



EMPLOYMENT TRIBUNALS

Claimant: MR J WALCOTT

Respondents: ABOVE BEYOND CARE LTD (1)
IASPIRE CARE SERVICES LTD (2)
Mr B KANDA (3)
Mr A NOTA (4)

Heard at: Watford (by CVP)

On: Monday 28 March to
Friday 1 April 2022 and
19 May in chambers

Before: Employment Judge Skehan
Mr Wimbor
Mr Dykes

Appearances

For the claimant: Mr Walker, counsel

For the respondent: Mr Sutton, litigation consultant

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal against the second respondent is well-founded and successful.
2. The claimant's claims for harassment on the grounds of religion against the second respondent and the third respondent are well-founded and successful to the extent set out below.
3. The claimant's claim for accrued but unpaid holiday pay against the first and/or second respondent is withdrawn by the claimant and dismissed.
4. The remainder of the claimant's claims are dismissed.
5. A remedy hearing has been listed for 4 July 2022 to commence at 10am or as soon as possible thereafter.

REASONS

1. At the outset of the hearing, and during the course of day one we revisited the list of issues. The parties jointly informed the tribunal that the list of issues recorded following the previous case management hearing in this matter was not comprehensive. The parties were prepared to address the following list of issues as agreed by both parties to be comprehensive and exhaustive:
 - 1.1. What was the reason or if more than one, the principal reason for the claimant's dismissal?

- 1.2. Is a potentially fair reason under section 98 of the ERA 1996? The respondent relies upon some other substantial reason of a kind such as to justify dismissal of an employee holding the position which the employee held (a potentially fair reason under section 98 (1)(b) ERA 1996.
- 1.3. If the respondent has established a potentially fair reason for the claimant's dismissal, was the dismissal fair or unfair having regard to the reason shown in accordance with sections 98(4) ERA 1996 which will depend 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 shall be determined in accordance with the equity and substantial merits of the case,
- 1.4. Are the complaints of discriminatory conduct, or any of them outside primary time limit for bringing such claims set out in the Equality Act 2010.
- 1.5. If any of those events are out of time, or they part of a continuing series of acts the last of which is in time.
- 1.6. If they are out of time and not part of a continuing series of acts, is it just and equitable to extend time in favour of the claimant to allow those complaints to proceed?
- 1.7. Did the following events take place:
 - (a) On or about Thursday, 29 May 2019 did Mr Nota say to the claimant who had requested a blind to be installed to block the sun coming through the skylight window, 'you don't need one because you have sunblock in your skin, so you will be fine'.
 - (b) Was the claimant in 2017 denied a request for a company car despite being required to visit an increasing number of units and despite the fact that Mr Nota and Ms Taylor were provided with company cars.
 - (c) Did the respondent's representative Mr Gill uphold allegations against the claimant because he remained associated with the church or investors.
 - (d) Did Mr Kanda on or about 3 February 2016 shout at the claimant in front of other colleagues that 'I had to put up with you a long time, coming in on Mondays dead because you go to church'.
 - (e) Was the claimant demoted or denied opportunities for promotion or other positions. Mr Nota was promoted to head of operations in 2017 without experience within the care sector. The claimant was neither informed of the vacancy nor offered the opportunity to apply.
 - (f) Ms Kurji was promoted to head office manager in August 2017 the claimant was not informed of the vacancy nor offered the opportunity to apply.
 - (g) Dismissing the claimant.
 - (h) From November 2019, Mr Kanda and Mr Nota conversing in front of the claimant in their own language.

- (i) Mr Kanda would say hello and goodbye to other staff members but not the claimant.
- (j) Mr Kanda shouting at the claimant in particular on 3 February 2016 (allegation D) and 15 February 2017.
- (k) The claimant was subjected to false allegations at a disciplinary process in October 2017.
- (l) Mr Kanda has on several occasions told the claimant that he was thinking of letting him go and in particular dressing up one such occasion as a redundancy in December 2016.
- (m) The claimant was denied access to his email between June and August 2016.

- 1.8. For clarification all allegations are made against the claimant's employer, allegations d, h, i, j and l are made against Mr Kanda. Allegations a and h, are made against Mr Nota
 - 1.9. The claimant's claim for holiday pay was withdrawn by the claimant prior to Mr Walker's submissions.
 - 1.10. The claim in relation to unpaid salary was a claim for unauthorised deduction from wages contrary to the Employment Rights Act 1996 and not a breach of contract claim. This unpaid salary claim is unconnected to the discrimination claims. The claimant claims that he was entitled to £1500 increase in his salary for each new unit opened from March 2016 until the termination of his employment, during which time 13 new units were opened.
2. We heard evidence from the claimant and Ms Pike on behalf of the claimant and Ms Taylor, Mr Nota and Mr Kanda on behalf of the respondents. All witnesses gave evidence under affirmation, their witness statements were accepted as evidence in chief and all witnesses were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.
3. In general terms the tribunal found the claimant to be a straightforward and helpful witness. The claimant produced a comprehensive witness statement setting out his evidence to the employment tribunal. There are parts of the claimant's evidence that appeared unclear and confused, however this generally corresponds with the contemporaneous documentation that often appears unclear and confused. This also corresponds with the respondents' practice of maintaining a fluid environment within the workplace and a general reluctance on the respondents' part to document matters. While some of the claimant's claims have not been successful, we do not consider that this detracts from the claimant's credibility on a general level. Ms Pike's evidence

was clear and considered and in general terms she was a straightforward and helpful witness.

4. Mr Nota and Mr Kanda both provided a relatively short witness statements, that did not address the claims in any detail. During the course of cross-examination Mr Nota appeared to provide evidence on what he believed would be most helpful to the respondents' position at any particular time and his evidence at times changed accordingly. Further Mr Nota's evidence referring to an alleged disclosure of confidential information on the claimant's part in circumstances where he was unable to credibly identify the information alleged to have been disclosed has detrimentally affected his credibility.
5. Mr Kanda controls various business interests in addition to the first and second respondent and played in active role in managing his business. It can be seen from the documentation that Mr Kanda was directly involved in all decision-making relating to the claimant. Mr Kanda has been shown to be prone to angry outbursts, reluctant to document agreements made, prone to rely upon the absence of recollection or documentation to question matters should they no longer suit his business interests. In places we found the evidence provided by Mr Kanda to be evasive.
6. The claimant is black British. He is a Christian and an active member of the Gospel Church holding significantly committed Christian beliefs. The claimant plays the keyboard for choir rehearsals and Sunday services and weekday evening activities. The claimant describes his attendance at church as being of significant importance and making him the person that he is. Ms Pike is also a member of the Gospel Church. The congregation of the Gospel Church are predominantly black.
7. The claimant was employed by the first respondent referred to in this judgment as 'ABC' from July 2012. ABC was concerned with providing furnished residential units for vulnerable young people. Mr Kanda told us that the ABC ceased trading in approximately April 2020 and all of its employees were transferred to the second respondent, referred to in this judgment as 'IAspire'. Mr Kanda said that this was a 'TUPE' transfer, referring to the Transfer of Undertakings (Protection of Employment) Regulations 2012 as amended. ABC and IAspire are both under the control of Mr Kanda. The claimant's employment terminated on 16 June 2020. It was common ground by submissions that the claimant's employment transferred from ABC to IAspire in April 2020 under the provisions of TUPE.
8. Mr Kanda and Mr Nota both agreed that during his employment, the claimant was a good employee who was professional, diligent, reliable, keen to do better for himself and keen to learn. Mr Kanda told the tribunal that he was 'happy with the claimant'.
9. The background to the claimant's claims arises from events in 2012 relating to investors within ABC. Ms Pike, was employed by a different business controlled by Mr Kanda until her dismissal in March 2016 by Mr Kanda for reasons connected to the investment agreement. Ms Pike brought Employment Tribunal

proceedings (the Pike Litigation) and the matter was determined by EJ Heal at a hearing on 3 to 5 May 2017 and in her judgment with reasons dated 19 June 2017. While we are not bound by this judgment, there is nothing within the evidence heard by this tribunal that would lead as to question or depart from any finding made previously by EJ Heal.

10. The detail of the investment agreement between Mr Kanda/ABC and the investors remains contested. We prefer the evidence of the claimant as it has been clearly set out by the claimant and has remained consistent throughout his employment, it is consistent with the evidence provided by Ms Pike and provided previously within the Pike Litigation. While Mr Kanda states that the claimant's recollections remains contested we were provided with no clear picture of Mr Kanda's version of events. Nor were we provided with any explanation as to why Mr Kanda, as an experienced businessperson, chose to complete an investment agreement for a significant sum relying upon the claimant and Ms Pike acting as go-betweens. We conclude:
 - a. in 2012 Mr Kanda asked the claimant and Ms Pike, to invest in his business for a share of ABC. They were unable to do so. Mr Kanda was aware that the claimant and Ms Pike were involved in a church and requested that the claimant find out if people in their church had money to invest.
 - b. The terms of an investment agreement were negotiated by the claimant and Ms Pike acting as go-betweens for Mr Kanda and five individuals from the Gospel Church, including the pastor Mr Bethanni, who wished to invest in ABC. The claimant and Ms Pike were not parties to the agreement. Mr Kanda gave the claimant authority to carry out his go-between role and the claimant was careful and conscientious in communicating to the investors what Mr Kanda had communicated to the claimant. Ms Pike signed a copy of an investment agreement with the authority of the 'investee' being Mr Kanda.
 - c. Mr Kanda agreed that the investors would become both directors and shareholders in ABC, however for reasons identified at the time there would be an expected delay of up to three years in recording the directorship and shareholding within the company documentation.
11. Mr Kanda acknowledges the loan agreement but denies that there was ever any authority given to either Ms Pike or the claimant to offer directorships or shareholdings within ABC to the investors. Mr Kanda accepted that he has known for at least 4 years prior to the claimant's dismissal that the claimant maintains his conflicting version of events relating to the offer of directorship and shareholding in ABC made by Mr Kanda to the investors. It can be seen from EJ Heals reasons, referring to correspondence from the Mr Kanda's solicitors dated 9 March 2016, that Mr Kanda was aware of the claimant's stated position from March 2016.
12. The claimant commenced employment with ABC in June 2012. Initially the claimant had no contract of employment or job description. The claimant described a fluid situation where he was doing 'now this role or now that role'. Business cards were printed in 2013 stating the claimant's job title as 'operations manager'. The claimant suffered an injury to his knee in 2013 and due to complications remained off work until April 2014. There was a period

during this time between about July 2014 and February 2016 when the claimant was, at the sole request of Mr Kanda treated as self-employed and not paid within the normal payroll. ABC conceded that the claimant remained an employee during this period.

13. When the claimant returned to PAYE status in early 2016, he agreed with Mr Kanda that he would draft his own employment contract. This contract referred to his role as 'operations team'. From about 2016 the claimant became sceptical over Mr Kanda's intentions in respect of assurances provided to him and began to covertly record some of his conversations with Mr Kanda. The transcripts of some of these recordings were contained within the bundle.
14. The claimant told the ET in the Pike litigation in May 2017 that he did not have a formal job title, but he worked in the operations team.
15. On 3 February 2016 Mr Kanda informed the claimant that there would be some changes to his role. The claimant requested these changes in writing. Mr Kanda became irritated with the claimant and shouted at him words along the lines of, 'I've had to put up with you for a long time, you come in on Mondays dead because you go to church.....Work should be your priority as this (church) is getting in the way of your job, so think about it...'. The claimant was upset by this interaction and later that day called Mr Kanda to address what was said. He recorded this subsequent conversation. From the transcript it can be seen that Mr Kanda acknowledged that he made the comment, he stated that he did not mean it like that. Mr Kanda compared the claimant to another employee who had an alcohol problem and came to work worse for wear on a Monday. Mr Kanda explained that he had let things build up and was ready to explode but he had to let it out and now he had forgotten about it. When asked about this exchange during cross examination Mr Kanda told the tribunal that he did not recall it. He was brought to the transcript of the conversation in the bundle and thereafter confirmed that he recalled the incident. Mr Kanda denied that he was angry when making the comment.
16. The transcript shows that the conversation on 3 February 2016 moved on to the claimant's remuneration. Mr Kanda says '... Like I said to you every unit I open up I'll give you X more and I'll do all of that, no problem...' Mr Kanda was asked about this agreement and said to the tribunal that he accepted a payment was to be made on every unit being opened now that he had seen the reference from 5/6 years ago. Mr Kanda denied there was any express reference to £1500 per unit as claimed by the claimant and said that when new units were open, all employees would be doing overtime. No payments were made to the claimant in respect of any new units opened.
17. We note the email from Mr Somerville of 20 April 2016 providing an employment reference check for the claimant to assist him with securing a tenancy. Mr Somerville states the claimant's position as: operations manager. Mr Somerville states the claimant's basic annual salary as 23,920. He says that the claimant's commission and overtime varies and is based on new units opened which will possibly be as much as £6000 over the next 12 months. He says the claimant's salary is only likely to change upwards as the company expands.

18. In March 2016, Mr Kanda summarily dismissed Ms Pike for reasons of entering into 'very serious agreements without authority' connected with the investment agreement. The Pike Litigation was commenced thereafter.
19. The claimant says that prior to April 2016 he was effectively carrying out the role of operations manager, travelling substantially and visiting the units on a rotation basis. He had the use of a company car and completed considerable mileage as part of his duties on a weekly basis.
20. On 7 April 2016 the claimant had a meeting with Michael Mascoll. It can be seen from the transcript that a change to the claimant's role has been requested by Mr Kanda, and it is envisaged that the claimant will be office-based rather than operations based. Mr Mascoll says '..... You will still be doing some of the other bits you've been doing but I think he [Mr Kanda] wants you more in the office..... No clear reason this provided by Mr Kanda in relation to the proposed change, reference was made directly to the claimant of a potential DBS issue and Mr Mascoll told the claimant that the changes arose from complications arising from the claimant's leg injury affecting his ability to drive for long periods of time. The claimant had been provided with a company car however this was returned at the end of its lease in August 2016. Mr Mascoll states that, 'I will be going out to the houses and Shirley will be going around the houses once every day on a rotation basis and doing reports and then I'll go around meeting managers.....'
21. We note that on 20 April 2016 the claimant's job title is referred to as 'operations manager' by Mr Mark Somerville. This is inconsistent and unexplained. Despite the claimant's role involving more office-based work from early 2016, by around May 2017 the claimant had informally regained his operations duties and considerable travel obligations in visiting the units on a rotational basis. There is an erroneous reference to the claimant's job title as 'operations manager' made by Peninsula during the meeting of 18 February 2020.
22. The claimant alleges that he was demoted in 2016 with the removal of his operational manager title and the reduction in his role to office-based duties. The evidence in relation to the claimant's role during this time was confused. The claimant was provided with an opportunity to draft his own employment contract in early 2016, the reference to 'operations team' rather than 'operational manager' comes from the claimant. Little attention appears to have been paid by the respondent to this job title and Mr Kanda took a fluid approach to job roles. We note the claimant's description of a fluid workplace in the sense of, 'one day you do this role the next day you do that role'. Changes were commonplace and unexplained. Had this been a plan to unilaterally demote or disadvantage the claimant, a resumption of those duties would have been unlikely. We conclude that there was a change to the claimant's role in April 2016 and there were subsequent changes to the claimant's role in 2017. These were agreed by the claimant, or at least not objected to by the claimant who continued to work as requested by the respondent. The claimant was not demoted.

23. In June 2016 the claimant provided a reference for a past member of staff, Ms Harris. The tribunal had the benefit of a transcript of the discussion between the parties on this point. Mr Kanda was angry that the claimant had completed this reference and, as punishment, decided to lock the claimant out of his work email account. The claimant was denied access to his email account for this reason for a period of time. Thereafter, there were general email access problems across the business and in total the claimant's did not have access to his work emails for a period of approximately a month.
24. In September 2016, the claimant received a witness summons from the employment tribunal to appear as a witness in the Pike Litigation as referred to above. In November 2016 Mr Kanda asked the claimant to bring the tribunal summons to work. The claimant felt uncomfortable doing this. He did not wish to become more involved in the Pike Litigation that he already was. In February 2017 Mr Kanda referred to the tribunal witness summons and shouted at the claimant. He demanded that the claimant bring in the summons. Later that evening the claimant received a call from Mr Somerville stating that Mr Kanda had informed Mr Somerville that he had shouted at the claimant and Mr Somerville wished to check that the claimant was okay.
25. On 14 December 2016, Mr Kanda started a redundancy process placing the claimant, who at that point had been employed for five years, and Ms Kurji, a relatively new employee, at risk of redundancy. This redundancy process was later abandoned with no redundancies made.
26. In about February 2017, investors, who were all members of the claimant's church, issued civil proceedings in the County Court against Mr Kanda and ABC (the Investor Litigation).
27. The claimant attended the Pike Litigation final hearing as a witness in May 2017. He was unwilling to appear voluntarily as a witness. The claimant had not prepared a witness statement for that hearing and EJ Heal made the following comment in respect of his attendance:
21. I have found Mr Walcott to be a reliable witness. He was in a difficult situation because he is employed by Mr Kanda and fears for the security of his employment if he gives evidence against him. Nonetheless, he gave evidence against Mr Kanda although he plainly did not believe it was in his best interests to do so. He gave evidence carefully and thoughtfully.
28. By May 2017 the claimant was undertaking much of his previous operational role and was required to visit the respondent's units on a rotational basis. The mileage undertaken by the claimant was substantial. The claimant repeatedly asked to be provided with a company car and his request was repeatedly refused. Mr Nota and Ms Taylor were provided with company cars by Mr Kanda. Mr Kanda said that these cars were provided as the individuals worked for companies other than ABC and IAspire and no ABC employee had a car. The claimant had during this time repeatedly requested a pay rise and this request was similarly declined.

29. During the course of the claimant's employment Mr Kanda made various appointments within his businesses. In particular, in 2017 Mr Kanda appointed Mr Nota to the position of head of operations of ABC. Mr Nota had worked within Mr Kanda's other businesses previously. The appointment was made without any open recruitment process or previous experience within the care industry. No other employee, including the claimant was informed of a vacancy for the role or provided with any opportunity to apply for it. In August 2017 Mr Kanda promoted Ms Kurji to head office manager. In a similar vein Mr Kanda made the appointment without any open recruitment process no other employee within the business, including the claimant was informed of the vacancy or provided with an opportunity to apply for it.
30. In October 2017, the claimant was invited to a disciplinary hearing. The disciplinary issue related to safeguarding incident concerning a vulnerable young resident that was raised with ABC by the council. Peninsula were instructed by ABC to assist however we did not have sight of the instructions. Peninsula conducted a disciplinary hearing with the claimant and concluded that no fault was found on the claimant's part. It was accepted by both Mr Kanda and Mr Nota during cross examination that the safeguarding issue did not fall within the claimant's responsibilities and ultimate responsibility lay within inadequate respondent policy for which Mr Nota was responsible. There was no documentation to suggest that any disciplinary allegation was raised with any other member of staff. Mr Nota during the course of his cross-examination told the tribunal that he did not know if the unit manager involved in the incident had been suspended and/or disciplined. He also told the tribunal at a later part of his evidence that the unit manager had been suspended and/or disciplined. We find Mr Nota's evidence to be unreliable. In the absence of any documentary evidence, we conclude that no investigation was undertaken prior to raising disciplinary issues with the claimant and no disciplinary issues were raised with any other member of staff. There was no obvious reason for the respondent choosing to raise disciplinary matters with the claimant in isolation.
31. In May 2019, the claimant says that he asked Mr Nota for a blind to be installed on a window near his desk and Mr Nota responded stating, 'you don't need one because you have sunblock in your skin, so you will be fine'. The claimant says that he was shocked and offended by this comment. Mr Nota denies that this comment was made. The claimant refers to a single comment and no follow up discussion or repeated request for a blind on his part. We know that a blind was ordered as the claimant referred us to reference to that fact in the supervision record of 30 August 2019. We conclude that it is likely that a discussion was held in respect of the need for a blind and the landlord was thereafter requested to fit that blind. We note that the claimant did not raise this comment with the respondent at the time or at any time prior to the issue of proceedings. The claimant had been recording conversations with the respondent at this time and had previously directly broached a comment he found offensive with Mr Kanda. We conclude on the balance of probability that this comment was not made by Mr Nota as alleged.
32. We were referred to a Judgment of District Judge Mauger of 25 October 2019 dealing with the Investor Litigation. This was a judgment related to an application by the claimants in that litigation to amend their particulars of claim

to add a claim in respect of the alleged shareholding entitlement. It can be seen from the judgment, and it was accepted by both Mr Nota and Mr Kanda that:

- a. the hearing was procedural in nature, no evidence was heard by DJ Mauger
- b. no findings of fact were made by DJ Mauger
- c. there is no reference or inference made within the judgment to the disclosure of any confidential information by the claimant within this Judgment
- d. there is nothing within this judgment that suggests or implies dishonesty on the part of the claimant.

33. The end result of Investor Litigation, to the extent of the documentation provided to the tribunal, was that the investors' application to amend their particulars of claim to include the alleged agreed shareholding was dismissed. Judgment was given on the admitted return of the outstanding £65,000 investment, to be set off against costs.

34. The claimant was dismissed on 8 weeks' notice by letter dated 21 April 2020 and his final day of employment was 16 June 2020. The reason for his dismissal was stated to be some other substantial reason, namely a loss of trust rendering the employment relationship untenable. It is said that the relationship between [the claimant, and ABC IAspire and Mr Kanda has irretrievably broken down beyond repair.' The respondents' say that the decision to dismiss the claimant was made jointly by Mr Nota and Mr Kanda. We conclude that while Mr Kanda discussed the decision to dismiss the claimant with Mr Nota, the decision was made by Mr Kanda with Mr Nota in agreement. Mr Nota had no material part in the decision making process.

35. Mr Nota told the tribunal that Peninsula were instructed to investigate suspicions that the claimant had disclosed confidential information, and damaged the reputation of ABC and IAspire in the course of the Investor Litigation. It is common ground that at no time was the claimant informed of the nature of the confidential information he is alleged to have disclosed, nor was it put to him during the hearing. The respondent have not set out in their evidence or anywhere within the documentation, the nature of the confidential information the claimant is alleged to have disclosed. There was a reference to confidential information contained within 'privileged communication dated 26 April' within the bundle however it was agreed that this document was not considered privileged within this litigation, the document was not in the bundle and no further information was available. During the course of cross-examination, Mr Nota told the tribunal that the confidential information related to the locations of the residential units and the disclosure of such locations had serious safeguarding implications. Mr Nota's evidence on this point was vague. Mr Kanda told us during cross examination that he was unable to identify the confidential information said to be disclosed by the claimant and accepted it was wrong to make such an accusation of the claimant. We conclude that the respondents were aware that there was no substance to the allegations made against the claimant of disclosing confidential information.

36. Peninsula represents the respondents in this tribunal also provided ongoing HR support and as referred to within the documentation as 'Face2Face'. There has been no disclosure by the respondents in respect of the instructions provided to Peninsula. The claimant alleges that Peninsula would produce a report that supported the desired report of the client and questions the independence and value of the reports provided. We note the documentation provided by Peninsula purporting to deal with a disciplinary investigation being Mr Hickman's report from 18 February 2020 (the '2020 Investigation Report'). We note that Mr Hickman's opening comments to the claimant are recorded as '.... So the reason that I've been asked to come in as investigation into -, and is not an investigation into ongoing work issues, it's around a conversation that it had quite a few years ago, with your involvement with your church, and Mr Bethanni.....'. Mr Kanda, who was the decision maker, said during cross-examination that he had not read that Investigation Report prior to dismissing the claimant and we do not comment further upon it.
37. Mr Kanda says that he carefully considered the report compiled by Peninsula's Mr Gill reflecting a disciplinary hearing held with the claimant on 31 March 2020 (the 2020 Disciplinary Report) and relied upon it. We note the following within that Disciplinary Report:
- a. The 2020 Disciplinary Report is difficult to follow in that it is confused and appears to fundamentally misunderstand the findings of the Employment Tribunal within the Pike Litigation and the findings of the County Court within the Investor Litigation. Both Mr Kanda and Mr Nota accepted that the report was fundamentally flawed and confused in several places.
 - b. Mr Gill seeks to draw a distinction between (i) the claimant's relationship with the claimants in the investor litigation as Members of the Gospel Church and (ii) the relationship between the claimant and the claimants within the investor litigation as lenders to his employer and subsequently the case against his employer. Mr Gill says 'whilst it could be argued that there is some overlap between the two relationships, it is my finding that they are distinct and that [the claimant] has continued to help lenders/claimants in the case against his employer. He continues to have both relationships with them, when a trustworthy employee would not have the relationship at (ii) above. It is this relationship not the relationship detailed in (i) which is caused the employer to lose trust in the claimant as their employee. There is no suggestion in any of the correspondence of documentation before me that [the claimant's] attendance at the church has ever been an issue...'
38. Mr Kanda mistakenly considered that the result of the Investor Litigation vindicated his position that he had not offered shareholdings to the investors as alleged. This was inconsistent with the claimant's version of events that Mr Kanda had agreed for the church investors to have a directorship and shareholding. Mr Kanda considered that the claimant's position was untenable as he remained associated with the Gospel Church investors. Mr Kanda had known of the claimant's stance for at least four years and accepted that nothing had changed between the claimant and any of the respondents in the intervening years. He told the tribunal that the only way that the claimant could avoid dismissal was for the claimant to cut his ties with the investors, effectively

leaving the Gospel Church. Mr Kanda conceded that was not an appropriate thing to ask the claimant to do.

39. The claimant made some more general allegations in relation to his treatment during his employment:
- a. the claimant complains that Mr Kanda and Mr Nota regularly spoke in their own language excluding him from November 2019. There is a reference within the documentation from July 2017 where the claimant requests within a supervision that 'everyone in the office spoke English as a respect to others'. We were told that the specific allegation (allegation h) relates to a particular occasion in November 2019 where the claimant believed Mr Nota and Mr Kanda were speaking about him as he packed his bag in the office. The claimant's evidence in relation to this event was vague. While we consider it likely that Mr Nota and Mr Kanda used their own language when conversing on occasion, we find no specific altercation occurred between the claimant and the respondents in November 2019 as alleged.
 - b. The claimant complains that he was not greeted by Mr Kanda from February 2016. We conclude that it is more likely than not that as the Investor Litigation proceeded, for reasons unconnected to the claimant, Mr Kanda became increasingly annoyed with the claimant. We find it likely that Mr Kanda omitted greeting him on occasion and this was noticed by the claimant.

The Law

40. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the Employment Rights Act 1996 ("the ERA") as a potentially fair reason. The respondent relies upon 'conduct'. If the respondent shows such a reason, then the next question, where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.
41. Section 13 of the Equality Act 2010 (EqA 2010) provides the statutory basis for the direct discrimination claim. This provides that where an employer, because of the protected characteristic of race or religion, treats the claimant less favourably than it treated or would treat others. When looking at a relevant comparator section 23 of the EqA 2010 provides that there must be no material difference between the circumstances of each case. The principle was expressed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 as follows:
- "...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

Only those characteristics which the employer has taken into account in deciding to treat the claimant in a particular way, with the exception of the alleged discriminatory characteristic, are relevant

42. As regards the burden proof, it is for the Claimant to initially prove facts which could establish that an act of discrimination occurred. It is only once this has been satisfied that the burden shifts to the employer. Once the burden has passed to the Respondent, it is on them to show that a contravention did not occur (s.136 EqA 2010).
43. The claimant raises issues of harassment that are pleaded in the alternative as direct discrimination. We note section 212(1) of the EqA 2010 providing that harassment and direct discrimination claims are mutually exclusive. Section 26 of the EqA 2010 sets out the definition of harassment as conduct related to the protected characteristic which has the purpose or effect of violating the claimant's dignity or creating an intimidating hostile degrading humiliating or offensive environment for the claimant. In deciding whether the conduct has this effect, the tribunal will take into account the perception of the claimant the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.
44. The relevant statutory limitation provisions are set out in sections 123(1)(a) & (b) of the EqA 2010 and sections 23(2) to (4), of the Employment Rights Act 1996.

Deliberations

45. Prior to Mr Kanda's oral evidence, there was confusion in respect of the identity of the claimant's employer. It was common ground by the conclusion of submissions that the claimant's employment was transferred from ABC to IAspire in accordance with the provision of TUPE. These provisions are not in dispute and there is no requirement to set them out. We refer to regulation 4(2)(b) and note that liability in respect of any acts or omissions on the part of ABC including, in this case discrimination or harassment contrary to the EqA 2010 before the transfer are treated as having been done by the transferee, IAspire. The claimant was dismissed by IAspire. The correct employer respondent to all claims is IAspire and the claims against ABC are dismissed.
46. What was the reason for the claimant's dismissal? IAspire claims that the claimant was dismissed for some other substantial reason, being a breakdown in trust and confidence between employer and employee. Mr Sutton submits that the tribunal must examine the circumstances as they were at the time of dismissal rather than with the benefit of hindsight and that the respondent relied heavily upon the investigation and disciplinary process as conducted by Peninsula and thereafter acted on reasonable grounds dismissing the claimant.
47. We have carefully considered the circumstances of this matter as of the date of dismissal. In general terms the respondents' evidence relating to the reason for dismissal was confused, inconsistent and lacking in credibility. The reason for dismissal stated within the witness statements was the disclosure of confidential information by the claimant said to give rise to the breakdown in trust and

confidence. Mr Sutton told the tribunal that it was a fair summary of the respondents' position to say that at no time was the claimant ever told of the confidential information that he had allegedly disclosed, this information was not referred to within any documentation either prior to the claimant's dismissal or at any time during this litigation, it was not put to the claimant during cross examination and Mr Sutton as the respondents' representative was unable to assist the tribunal as he did not know what the respondents referred to when they alleged confidential information was disclosed by the claimant. We have concluded that no confidential information was disclosed by the claimant and there was no genuine belief on the respondents' part that the claimant had disclosed confidential information and this allegation formed no material part in the reason for the claimant's dismissal.

48. We have considered the documentation generated by Peninsula. Despite contracting out the investigation and disciplinary hearing to Peninsula, Mr Kanda retained the decision-making function. The respondents seek to rely heavily upon reports conducted by Peninsula in circumstances where:
- a. Mr Kanda said that he did not read the 2020 Investigation Report prior to dismissing the claimant;
 - b. both the 2020 Investigation Report and the 2020 Disciplinary Report prepared by Peninsula can be fairly described as fundamentally flawed and unfair. Neither Mr Kanda nor Mr Nota were able to address or explain any of the accepted flaws within the reports; and
 - c. the respondents have not disclosed the instructions to Peninsula and the claimant says that Peninsula would tailor a report to a client's requested outcome.

We consider that it is proper for the tribunal's predominant focus to be on the justification and reasoning as applied by the decision maker. The above factors lead us to conclude that both of these Peninsula reports are little more than window dressing to bolster Mr Kanda's chosen course of action. It is not possible for the respondents to evade responsibility for their actions and decisions by reference to input by third party reports in these circumstances.

49. Mr Kanda and Mr Nota both agreed that the claimant was a good employee who was professional, diligent, reliable, keen to do better for himself and keen to learn. Mr Kanda told the tribunal that he was happy with the claimant. We conclude that this is a fair and accurate reflection of the claimant's contribution to the respondents' business throughout the claimant's employment. We are unable to identify any matter that would allow us to find that the claimant had in any way contributed to a breach of the implied term of trust and confidence that should exist between an employer and employee.

50. We conclude that the claimant's dismissal was prompted or triggered by the conclusion of the Investor Litigation. Mr Kanda considered the outcome of the County Court litigation in his favour to validate his version of events and that he had 'won' his dispute with the church investors over the alleged shareholding. We conclude that the claimant was dismissed from his employment because:
- a. the claimant maintained consistently that Mr Kanda had indicated his agreement to the church investors becoming shareholders and directors within his business, contrary to Mr Kanda's position; and

- b. The claimant had maintained his contact with the investors through his ongoing association with the Gospel Church. While the 2020 Disciplinary Report sought to distinguish between the claimant's contact with individuals as investors and contact with those individuals as members of the Gospel Church, Mr Kanda made no such distinction. We conclude that the allegation relating to the claimant disclosing confidential information was intended to muddy the waters and provide a veneer of appropriateness for Mr Kanda's refusing to continue to employ the claimant while he remained involved with the Gospel Church. The reality of the situation, as was known to Mr Kanda, was that the claimant had done nothing wrong.
51. We conclude that the respondent has not identified a potentially fair reason for the claimant's dismissal in accordance with section 98 (1)(b) ERA 1996. The dismissal is unfair, and we go no further in considering the unfair dismissal claim.
52. Mr Walker clarified that the claimant claimed unauthorised deduction from wages. This was expressly said not to be a breach of contract claim nor was it part the discrimination claims as set out below. We have considered the claimant's evidence, the transcript of the call with Mr Kanda on 3 February 2016 and the reference to Mr Somerville's email of 20 April 2016. The detail of what was agreed between the parties is difficult to determine and we note Mr Kanda's general reluctance to reduce his agreements to writing. On the balance of probability we conclude that there was an agreement made between the claimant and Mr Kanda in early 2016:
- a. we find it unlikely that the agreement was simply an opportunity to work additional overtime hours in the event of new units being opened as suggested by Mr Kanda during cross examination.
 - b. we also find it unlikely that Mr Kanda would agree to a £1,500 increase in salary for every new unit opened. This would appear disproportionate in the circumstances, and should there have been agreement in respect of such an ongoing salary increase, it is particularly odd for the claimant not to have referred to it when asking for reinstatement of his company car or a pay rise. This is also at odds with Mr Somerville's email of 20 April 2016.
 - c. We find it more likely than not that there was an agreement between the claimant and Mr Kanda existing early 2016 entitling the claimant to a commission payment of £1500 for each unit opened by ABC. We find that this agreement was entered into sometime after the discussion with Mr Kanda on 3 February 2016. However no payment was ever made under this commission arrangement. We consider it noteworthy that the claimant had not at any time during the course of his employment raised non-payment of agreed sums with Mr Kanda, even when asking for pay rises etc. We conclude that the commission structure was withdrawn by Mr Kanda at some point prior to the end of 2016 and not reinstated at any later date.
53. To the extent that there is any valid claim for unauthorised deduction from wages arising from our findings on this matter, we note a jurisdictional issue in relation to this claim. Any claim under S13 ERA must be brought to the attention

of the employment tribunal, subject to the extension of time for early conciliation, within three months beginning with the date of payment of the wages from which the deduction was made or in respect of a series of deductions, the time limit begins to run with the last deduction in the series. The tribunal has jurisdiction to extend the time limit where it was not 'reasonably practicable' for the complaint to be presented before the end of the three-month period. Even if this claim is said to consist of a series of deductions in respect of unpaid commission, the final payment was due, at the latest, at the end of 2016. This claim has been brought to the employment tribunal's attention in June 2020, years outside of the limitation period. We can identify no sensible argument that it was not reasonably practicable for the claim to be brought prior to this time. In the circumstances we conclude that we have no jurisdiction to consider the claimant's claim for unauthorised deduction from wages relating to any unpaid commission payments from 2016.

54. We turn now to the allegations of direct discrimination as defined within section 13 of the EqA 2010. The claimant explained his claim for religious discrimination as a continued course of conduct since 2016 terminating with his dismissal on the grounds of his association with the Gospel Church. The claim for race discrimination (other than 'allegation a') was based on the fact that the members of the Gospel Church are predominantly black. In considering the direct discrimination claims, the tribunal is obliged to carry out a comparison and identify a comparator. We sought submissions from both parties in respect of the circumstances of appropriate comparator. Both parties agreed that:
- a. the appropriate comparator in the religious discrimination claim is an employee who is not religious and has an ongoing relationship outside of work with a group of investors who are in a long-running legal dispute with the employer, and who has played a similar role to a similar extent as set out above. The relationship of the comparator with those investors is based upon a deep connection such as a fraternity organisation, as suggested by Mr Walker or a family connection as canvassed by the tribunal, where it is accepted by all that it would be unreasonable and inappropriate to expect the individual to sever such a tie.
 - b. The appropriate comparator in the race discrimination claim is an employee who is not black and in circumstances thereafter as set out above in subparagraph a. above.

55. We address each of the allegations in turn:
'Allegation a' – We refer to our factual findings above.

'Allegation b' - The claimant had use of a company car up to August 2016. The claimant's operational role and travel obligations in 2016 were transferred to his colleagues, predominantly to Shirley and/or Mr Mascoll. The claimant does not allege that either of those individuals were provided with a company car to visit the units. The claimant refers to Mr Nota and Ms Taylor being provided with company cars with the inference that they had little use for them. While it would obviously have been reasonable for the respondent to provide the claimant with use of a company car, we conclude that failure to provide their car was not a decision that was personal to the claimant, but that Mr Kanda had chosen not to provide those in ABC who were required to regularly visit units with company cars. This treatment is unconnected in any way to the claimant's race, religion

or any association between the claimant and the investors or the Gospel Church:

‘Allegation c’ – This related to Mr Gill’s report and we refer to our findings in respect of Mr Gill’s report as set out above. Mr Gill did not make any decisions. We were not provided with submissions to assist us further. We consider this to be an allegation relating to the rationale for the claimant’s dismissal. Peninsula was instructed by Mr Kanda and we consider Mr Kanda’s rationale for his decision to dismiss the claimant separately. We have insufficient evidence to make any further finding in relation to this allegation.

‘Allegation d’ - Mr Kanda’s comment on February 2016 along the lines of ‘I had to put up with you a long time, you come in on Mondays dead because you go to church’ can be fairly described as an angry outburst made without justification. There is no evidence suggesting that the claimant impaired in any way in his performance of his duties on a Monday. Mr Kanda’s subsequent expression of similarities between an employee who had overindulged in alcohol during the weekend and was unable to properly focus on Monday was an offensive comparison for the claimant. We conclude that this is a comment expressly offensively referencing the claimant’s church, made in anger that is driven by Mr Kanda’s dispute with the investors in ABC, who are also members of the Gospel Church.

‘Allegation e’ - We refer to our factual findings above in relation to alleged demotion.

‘Allegation e and f’ – These relate to the recruitment of Mr Nota and Ms Kurji and lack of opportunity provided to the claimant. We note that no other individual within ABC was provided any opportunity to apply for these roles and the claimant was not singled out in the lack of opportunity offered. We conclude that this is an example of Mr Kanda’s business style. While these matters reflect poor HR practice, we conclude that these appointments were unconnected to the claimant or his race, religion or any association between the claimant and the investors who were members of the Gospel Church.

‘Allegation g’ – This relates to the claimant’s dismissal, and we repeat our findings made above.

‘Allegation h’ – We refer to our factual finding relating to the particular incident of Mr Kanda and Mr Nota conversing about the claimant in front of the claimant in their native language in 2019. There is no evidence to support any further finding in respect of this allegation.

‘Allegation i’ - We have concluded that it is more likely than not that as the Investor Litigation proceeded through its County Court journey, Mr Kanda, on occasion did not say hello and/or goodbye to the claimant as he did other members of staff. We conclude that the reason for this was related to the claimant’s ongoing connection with the church investors who were members of the Gospel Church.

‘Allegation j’ – This relates to Mr Kanda shouting at the claimant in relation to the witness summons for the Pike Litigation. We conclude that this related to an annoyance on Mr Kanda’s part at the claimant’s involvement with the investors who were members of the Gospel Church, matters that were central to the Pike Litigation. We have no evidence to make any finding of fact to support any further allegation of shouting on Mr Kanda’s part (other than allegation d).

Allegation k’ – This relates to the unfounded disciplinary allegations made against the claimant in October 2017. These allegations arise from a genuine safeguarding complaint made by the council, however there is no rational explanation as to why the respondent chose, as a first step to unfairly initiate disciplinary proceedings against the claimant. We consider that had the respondents knowingly singled out the claimant for disciplinary allegations where they were aware at the outset that the claimant had no responsibility, it would be unlikely for the subsequent disciplinary report exonerating the claimant to be commissioned by the respondents and produced by Peninsula. We conclude on the balance of probability that the more likely explanation is that Mr Nota and Mr Kanda gave insufficient consideration to their own internal policies, their fluid view of job roles led to genuine confusion in respect of where responsibility rested. They failed to follow a fair procedure and jumped to a premature ‘disciplinary stage’ in response to a formal complaint by the council. While this was obviously unreasonable and unfair, we conclude that this was unconnected to the claimant’s race, religion or any association between the claimant and the investors or the Gospel Church.

‘Allegation l’ - There was an occasion where the claimant was placed at risk of redundancy in December 2016. Both the claimant and his colleague were placed at risk of redundancy and that proposed redundancy did not progress. We do not comment on the fairness of the process however we conclude that had Mr Kanda intended to target the claimant he would be unlikely to commence the process, involve other employees and then abandon it. We conclude that these actions are unconnected to the claimant’s race, religion or any association between the claimant and the investors or the Gospel Church. We have not found facts relating to any other occasion where the claimant was informed that Mr Kanda was ‘thinking of letting him go’.

‘Allegation m’ - There was a period of time in mid-2016 the claimant was denied access to his email. We have seen the transcript of a discussion relating to this matter and conclude that Mr Kanda was genuinely displeased that the claimant had provided a reference for his colleague and Mr Kanda chose to remove the claimant’s internet access as punishment. While we consider this punishment capricious on Mr Kanda’s part, we conclude that these actions were taken for the reasons stated by Mr Kanda and are unconnected to the claimant’s race, religion or any association between the claimant and the investors or the Gospel Church.

56. In respect of allegation d, we consider that the reference to the church brings this potentially under the heading of both direct discrimination and harassment. We note the provisions of section 212(1) of the EqA 2010 and it is not possible to have a finding of both direct discrimination and harassment and we consider that this allegation is properly dealt with under the ‘harassment’ heading below.

57. In respect of allegations g, i, and j, while we have found the reason for the claimant's treatment as set out in above we do not consider that it can be said that the claimant was subject to less favourable because of either race or religion. We find that Mr Kanda would have treated a comparator, in the circumstances set out above, in a similar negative fashion to that afforded to the claimant, as any comparator would be equally and inextricably associated with the investors and their version of events. For this reason, we do not consider that these allegations constitute direct discrimination on the grounds of either religion or race.
58. We now look at the harassment claim in respect of allegations d, g, i, and j, and the definition as contained within section 26 of the EqA 2010. An employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. The definition of harassment in respect of 'related to' a protected characteristic is different from and potentially wider than the definition within section 13 for direct discrimination of 'because of' a protected characteristic'.
59. We conclude that each of these allegations d, g, i and j amount to conduct unwanted by the claimant which has both the purpose and effect of creating an intimidating, hostile, humiliating and in respect of allegation d in particular, offensive environment for the claimant. We have carefully considered the question whether these acts are 'related to' the claimant's religion or race. Allegation d has an obvious connection to religion by the express reference to the church and we conclude that that allegation is clearly 'related to' his religion. The others require closer inspection. The acts are driven by the deteriorating relationship and litigation between Mr Kanda and the investors. However, we conclude that the investors and the Gospel Church in these circumstances are inextricably linked. Mr Hickman's reasons for starting the disciplinary investigation expressly mention the claimant's involvement with his church. While the Peninsula 2020 Disciplinary Report had sought to draw some distinction between the claimant's relationship with the investors and the claimant's relationship with his church, Mr Kanda made no such distinction. Mr Kanda provided no space or acknowledgement of the claimant's entitlement to expression of his religion and religious identity by way of his membership of the Gospel Church. We conclude that the claimant has provided sufficient evidence to show on a prima facie basis that the conduct complained of is 'related to' his religion. The burden of proof shifts to the respondent in accordance with section 136 of the EqA 2010. The respondents' stated concerns in respect of the disclosure of confidential information to the investors has been exposed as a sham. This was identified as the distinguishing reason by Peninsula for identifying the claimant's ongoing relationship with the investors (as opposed to the Gospel Church) as problematic. Mr Kanda accepted during cross examination that for the claimant, to avoid dismissal he would need to cut his ties the Gospel Church and such a request was inappropriate. Taking the entirety of the circumstances into account we conclude that the claimant's treatment in respect of allegations d, g, i and j was 'related to' the claimant's religion.

60. This is a scenario whereby the respondents accept that the claimant's position had not changed since 2016. We conclude, that while there are some gaps between the allegations d, i and j and the ultimate deterioration of the claimant's relationship with the respondent and his dismissal, this conduct arises from the same background circumstances and constitutes conduct extending over a period of time culminating in the claimant's dismissal. For this reason, we do not consider that a limitation question arises in respect of allegations paragraph d, i, and j, above. We conclude that the claimant's claim for harassment on the grounds of religion as set out in paragraph d, g, i, and j, above is successful. The issue of remedy will be considered separately as set out above.
61. The claimant's claim for harassment related to race is based on the fact that the members of the Gospel Church are predominantly black. While we accept that the congregation of the Gospel Church was predominately black as alleged, we consider this to be too remote for the respondents' actions to be said to be 'related to' race. For this reason, we find that the claim for harassment on the grounds of race fails and is dismissed.
62. As explained to the parties on 1 April 2022, the tribunal required a further deliberation day, listed for 19 May 2022 to complete our decision. This written reserved judgment reflecting our unanimous decision was forwarded to the parties as soon as possible following the conclusion of our deliberation.

Employment Judge Skehan

Date: 20 May 2022

Sent to the parties on:

23 May 2022

For the Tribunal: