50 and a compensatory award of £82,056.

2. The recoupment provisions apply.

3. The race discrimination claim fails

4. The race harassment claim fails

REASONS

1. The claimant's employment in the respondent's commercial banking arm ended on 14 April 2019. He had been selected for redundancy in July 2018, and no further alternative employment was available. On 15 August 2019 he presented claims to the employment tribunal for unfair dismissal, race harassment and race discrimination.

2. The harassment claim concerns a remark made in July 2018. The discriminatory treatment alleged consists of the selection decision

announced in July 2018, the remark also alleged as harassment, and the dismissal in April 2019. The respondent asserts that the claims arising from matters preceding the termination of employment are out of time.

Evidence

3. To decide the claims we heard live evidence on liability and remedy from:

Kwabenga (Kibbs) Osafo-Agyare, claimant
Jayne Melling, Senior Manager in the Finance Division, the claimant's line manager
Andrew Myson, the Head of Product Control and IPV, Ms Melling's manager, who made selection decisions
Ian Callaghan, Finance Director for Product Control and IPV, attended the selection review meeting in June 2018,
Jacques van Zijl, senior manager Valuation Methodology and Prudential Valuations, and the maker of the alleged remark
Stuart Haycock, Head of Finance for SME and Mid Corporates, who heard a post dismissal grievance

4. There was a 469 page hearing bundle. Unfortunately, the witness statements all referred to the hard copy pagination, which being full of inserts did not align in any predictable way with the pdf numbering; this difficulty was ameliorated by a hyperlinked bundle index and by intelligent and diligent bookmarking of the documents bundle.

Conduct of the Hearing

5. This was a remote hearing, to which the public had access. Bundles and witness statements were available to the public during the hearing on email request to the respondent's solicitors.

6. We heard evidence on the first two days. Each side made an oral submission on the morning of the third day, and judgment was then reserved. Both parties had provided written skeleton arguments at the outset of the hearing.

7. To decide this claim we have heard evidence about a number of comparators and other candidates for redundancy. Their names were used in the hearing, but in this written decision which will be available online, they are referred to by code. They have not participated in proceedings, and it is not necessary for public understanding of how and why this case has been decided to identify them other than by relevant characteristics. This limited anonymity will protect their privacy.

Findings of Fact

8. The respondent is the UK's largest retail bank. In 2018 there were just under 65,000 employees.

9. The claimant worked in the commercial banking finance division. He is a qualified management accountant, with a BSc degree in mathematics and computing, an MSc in mathematical trading and finance, and a postgraduate diploma in accounting and finance. Before joining the respondent he had worked for a series of financial institutions in valuation risk. His career has included Product Control and independent price verification (IPV) in credit and fixed income, equity and rates and derivatives. He started work for the respondent on 3 August 2015 as IPV manager for equities within the Product Control and IPV team. In December 2015 his contract was made permanent. By 2018 he earned £70,382 per annum and was in his late forties.

10. By the start of 2018, when the disputed events took place, the claimant worked in one of four teams under Andrew Myson, then head of product control and IPV. The Product Control and IPV team as a whole was responsible for independent price and valuation controls of trading books and products, and some regulatory returns. The four teams within it respectively looked after rates, foreign exchange, credit products and central governance. The claimant worked in central governance, and was responsible for looking after IPV by checking the front-office valuation of the equity book, including checking the financial data that supported the valuations. A quarterly return had to be produced. Lulls in work at other times meant he was sometimes available to help on other governance tasks. The claimant was a manager (band E) and reported to Jayne Melling, senior manager (band F), who in turn reported to Mr Myson, (Band G), who reported to Ian Callaghan.

Redundancy Selection

11. The 2018 restructure affected 55 staff and was designed to save costs by moving most processing work out of London, in this case to Edinburgh. There was to be a reduction of 24 roles in the Commercial Banking Finance team, but 18 new roles in London in the new structure, in technical business partnering, IPV and methodology. There were to be four IPV manager band E roles, two IPV methodology Band E roles, and one IPV assistant manager at band D.

12. The plans were presented to the staff by Mr Callaghan, finance director, on 17 April 2018. Altogether 15 band E product control/IPV/methodology employees were placed into the selection pool. They were told they could apply for up to three roles in the new structure, at the same level as their existing roles – it was not an

opportunity for promotion – and advised that decisions would be made on the basis of 40% of marks for their previous year's performance review rating, and 60% scored from a candidate profile form which they were to complete themselves for the purpose.

13. At the time, the claimant's 2017 performance rating was "good", the middle rating of three. After discussion with his line manager in January and February 2018 he had decided to agree the overall mark, despite disputing some of the assessment of the individual topics aggregated to produce the overall rating.

14. Candidate profiles had to be submitted by 8 May 2018. Line managers encouraged their reports in one to one meetings to fill them in. As described by Ms Melling, they checked that all the questions had been answered, but did not check the quality of the answers given.

15. The claimant applied for 2 Band E jobs in the new structure, one as IPV manager, the other IPV Methodology Manager. He understood the new posts would be generic across asset classes, and considered that he had sufficient broad experience. He decided, after weighing up the competition, that he was unlikely to be suitable for a third post.

16. Once the profiles were submitted, marks were assigned to each candidate. An aggregate score was given for the performance rating, and they did not drill into the detail. If the claimant had attained the higher rating in 2017, he would have been given an extra 4 marks. In fact all but 2 of the candidates had 'good' ratings, like the claimant, and were given 24 points for that.

17. A more senior manager scored the candidate profiles against five headings: specialist knowledge, self-organisation, analytical skills, organisational awareness and environmental awareness. In each case the markers looked for detail of a specific task or situation where the candidate considered he had demonstrated that skill. Mr Myson scored the claimant, and others in his chain of command, which included all the named comparators. He was relatively new to the team. He said he did not know individuals well. Others were scored by Jatinder Nayyar, head of Finance, and James Oliver, Head of Finance for Business Partnering.

18. Some of the claimant's answers in his candidate profile were considered too generic, and not to show specific examples of situations where he had demonstrated the qualities described. This gave him fewer marks.

19. In the course of the case the claimant identified 8 individuals whose treatment should be compared with his, recorded here as comparators A B, C, D, E and F. In the hearing, this had been cut to

comparators C. D. E and F. The claimant is black British. Comparator C is white British, D is white Scottish and F was identified as Indian. Of the discarded comparators, A is white-other, B as Algerian Arab and G of Chinese ethnicity. We have no other information about the ethnic composition of the workforce generally or commercial banking in particular.

20. Of the candidates for the four jobs going for IPV Manager, offers were to be made to candidates who had scored 62.4, 61.6, 67.2, and 60. This includes comparator F, who scored 61.6. For the two Methodology manager roles, offers were made to candidates scoring 74.4 and 64.8.

21. Comparator F had scored 61.6 for the IPV manager role, so was to be offered it, but as he had indicated a preference for voluntary redundancy, it was necessary to identify a runner up as well. As in the event F did choose to go on voluntary redundancy, it is important to examine who was the successful runner up, as it was not X, or the claimant, but candidate C, who was in due course offered the job.

22. Of the unsuccessful IPV manager candidates, the scores (starting at the bottom) were 40.8, 48, 50.4 (comparator C), 52.28 (the claimant) and 55.2, who we will call X, about whom nothing is known save that according to the chart he was one of the very few who was interested in voluntary redundancy.

23. On 12 June there was a “wash up meeting”, intended to compare the scores across the board, and to ensure the process was “robust and fair”, to use Ian Callaghan’s words. He attended as well as two people from HR, the three managers who had scored the candidates, and two others responsible for the overall structure. Ian Callaghan did not look at the detail of anyone’s scores.

24. We were told that when it came to discussing the runner up for IPV manager, Mr Myson told the meeting that he had been informed by candidate C’s line manager, Mr Gavin, that candidate C had been very short of time when it came to preparing his candidate profile, as at the time, in addition to his own duties which involved daily regulatory reporting, he had been covering for a colleague who was on jury service, and the jury service was extended unexpectedly for an extra week. It was suggested that as a result he had not done himself justice. The minutes of the wash-up meeting show discussion of candidate C, but no discussion of the claimant. We were also told that candidate C was not re-scored, he was simply preferred to the claimant.

25. When this was explored in evidence, we were told that the claimant’s experience was limited to equities, while the others had extensive skills in asset classes which would remain relevant in future while the

equity book was being run down.

26. The claimant had a further objection on the scoring for answers in the category “environmental awareness”. The respondent, the claimant, and most candidates understood this to mean being aware of developments in the financial world which might affect their work. Candidate E’s answer shows that he had understood this to mean what could loosely be called “green” issues, as the example he gave was that in a recent LIBOR meeting he had taken steps to ensure that documents were not printed out, so saving paper. Asked about this in the hearing, we were told that LIBOR was a live issue for banks, and candidate E had mentioned LIBOR. So he had demonstrated he was aware of this as an environmental issue. (LIBOR is the London interbank offered rate, a way of estimating interest rates, which for many years relied on City banks to state what rate they would be prepared to offer when lending money to each other, always a hypothetical exercise; after the financial crisis of 2008 it has emerged that there was collusion between banks in setting that rate, so as a measure of the state of the market and soundness of the banks’ credit, it understated the credit worthiness of banks and was not useful; the process was later altered and heavily regulated). Candidate E had been given 3 points for this answer, while the claimant got 2 for his, which listed alerts he had reviewed and specific projects. We were told that zero was not an option - if someone actually answered a question the mark should be 1. Potentially, candidate E’s score should, according to the claimant, have been at least 1 point lower than it was, so a total of 61.4, which would still jave left him with a job offer.

27. On 2 July the claimant was told at a meeting with Mr Myson and Ms Melling that he had been unsuccessful. He was encouraged to use the respondent’s internal job vacancy website, and provided with support for external applications. In the event the claimant made full use of the internal job vacancy system, and did not apply externally. There is no complaint about arrangements for finding suitable alternative vacancies.

“Be kind to the Africans”

28. Shortly after this – the exact date is not given but it was in the latter half of July – the claimant says that he was working in the open plan office one day when he heard Jacques Van Zijl, who is white South African, a senior manager in another team reporting to Ian Callaghan, standing about 8 metres away, and shouting out: “be kind to the African, why should I be kind to the African”. The claimant says this episode was witnessed by two colleagues, GR and CB, and he met the eyes of one of them, but otherwise made no comment at the time. He did not speak to Jacques Van Zijl about it, nor make a complaint, formal or informal, indeed he did not mention it to anyone until after

his employment had ended.

29. Mr Van Zijl, when first told about this, after tribunal proceedings had begun, denied the remark. He has no recollection of any such words being uttered.

30. We heard in evidence that the claimant and Mr Van Zijl had been on friendly terms hitherto. They had attended an art exhibition together and sometimes went for drinks. Mr Van Zijl said the first he heard of it was when these proceedings were served. The named witnesses told the respondent in a grievance investigation that they had no recollection of this remark, one of them adding however that it would have been out of character for the claimant to have invented it.

31. We have to find as a fact whether or not the remark was made. Bearing in mind that the claimant has impressed us as a careful witness, we conclude that he heard some such words, but note that there is no evidence at all from him or others of what they meant or the context in which they were uttered.

Earlier Encounters with Ian Callaghan

32. There were two earlier matters which have caused the claimant concern and made him think he may have been singled out for poor treatment by his managers, Ian Callaghan in particular.

33. The first of these concerned the 5% pay rise he had understood he was to receive when he made a lateral transfer to his job in May 2017. His understanding was confirmed by the head of Finance on 26 April, but when it came to pay day, he did not get the rise. He did not get it in the end of June payroll either. The emails show that Ian Callaghan had in fact approved it on 12 June, but there was some administrative hitch. On discovering he had not been paid the increase again, the claimant wrote an email to Mr Callaghan on 30 June, headed: “apologies as my behaviour has caused some discord”, saying, “in any event despite what I’ve negotiated and implied commitment with Brendan, recent comments indicate public policies and lateral moves are not what they seem”, adding that Mr Callaghan no doubt had more important things to deal with. He added: “I have obviously erred significantly but had not realised. A short while later he said: ”I know I am low in pecking order, but the team requires a good mix and blend of levels. It’s nothing intriguing, however if someone said the same to me I might wonder what it is they thought they’d done wrong? I felt ignored and things have changed somewhat in Brendan’s absence – I’ve worked for him on two separate occasions successfully”. On the claimant’s evidence, he wrote like this because when he raised the issue of the May pay packet , Mr Callaghan’s manner was challenging, saying “you want a pay rise, do you?”. Ian Callaghan himself found this communication

baffling and asked Jayne Melling if she knew what it was about. She replied that he was probably talking about his pay rise which "seems to be stuck in limbo", adding that no one had told him he would not be getting the pay rise; he had done the handovers and was up to speed on everything. She was disturbed by the way the emails were written: "if it is about his pay rise why not simply say".

34. In the event, Mr Callaghan saw the claimant the next working day, and on 4 July his PA confirmed to all concerned that it had now gone through and would be backdated. It did and it was.

35. The second episode involving Mr Callaghan was in November 2017. The claimant was taking the respondent's online training in mental health. He was concerned about a slide in the training pack which identified higher rates of mental health disorders in particular groups in society, specifically disabled people and those with long-term health conditions, black and minority ethnic groups, and LGBT people. The claimant expressed concern in writing that this might lead to miseducation or misdirection, as there were other groups, not black, which might have high rates of mental health disorder, such as working classes in deprived areas, or drug abuse and alcoholism in certain Scottish communities. Identifying ethnic minority groups in this way might lead to "counter-productive reactions", and he added a link to an article In the Independent. He also wrote direct to Ian Callaghan saying he found the first question on the topic "quite raw"; it was not right to say that minority groups on one side and the other 3 in 4 on the other. More subtlety was necessary, and he would like to get involved in shaping this.

36. Mr Callaghan contacted him straightaway ,that he was happy to chat through his thoughts on this, and would find out if there was a mechanism for feedback, he was sure the last thing the authors of the training wanted was to get off on the wrong foot. A meeting was arranged for the claimant to discuss the topic within a more senior manager. Mr Callaghan says that as far as he was concerned the issue was then closed.

Events from Selection for Redundancy to Dismissal

37. In August 2018 the claimant handed over his IPV Equity duties to Phil Goldsmith, a more senior manager, who was also displaced and left after a year. The claimant sought to say that this indicated his job was not redundant, as the plan was to hand IPV Equity duties over to the new IPV managers. The respondent says Mr Goldsmith was largely there to project manage the move to Edinburgh, and the claimant's remaining duties were a small part of this. The evidence, not realistically disputed by the claimant, was that the bank's equity holdings had increased following the financial crisis, because as businesses defaulted on their bank loans, the bank stepped in to take

equity in place of the loan to ease the crisis, but was slowly running down the equity book. In closing, the claimant no longer argued that there was not a redundancy situation, just that the selection process was unfair.

38. Soon after, he had a meeting with Mr Callaghan as he left the team, at which, he says, Ian Callaghan said he had done something wrong. The claimant has puzzled over this remark and what it meant about selection. Mr Callaghan simply denies it – it was a goodbye and good luck meeting rather than an exit interview, ad he did not think the claimant had done anything wrong. In our finding the claimant has misheard, or misremembered what had been said about the missing pay rise 18 months earlier, and the meeting was bland.

39. The claimant worked the next six months on secondment in the credit risk department. Despite several applications for further internal vacancies, in one of which he was one of the last two, he could not find a vacancy to follow that. Having been given notice on 22 February 2019 his employment ended on 19 April.

Appeal as Grievance

40. Both in the letter of July 2018 telling him he was redundant, and in the notice letter of February 2019, the claimant was offered the opportunity to appeal the decision in 14 days. He had not done so. Now he did appeal. In a letter of 2 May 2018 he complained his post was not in fact redundant, as someone was still doing the work, equities having been removed from the new team. He added that he hoped the reasons for dismissal were not discriminatory. He pointed out he had a broad skillset making him better placed than other candidates for a generic IPV job. He then stated that his dismissal was because he was considered to have done something wrong, which he thought must be his having raised the missing pay rise in 2017, and then described the “be kind to the African” episode.

41. Stuart Haycock was appointed to investigate. He interviewed first the claimant, who added the mental health episode to his background of concern, and that he understood that 40% of the marks were down to managerial discretion.

42. Then he saw Andrew Myson, Ian Callaghan, Ciaran Brodrick and Gordon Redmond. He did not interview Jacques van Zijl himself, he said, because he was advised to find out whether the witnesses remembered anything untoward before raising it. As a result, the first Jacque van Zijl knew of the allegation was in the course of these proceedings.
43. Andrew Myson said he had explained to the claimant that he had scored lower on his candidate profile because he had not given tangible examples of working effectively, and that he could describe

theoretical situations but have not given examples of situations in which he himself had demonstrated skills required. Andrew Myson also volunteered "for full disclosure" that at the wash-up meeting they had considered individual mitigating circumstances. None were identified for the claimant, but "it was acknowledged one colleague's application was completed whilst also performing their role in the period of particularly abnormal resource constraint in their team and this was considered during the scoring".

44. The effect of this on scoring or outcomes was not explored by Mr Haycock. The colleague and the result seem not to have been discussed, nor the relative scoring of successful and unsuccessful candidates. The claimant himself was not aware of any scores until disclosure of documents in the course of these proceedings. So he could only rase general points about what he saw as unfair.

45. On 12 July the claimant was informed by letter that the appeal did not succeed. There was no evidence of discrimination in candidate selection or scoring. There was no allowance for managerial discretion. It had been appropriate to include equities in the restructure and it had materially changed in the restructure. He did not understand Mr Callaghan to have been discriminatory, nor did he think the controls of the selection process allowed this to have an impact on the selection decision. On the remark alleged to have been made by Jacques van Zijl, no one remembered it, and in any case a one off incident did not indicate a culture of discrimination, and even if it did that had not tainted the selection process.

Relevant Law - Unfair Dismissal

46. Section 98 of the Employment Rights Act 1996 provides the following as potentially fair reasons for dismissal: conduct, capability, statutory obligation, redundancy, or "some other substantial reason justifying dismissal". It is for the employer to establish the reason for dismissal.

47. If a potentially fair reason is shown by the employer, section 98 (4) provides that it is the employment tribunal to determine:

> "whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (which)
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case".

48. The tribunal must not substitute its own view for that of the employer, provided the employer's action was within the range of responses of a

reasonable employer, and this principle applies both to findings on whether the decision itself was reasonable, and on whether the process adopted was reasonable – **Foley v Post Office (2000) IR LR 82,** and **Sainsbury's Supermarkets Ltd v Hitt (2002) EWCA Civ 1588.**

49. Where a dismissal is found unfair because of shortcomings in the process by which the decision was reached, when it comes to remedy, the tribunal can consider what difference a fair procedure would have made to the outcome – **Polkey v AE Dayton Services Ltd (1988) AC 344**.

50. A dismissal by reason of redundancy is defined in section 139 of the Employment Rights Act as where:

> the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
>
> have ceased or diminished or are expected to cease or diminish

51. In redundancy cases, a tribunal may, in relation to the fairness issue, consider the pool of employees considered for redundancy, how the criteria for selection for redundancy within that pool are identified and applied, how employees are consulted about redundancy, and what consideration is given to alternative employment, but should remember not to decide for itself whether an alternative would have been fairer, but only whether the employer's decisions were within the range of conduct of a reasonable employer – **Williams v Compair Maxam Ltd (1982) IRLR 83**. In **Amazon .co.uk Ltd v Hurdus UKEAT/0377/10RN**, tribunals were reminded not to interfere with a selection system that is within the range of reasonable responses. On alternative work, an employer is generally obliged to take reasonable. When deciding the reasonableness of selection decisions, the respondent invited us to consider **British Aerospace v Green (1995) ICR 1006** which concerned whether the assessments of all successful candidates for redundancy should be disclosed, holding they did not, unless there were particulars given suggesting disclosure was required, and in turn cites **Eaton Ltd v King (1995) IRLR 75** to the effect that provided the employer's process of assessment was carried out "honestly and reasonably", with a "good system of selection, reasonably administered" it was not necessary to examine the markings of each and every individual.

Relevant Law - Discrimination

52. Section 13(1) of the Equality Act defines direct discrimination**:**

> 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.

53. Deciding what is 'less favourable' involves a comparison, and by section 23 (1):

> On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

54. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> (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.

55. How this is to operate is discussed in **Igen v Wong (2005) ICR 931.** The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts proved by a claimant. If inferences tending to show discrimination can be drawn from those facts, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts required to prove any explanation are in the hands of the respondent.

56. The process is not easy. Tribunals must focus on the reason why the claimant was treated as he was, recognising that construction of a hypothetical comparator is done as an aid to identifying the reason for the treatment - **Shamoon v Royal Ulster Constabulary (2003) ICR 337. Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519**, explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88 -** but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

57. Among the factors from which we can draw inferences, are statistical

material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR642**, where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. Omissions and inaccuracies could be factors indicating discrimination -**Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519**.

58. The fact that an employer has acted unfairly or unreasonably does not of itself infer discrimination: **Glasgow City Council v Zafar (1998) ICR 120.** Further, there may be unjustified reasons for an employer's actions, but if the tribunal accepts that these were the genuine reasons, and those reasons would have been applied to someone not sharing the claimant's protected characteristic, discrimination cannot be inferred from that**: Bahl v Law Society (2004) EWCA Civ 1070.**

Harassment

59. Harassment is defined in section 26 of the Equality Actas where "(1) (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.

    Section 26(4) provides that "in deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—(a)the perception of B; (b)the other circumstances of the case; (c)whether it is reasonable for the conduct to have that effect

Jurisdiction

60. Claims under the Equality Act must, by section 123, be presented to the employment tribunal of the date of the act complained of, or within as the tribunal considers just and reasonable. Where conduct extends over a period, time runs from the end of that period. Case law makes clear that tribunals must distinguish between a single act which has ongoing consequences, which is not a course of conduct, and a true course of conduct.

61. If the claim is out of time, and the tribunal is considering whether to exercise its discretion to extend time, they were invited in **British Coal Corporation v Keeble (1997) IRLR 336** to consider the factors in the Limitation Act relevant to personal injury claims as 'illuminating'. In **Abertawe Bro Morgannwg University Local Health Board v Morgan EWCA Civ 640** it was emphasised that the tribunal's discretion is very wide; it need not consider all the **Keeble** factors as a checklist, but should usually consider the length of the delay, the reasons for it, and whether delay has prejudiced the respondent. In **Adediji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23**, tribunals were enjoined not to take a checklist approach.

Discussion and Conclusions
Harassment

62. In our finding the claimant did hear remarks to the effect "why should I be kind to the African". On the evidence, we cannot find that these remarks had the purpose of creating an intimidating hostile degrading humiliating or offensive environment for the claimant. There was nothing in the relationship with the speaker, before or after, to suggest that this would have been his purpose.

63. We go on to consider whether they had that effect. It is by no means clear that the claimant himself considered they were offensive or hostile at the time. On his own account, he met a colleague's eyes, but that is all, and this could have been just because he was loud. He did not speak to anyone about it, and we know that he had spoken to others before raising the mental health awareness slide. He had already been selected for redundancy, so had little to lose, though we appreciate he might have not wanted to rock the boat while hopeful of alternative employment. An assessment of whether, objectively, these words had that effect, in all the circumstances, is very difficult, almost impossible, because we know nothing of the context. We do not know what the speaker was talking about, or who he was talking to, what remark preceded it, or what followed. He could, as the claimant suggests, have been talking about the claimant, as the only person of African origin around. But he could have been talking about foreign aid, and whether charity begins at home. He could have been talking about African art objects or art dealers (he had an extensive collection), or about travel, and he was well-travelled. In our finding, harassment is not established.

64. Even if we were wrong about that, given that the claim was brought more than 12 months after the event, we would not consider it just and equitable to extend time, for the following reasons. The claimant did not mention the incident to anyone until May 2019, more than 10 months after the event. When he did, neither of the eyewitnesses he mentioned could recall anything. The reason for the delay appears to be that he did not want to upset anyone while he was still precariously looking for alternative employment within the bank. We can credit that, and we do not think that the failure to report the incident at the time means that he has made it up or that it did not happen. What the delay does mean is that it is extremely difficult to find out what did happen, and more particularly the context. As a result the respondent is prejudiced. They have no contemporary written record or statements, which might have been a basis for a defence out of time. The lay members are critical of the respondent for not asking Mr van Zejl for his version at the time, when they preferred to find out what the witnesses recalled before approaching him, but agree that what he would have said if asked in May or June 2019 is unlikely to have differed from what he said when asked in August or September, which was that he had recollection at all of a conversation with unknown persons in July 2018. Human memory is fallible, and so might be the claimant's. He does not have a contemporary note of his own, and he had had a long time to mull it over. The delay has

caused substantial prejudice to the respondent seeking to the defend the claim, and taking into account the length and reasons for the delay, means it is not just or equitable to extend time.

Unfair Dismissal

65. The claimant does not dispute there was a redundancy situation, as defined by statute. Nor is it disputed there was an appropriate pool, nor that the criteria used were reasonable. There is no challenge to consultation of employees before or after the decision, nor to arrangements for finding suitable alternative vacancies. The claimant's case is that he was undermarked, and then that candidate C was preferred to him as the runner-up, who eventually got the job, despite having lower marks.

66. On whether he was undermarked, we have no evidence that he should have had better marks for his answers compared to others – we were not taken in detail to any of the other answers save candidate E's on environmental awareness. The scoring system had its imperfections, as this answer shows – it was absurd to say that as the saving of paper occurred at a LIBOR meeting he had demonstrated awareness of LIBOR regulation as a relevant part of the bank's operating environment - but we were not taken to other wild scoring, and broadly it was a reasonable way to select from a group of people who were all rated good (two better) employees.

67. What caused us concern was the treatment at the wash-up meeting of candidate C's ranking. We had very little explanation of why this was done. Mr Myson could not remember whether he heard from candidate C's line manager about his time constraints before or after he marked his score. If it was before, it might be thought he would make an allowance at that stage, in which case it should not be applied again at wash-up. If he heard about it between scoring and wash-up, it caused us concern that he did not know much about the individuals (as he was new) and relied on the line manager for the information about whether someone's score did them justice. The evidence was clear that the meeting did not review C's actual scores, let alone consider the claimant's score. We have looked at C's scores: they are succinct, but not inadequate, and cover relevant detail, for example on the environment question. In this hearing it was said those in the meeting considered equities to be running down and that they needed C's skills. But the scoring system already asked about skills, and the claimant had them; in any case the new posts were to cover all asset classes. Finally, as the claimant has argued, candidate F himself did not have IPV experience, suggesting they did indeed look for generic skills, not specific ones.

68. It was only in re-examination of Mr Myson that he was asked to look at the results tables again and to confirm that candidate X, hitherto unmentioned, had scored more that the claimant and still been beaten by candidate C. The placing of candidate X does not feature in the minutes of the wash-up meeting, or in the respondent's witness statements. In answers to cross examination they had acknowledged

the claimant would have been runner-up if candidate C had not been preferred, which prompted them being taken to the scores table in re-examination. Because of the way this came out we know next to nothing about candidate X. We assume he was not black, or more attention might have been paid by the parties to his position. We do see from the results chart (which shows an IPV manager role being offered to candidate F), that candidate X, like candidate F, was one of the few who had expressed an interest in voluntary redundancy. In the absence of any other information, it may well be that the wash-up meeting knew or assumed that candidate X would be taking voluntary redundancy, as was known or expected of candidate F, and so did not consider him at all. We do not even know if candidate X did take voluntary redundancy, but we have little explicit information about what was the fate of other candidates, and even with the comparators it has to be gleaned from the charts, and remains incomplete. It is also *possible* that they did not think at all about the two people who scored higher than candidate C, the claimant and candidate X, but were persuaded that candidate C's skills were so essential that he should be offered the job if F left as expected. This is unlikely when X was 5 points ahead of C.

69. This tribunal finds it hard to see how anyone can say that it was fair that a reasonably robust method of selection by objectively scored assessment of candidates against criteria should suddenly be ignored when choosing who should get the job. If there was a special reason why scores had to be looked at, or special consideration given, there should have been a process for deciding what to do, and they should either have been taken as they were, or just remarked, One of the core criteria in **Williams** is that "the employer will seek to ensure that the selection is made fairly in accordance with these criteria". The respondent had perfectly good criteria, and a good system of rating candidates against criteria, but they suddenly departed from it. The selection was not made in accordance with the criteria, and it was not fair to make the decision without looking at the detail of their answers and what difference this shortage of time might have made. Going back to **Eaton**, it is hard in these circumstances to present this as "honest and reasonable", or to say that a reasonable system was "reasonably administered".

70. It is important to be clear that on the balance of probability this lack of fairness caused the claimant's dismissal. The respondent argues that if candidate C had not been taken out of order, the claimant would still have been dismissed, because candidate X would have been the runner-up. We have considered this carefully, and concluded that the only piece of information we have about candidate X, apart from his scores, is that he had volunteered for redundancy; we know the decision makers had this in mind, because they were looking for a runner-up for F. That is the likely explanation for what is otherwise unexplained, given he was five points ahead of C. We have not been told *his* skills were not needed (as was being suggested of the claimant). We have been told nothing at about X although this is known to the respondent. The respondent could have given evidence about his outcome, so as to substantiate the assertion that he would

have been runner up rather than the claimant if C had not had special treatment, but they did not.

Race Discrimination

71. Of the "kind to the Africans" remark, we do not consider it is less favourable treatment of the claimant than of others, because there is nothing to suggest it was directed to the claimant. If it was, the claim is out of time and we do not consider it just and equitable to extend time for the same reasons as in the harassment claim. It is not argued this was part of a course of conduct; if it were, we do not accept that. Mr van Zijl was not part of the scoring and selecting exercise that forms the rest of the claim. The decision had been made by others.

72. As for the selection process, we considered with care what the claimant had proved from which we could infer and conclude in the absence of explanation that the claimant being black was part of the reason why he was not picked as runner up. He has established that he was black in a largely white group of 15, without any other black people in it. C, who is white, was picked despite a lower score. As explained, we concluded that the claimant would have got the job had C had not been preferred. He had raised race as a general issue with Ian Callaghan in November 2017, though Mr Callaghan denies he had him down as chippy or a troublemaker this *could* have infected his view of him. Mr Callaghan had sorted the pay rise, where delay was down to administrative confusion. On the mental health issue, he dealt with the claimant's concern promptly and sympathetically, pointing him to the right places to give feedback; he was not dismissive. Other than that, the claimant was as good a worker as anyone else, there were no complaints about his ability.

73. This is a very bare claim - just less favourable treatment, and the difference of race. The only "something else" is that Mr Callaghan might have had him down as a difficult character, and that is a possibility only. It is scarcely enough to cause us to look to the respondent to an explanation. Nevertheless we do. Unconscious bias undoubtedly exists – many of us pick up stereotypes from verbal and physical cues as children, not learned from our own experiences, of which our adult rational selves are barely aware.

74. The respondent's explanation is that C's line manager thought he had not done himself justice because he was working two jobs during the three weeks available to fill in the form; the meeting then decided C should be retained because of his skills. This was unfair, as we have found, but it could have occurred without any difference in race, supposing the claimant were not black. Ian Callaghan, who might have said something, had not in fact looked at the scores. There was no discussion of the claimant. Andy Myson, who made the plea for C, is not linked to anything connected to the claimant's race. We concluded that the selection of C was unfair, but the reason was not his race.

75. For completeness, if the selection decision in July 2018 was out of time, we would have extended time as just and equitable. On this matter, the respondent did have contemporary written evidence. If the claimant had appealed when invited late in 2018, the particular point would not have come up, because the claimant did not have other people' scores. When it did come up in May 2019, Andy Myson remembered (possibly because he had referred to the meeting notes) that candidate C had had special treatment. The respondent has had to defend the unfair dismissal claim, which is in time, which means close examination of events in June 2018 in any event. The evidence is far less damaged by delay than in the harassment claim, and there is little prejudice to the respondent in allowing it out of time.

Remedy

Basic Award.

76. The claimant had worked three complete years by dismissal, and was over 41 in each year, so is entitled to a basic award of 4.5 weeks pay subject to the statutory cap on a week's pay in force at the date of dismissal, £525. The award is £2,362.50.

Compensatory Award

77. The claimant looked for work after leaving but without success. It was suggested by the respondent he had failed to mitigate his loss. The claimant's witness statement is silent as to his search for work. The documents bundle shows nine job interviews between May 2019 and February 2020. The claimant said he had just submitted a sample, but we are unclear why he should do this. From March 2020, when lockdown, began he had either not applied or not been successful, there is no evidence. By December 2020 he was looking at retraining as a teacher and took a short course, and had done some work for Amazon. This did not feature on his schedule of loss for the January 2021 hearing, despite an explicit order by EJ Adkin in December 2019 to supply details of alternative employment, earnings and benefits.

78. In May 2021 he found work as a contractor in financial services. We had outline figures of gross earnings, and no calculation as to the tax or national insurance position so as to compare his employment position; he has not calculated a partial loss, nor provided information with which we could make a calculation. He did not submit an updated schedule for this hearing until the morning on which submissions were made. We concluded there is no loss from that date.

79. On whether he has made adequate attempts to mitigate his loss, it is true he did not look for work outside the bank until dismissal, but there were a number of secondment opportunities (six and another two where he had final interviews) that he was pursuing right up to dismissal, and we hold it was reasonable to focus on that. After dismissal, there were uncertainties for financial services in 2019 because of the Brexit negotiations, in particular whether there would be a deal for financial services (there was not) and whether they

might be losing work and staff to Dublin or Frankfurt. Some jobs will have been considered essential, but in general recruitment is likely to have slowed. The respondent was in a position to have presented evidence to dispute this but did not. Nine interviews in as many months is not unreasonable. Then just as Britain left the EU on 31 January 2020, lockdown occurred in a few weeks. The result, even in non-retail financial services, was to slow almost all recruitment to a standstill and rely instead on getting existing staff to cover the work of staff absent or leaving. It is not realistic to expect the claimant to have found work then. He was also looking for alternatives towards the end of the year, as conditions eased a little. Taken in the round we concluded it was just and equitable to make an award for loss of earnings from dismissal in April 2019 to May 2021, when he found well remunerated work as a contractor.

80. For calculations, we take a monthly gross figure of £6,416 plus £422 in pension contributions (it is not stated whether this is defined benefit or defined contribution so we assume the latter). The respondents say these are agreed so we have not looked to the payslips. We do not include medical insurance premiums because there is no evidence that the claimant has suffered loss, either by taking out his own policy or by needing private medical treatment. Taking that loss over 24 months we get to £164,112. From that we deduct the severance payment of £17,820, other earnings of £818.75, and add £500 for loss of statutory rights. That leaves £145,475.25.

81. Strictly the award should have based on earnings net of tax and national insurance, figures which we have not been given But as the claimant will be liable to tax on any amount over £30,000 in this tax year when he already has substantial earnings as a contractor, we would have had to gross it up before applying the cap. But as the cap applies to the award calculated on the gross figures, there is no practical difference.

82. We were invited to make a reduction for causation, but we cannot see that the claimant has contributed to his dismissal and there was no relevant evidence. As for **Polkey**, we have held that on the available evidence the claimant would have got the job given to candidate C.

83. The statutory cap applies, which is the lower of 52 weeks' pay and, for an April 2019 dismissal, £86,444. A week's pay includes employer pension contributions (**Drossou**), so the cap is £82,056. That is the amount of the compensatory award.

Recoupment

84. When out of work the claimant claimed Job Seekers Allowance and Universal Credit. The Recoupment (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply to the compensatory award for unfair dismissal. The parties are referred to the annex to this judgment for an explanation of recoupment.

85. The amount awarded for loss of earnings was reduced by the application of the statutory cap by 43.6%. To arrive at the prescribed element, the monetary award (£82,056) is correspondingly reduced by 43.6% to £46,279.58 -regulation 4(2).

86. The prescribed period is from 15 April 2019 to 30 April 2021.

87. The monetary award exceeds the prescribed element by £35,776.42.

Employment Judge Goodman

Dated24/01/2022

JUDGMENT and REASONS SENT to the PARTIES ON

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.24/01/2022.

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FOR THE TRIBUNAL OFFICE

Claimant **Mr K. Osafo-Agyare**

Respondent **Lloyds Bank plc**

ANNEX TO THE JUDGMENT (MONETARY AWARDS)

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.