



EMPLOYMENT TRIBUNALS

Claimant: Mr A Falomo

Respondent: Wm Morrison Supermarkets Plc

HELD at Newcastle CFCTC

**ON: 20 – 22 September 2021
9 – 11 November 2021**

BEFORE: Employment Judge Loy

Members: Mr S Wykes
Ms E Wiles

REPRESENTATION:

Claimant: Mr Jieman, Trade Union Representative

Respondent: Mr Singer, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

- 1. The complaints of direct race discrimination are not well-founded and are dismissed.**
- 2. The complaints of harassment related to race are not well-founded and are dismissed.**
- 3. The complaints of indirect discrimination are dismissed following a withdrawal of the claim by the claimant.**

REASONS

The claimant's claims

1. By a claim form presented on 4 July 2020, the claimant brought claims of unfair dismissal, direct race discrimination, indirect race discrimination and harassment related to race. Some of the complaints referred to above were withdrawn. In particular, the claimant's claim of unfair dismissal was dismissed by Employment Judge A M S Green on 11 September 2020 upon withdrawal by the claimant. The claimant had less than two years' service and was not advancing a claim of "automatic" unfair dismissal.
2. On the final day of the hearing, the claimant withdrew his claim for indirect race discrimination upon explanation from the Judge that an allegation of covert discrimination was in law a claim of direct race discrimination and not indirect race discrimination which has a distinct meaning. The matters that the claimant had wished to be considered as indirect discrimination claims were therefore considered as part of the claimant's direct race discrimination claims.
3. The complaints which were advanced to a full hearing and which remained to be determined were:
 - (a) Direct race discrimination; and
 - (b) Harassment related to race.
4. The claim form was amended on 5 February 2021 through the provision of further information and particulars of claim (bundle pages 43-45). The respondent was given permission to present an amended response form and grounds of resistance. The Tribunal confirmed acceptance of the amended grounds on 24 March 2021 (bundle pages 48-69 and 70).

The hearing

5. The hearing was conducted in person at the Teesside Justice Centre. The claimant gave evidence on his own behalf. He called no further witnesses.
6. The respondent called the following witnesses, all of which were employed at the respondent's Regional Distribution Centre at Stockton ("the RDC"):
 - (a) Simon Burrows, Site Manager and previously Warehouse Manager – Ambient Warehouse.
In the latter position, Mr Burrows was the claimant's direct line manager;
 - (b) Mark Raper, Interim Warehouse Manager – Ambient;
 - (c) Ryan Mears, Warehouse Manager – Fresh;
 - (d) Andrew Rotherforth, Shift Manager – Fresh;
 - (e) Shaun Carson – Warehouse Operative; and
 - (f) Zoe Austin, People Manager - HR Department.

Mr Burrows, Mr Rotherforth and Ms Austin all made supplemental statements in addition to their main statement dealing with matters which arose at a preliminary hearing before Employment Judge Martin on 31 August 2021. Those matters related principally to the identification of comparators by the claimant which the claimant had not previously identified.

7. The parties had prepared a bundle of documents consisting of 293 pages.
8. The first morning of the Tribunal was set aside for Tribunal reading. The parties attended from 14:15 on the first day. Evidence finished 16:00 on 10 November 2021. The parties made submissions on the same day. The Tribunal deliberated on that afternoon and gave an oral Judgment to the parties.
9. These written reasons are issued at the request of the claimant.

The issues

10. The Tribunal spent some time on the afternoon of 20 September 2021 discussing and clarifying the issues. By agreement between the parties and with the Tribunal's consent, the following issues were identified for the Tribunal's determination:

(1) Time Limits

Was the claim form presented within the time limit set out in section 123 of the Equality Act 2010 ("the EqA"). The respondent contends that any alleged act or omission of discrimination which took place prior to 26 March 2020 is out of time. The claimant relies upon the complaints forming part of a continuous act of discrimination (which the respondent denies). The respondent contends that it would not be just and equitable for the Tribunal to extend time in order for it to hear any elements of the claimant's complaint of discrimination which took place prior to 26 March 2020.

(2) Direct race discrimination section 13 EqA

Allegation 1. The claimant asserts that he was not given appropriate support by the respondent's management at the RDC. The claimant contends that this was an act of direct race discrimination.

Allegation 2. The claimant's probationary period was extended by Simon Burrows at a meeting on 1 June 2020. The claimant contends that this was an act of direct race discrimination.

Allegation 3. The claimant was required by Simon Burrows, Site Manager, to cover two shifts and work with six Team Managers as opposed to the normal ratio of three Team Managers. The claimant contends this is an act of direct race discrimination.

Allegation 4. Team Managers refused to carry out duties delegated to them by the claimant as their Shift Manager. The claimant contends that these were acts of direct race discrimination.

Allegation 5. On or around May 2020, Simon Burrows threatened the claimant that he would be required to attend a 1:1 one meeting if the claimant failed to falsify certain shipping reports relating to goods that should have been shipped before 10pm, but were still awaiting shipping when the claimant arrived on shift. The claimant says he refused to change the documents to show that they had been shipped before 10pm. The claimant contends that this was an act of direct race discrimination.

Allegation 6. The claimant was not provided with a new "buddy" when his original buddy, Mr Chris Metcalfe, moved to day shift. The claimant contends that this was an act of direct race discrimination.

Allegation 7. Kayleigh Lattaway referred to the claimant as a “coloured man”. The claimant contends this is an act of direct race discrimination.

Allegation 8. The claimant was held accountable for faults that occurred when he was off-site during the period prior to June 2020. The claimant contends that this is an act of direct race discrimination.

Allegation 9. Shaun Carson said to the claimant that he had been told by Mr Raper that the claimant’s probationary period was to be extended some three weeks before his probationary review meeting with Mr Burrows. The claimant contends that the respondent’s failure to do anything about this “leak” was an act of direct race discrimination.

Allegation 10. The claimant’s Team Managers would change his shifts on purpose. The claimant contends that this was an act of direct race discrimination.

Allegation 11. The claimant’s shifts were changed by Mr Burrows on short (two days’) notice. The claimant contends this is an act of direct race discrimination.

Allegation 12. The claimant’s dismissal by Simon Burrows. The claimant contends that this was an act of direct race discrimination.

In respect of these allegations the Tribunal was asked to decide:

- (i) Did the alleged treatment occur?
- (ii) If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of his race?
- (iii) If so, can the respondent prove a non-discriminatory reason for any proven treatment.

(3) Harassment – section 26 EqA

Was the claimant subjected the following conduct:

Allegation 1. On or around May 2020, did Kevin Walker ask the claimant if he wanted to fight Kevin Walker’s brother, Dave Walker.

Allegation 2. On an unidentified date, following a conversation between the claimant and Mr Rotherforth, did Dave Walker ask Mr Rotherforth about the contents of the confidential conversation between the claimant and Mr Rotherforth.

Allegation 3. On or around three weeks before the claimant’s probationary period review meeting with Simon Burrows on 1 June 2020, did Mr Carson inform the claimant that the claimant was to have his probationary period extended?

Allegation 4. On unidentified dates, did the Team Managers (Kevin Walker, David Walker and James Thompson) attempt to sabotage the claimant’s planning?

- (i) If so, was the conduct unwanted?
- (ii) If so, was any such treatment related to the claimant’s race?

- (iii) Did such treatment have the purpose or effect of violating the claimant's dignity and/or creating an intimidating hostile, degrading, humiliating or offensive environment for the claimant? If so, was it reasonable for such treatment to have had such effect (taking into account his perception, the other circumstances and whether it was reasonable for the conduct to have that effect)?

Findings of fact

11. The Tribunal heard a good deal of evidence. It is not the Tribunal's function, however, to set out every piece of evidence or to make findings on every issue or dispute between the parties. The Tribunal's factual findings are therefore limited to those which we have considered to be necessary for the purposes of determining the issues and complaints.
12. The respondent is a well-known supermarket. The claimant is of African Nigerian descent and is black. The claimant was employed by the respondent as a Shift Manager assigned to the night shift on the Ambient Warehouse at the RDC.

A brief overview of the respondent's Retail Distribution Centre and the claimant's employment

13. The RDC provides stock to approximately 30 Morrison supermarkets. It employed in the region of 520 employees at the relevant time. The RDC is required to meet its key performance indicators within the context of the broader Morrison business. Ultimate responsibility for the KPIs is that of the Site Manager. At the relevant time, the Site Manager was (and remains) Simon Burrows. The KPIs cover both financial and operational targets.
14. The claimant was employed as a Shift Manager in the respondent's Ambient Warehouse on the night shift. There are two night shift managers in the Ambient Warehouse. There is a parallel Fresh Warehouse for goods that need to be stored at a low temperature. Each Shift Manager works four days on and three days off. Accordingly, the two Shift Managers in each of the Ambient and Fresh Warehouses overlap by one day a week (although they may have different start times on this day). The other Shift Manager on night shift at the Ambient Warehouse at the time of the claimant's employment was Chris Metcalfe.
15. Each Shift Manager is normally responsible for three Team Managers. The relevant Team Managers for whom the claimant was responsible were Kevin Walker, David Walker (Kevin's brother) and James Thompson. The claimant reported initially to Mr Burrows. After 13 May 2020 when Mr Burrows became full time Site Manager, Mr Raper replaced Mr Burrows as Interim Ambient Warehouse Manager and became the claimant's line manager.
16. The claimant commenced employment on 2 December 2019. The claimant's contract of employment is at page 79 of the bundle. The claimant signed that contract on 30 November 2019. That contract of employment is not signed by the respondent, however it was common ground that this contract applied to the claimant's employment. The contract provides "that the Colleague Handbook (as amended or replaced from time to time) applies to [the claimant] and the sections of the Handbook marked contractual formed part of [the claimant's] terms and conditions of employment", and that "[the claimant] understands that

it is [his] responsibility to read and familiarise [himself] “with the contents and raise any matters that are unclear.” The contract reflects the claimant’s appointment to the position of Shift Manager. Although the contract refers to Warehouse Manager – Fresh, it was common ground at the hearing that the claimant was the Shift Manager on the night shift in the Ambient Warehouse.

17. There was an expanded sample contract of employment at pages 162 to 170 of the bundle. It was common ground this reflected the claimant’s own contract of employment. The following provisions are material to this matter.

18. First, there is a probationary period at section 1.10 (bundle page 164-165) which provides that:

*“The first 26 weeks of your employment form your probationary period”.
Further details on what this means are contained within your Colleague Handbook.”*

19. Secondly, at section 3.1 of the sample contract of employment (bundle page 165), it is provided that:

“You must follow all the rules, policies and procedures in your Colleague Handbook. If there is any conflict between the terms of this agreement and the Colleague Handbook, this agreement will prevail.”

20. Thirdly, at section 3.9 (bundle page 167) there is a direct reference to the company Disciplinary and Grievance Procedure which are outlined in the Colleague Handbook. Those policies are expressly stated to be non-contractual.

21. At pages 203-204 of the bundle is the respondent’s Probation Policy. In so far as is material, the Probation Policy provides:

“Extending the probationary period – *In most circumstances the probationary period will give the manager enough time to assess a colleague’s performance. However, in certain circumstances, we may want to consider extending the probationary period.*

Reasons for an extension could include the following:

- *Where the manager believes with further time the colleague will make the required improvements (only by exception).*
- *If the colleague doesn’t agree to the extension of the probationary period, this should be discussed.*
- *If the manager and colleague can’t agree and the manager believes they have sufficient evidence to support the extension, the manager should explain that this will remain.*
- *Once a colleagues probationary period has been extended, regular review meetings will take place to review progress and to determine whether they will pass their probationary period or if employment will be terminated.”*

22. The respondent’s Respect in the Workplace Policy is at pages 73 to 75 of the bundle. In so far as is material, the Respect in the Workplace Policy provides:

“Bullying and harassment behaviours – *This list is not exhaustive, however some examples may include:*

- *Unwanted physical contact.*
- *Unwelcome remarks, or criticism about a person's dress, appearance or age in public or via social media ..."*

And;

"In Morrison's we don't tolerate any form of discrimination, victimisation, bullying or harassment."

And;

"Harassment is unwanted conduct that has the purpose or effect of violating a person's dignity, or creating an offensive, intimidating or hostile environment." This can be physical, verbal, non-verbal or written and also covers unwanted sexual advances, including touching or standing too close."

23. The Respect in the Workplace Policy (bundle pages 73-78) also provides that all colleagues (which includes the claimant) are within the scope of the policy.
24. The claimant's training records are at pages 155-157 of the bundle. As is reflected in the training record at page 156, the claimant completed the "Leading Respect in the Workplace video training" on 10 December 2019 and the "Achieving equality and diversity" training on 17 January 2020.
25. The respondent's Disciplinary Policy is at pages 76-78 of the bundle. In so far as is material the Disciplinary Policy provides as follows:

"Examples of gross misconduct ...

Behaviour:

- Serious breach of Morrison's Respect in the Workplace Policy including but not limited to harassment, discrimination, bullying or victimisation towards any colleague".
26. In terms of the organisation of the RDC, there is one overall manager responsible for the site: Simon Burrows, Site Manager.
 27. There is then a Warehouse Manager for each of the two warehouses: Ambient and Fresh. The Warehouse Manager during the claimant's employment was Mr Burrows and then Mr Raper on an interim basis.
 28. Mr Raper's counterpart as Warehouse Manager in the Fresh Warehouse was Mr Andrew Rotherforth.
 29. Directly beneath the Warehouse Managers are two Shift Managers. In the Ambient Warehouse the Shift Managers were the claimant and Mr Chris Metcalfe.
 30. Directly beneath the shift managers are three Team Managers reporting directly to the Shift Managers. At the relevant time the Team Managers reporting to the claimant were Dave Walker, Kevin Walker and James Thompson.
 31. Beneath the Team Managers are the Warehouse Operatives who were primarily engaged in picking the products for onward dispatch to the respondent's stores. Kayleigh Lattaway was a Warehouse Operative primarily assigned to the Fresh Warehouse but with the skills necessary to be deployed into the Ambient Warehouse in accordance with business need. It was common ground that Ms Lattaway did not enjoy working in the Ambient Warehouse.

32. Six months into the claimant's employment the matters which led to the claimant's dismissal arose.
33. On 1 June 2020, the claimant attended a probationary review meeting with the Site Manager, Mr Burrows. Zoe Austin, People Manager, attended the review meeting as a note taker. The notes of that review meeting are at pages 86 to 91 of the bundle. A number of things are significant in terms of what took place at that review meeting. Mr Burrows asked Mr Falomo how he was feeling. Mr Falomo awarded himself 20 out of 50 in response to that question. The claimant identified that the biggest reason for such a relatively low self-assessment was that he needed to bridge between the day and night shifts better. He also identified the need to make sure the warehouse team was not negative.
34. Mr Burrows then asked the claimant to talk through the successes of his first six months in employment at the respondent. The claimant mentioned engagement with his team. The claimant had identified the need for him to "change strategy" to avoid conflict with the team members. The claimant spoke of having to go "back to basics" and carrying out 1:1s to gradually implement that strategy. Significantly he describes himself as:
- "Right now happy with where I am with the team" (bundle page 87).***
35. The claimant also described himself as being ***"90% of the way there"*** in relation to the engagement relationship side of his role. The claimant said he was 90% there with some managers and 50% there with some others. The claimant also said that the feedback from his colleagues would reflect that assessment.
36. Mr Burrows asked the claimant whether there was anything else he wanted "to shout out about?". The claimant referred only to colleagues not picking up damages, pallet sortation when they leave at 2am. The claimant identified no other issues or problems.
37. The claimant was also asked what he would do if he could go back six months and start again with the respondent. The claimant said he would have taken a different approach in terms of how he engaged with people. He said he ***"realise(d) [he was] wrong"***, and ***"needed to understand" (bundle page 88)***. The claimant was also asked whether he was getting everything he needed from Zoe's team and from himself (Mr Burrows). The claimant responded ***"yes" (bundle page 89)***.
38. Mr Burrows then provided his feedback to the claimant. Mr Burrows explained that he had not seen sufficient progress with the claimant's 90 day plan. The 90 day plan was part of the claimant's presentation at interview and he was required to implement that over the first 90 days of his employment. It was the claimant's lack of progress against that plan to which Mr Burrows was referring at the probationary review meeting. Mr Burrows also said that he understood that the claimant had ***"not got a good team and been on [his] own some time" (bundle page 89)***.
39. Mr Burrows also referred to the fact that shipping was not been done in time. Mr Burrows identified the need to ensure that all processes were followed accurately and on time. Mr Burrows commented that, ***"Ambient overall last few weeks gone backwards." (bundle page 89)***.
40. In the circumstances, Mr Burrows informed the claimant that he would be extending the claimant's probationary period for a further 12 weeks. Mr

Burrows referred to the fact that another Shift Manager was joining the respondent the following week which would give the claimant more time to carry out his role as Shift Manager rather than stepping into the role of Team Manager out of necessity.

41. Mr Burrows was also conscious of things that he could have done better in respect of the claimant's first six months of employment. Mr Burrows said that on reflection he shouldn't have left the claimant on nights with the Team Managers that the claimant had to manage. Nevertheless, Mr Burrows pointed to the fact that help was on its way in the form of the additional Shift Manager who would shortly be joining the team. Mr Burrows also explicitly made clear that he would support the claimant moving forward and encouraged the claimant not to give up on his changed approach **"until [he] sees success."** Mr Burrows also said that if there was progress over the next three months then there would be no issues with continuing the claimant's employment.
42. The claimant told Mr Burrows that three weeks ago (week commencing 11 May 2020) that he had been told by Shaun Carson (Warehouse Operative) that his (the claimant's) probationary period was to be extended by three months. The claimant had approached Mr Raper about this because he considered it to be a breach of confidence. Mr Burrows' immediate response to the claimant was to explain to him that he [Mr Burrows] had only made the decision to extend the claimant's probationary review last week (i.e. the week commencing 25 May 2020). Mr Burrows also explained that he only spoke to Mr Raper about his decision the previous Saturday, 30 May 2020.
43. The review meeting ended with Mr Burrows indicating that the claimant had the support of his senior managers, himself and Mr Raper, both of whom wanted the claimant to succeed. Mr Burrows emphasised that over the next three months the claimant would have all the support he required. Miss Austin then expressly asked the claimant "what support do you need from us?" The claimant did not directly answer that question but he was nevertheless reassured that Mr Burrows had confidence in the claimant and that the claimant should "shout" if he needed help in terms of training for the team or himself.
44. There was no dispute between the parties about the accuracy of the notes of the probationary review meeting. Significantly, at no point during the review meeting did the claimant mention that he considered that he was the victim of any race discrimination or harassment. On the contrary, the claimant described himself as "happy" with where he was with the team. The claimant did not raise any issues relating to insubordination by the Team Managers, alteration of his shifts on short notice, being held accountable for faults occurring when the claimant was not on site; being asked to attend a 1:1 meeting with Mr Burrows unless he agreed to falsify shipping reports; and not being given sufficient support. Not only did the claimant not identify these matters as examples of race discrimination, he did not mention them at all.
45. Mr Burrows followed up the review meeting with a letter dated 3 June 2020 (bundle pages 92 to 93) summarising the outcomes of the meeting. In that letter Mr Burrows specifically identified the two areas which required improvement: engagement – developing the way Mr Falomo worked with his colleagues including ensuring that he got the names of his team members right and to change the ways of working with his Team Managers; and, secondly, to deliver on the 90 day plan using his 5s and six sigma qualifications to improve the service. This was part of the 90 day plan that the claimant presented at the

recruitment stage. Thirdly, the claimant was to ensure that processes are followed such as ensuring that shipping on time is adhered to and managed. Mr Burrows enclosed a copy of the minutes of the review meeting. Mr Burrows reflected those perceived areas for improvement at paragraphs 17A to D of his witness statement.

46. The specific events which led to the claimant's dismissal took place between 1 and 8 June 2020.
47. On 8 June 2020, an investigation meeting was held with Kayleigh Lattaway. The notes of that meeting are at pages 94 to 97 of the bundle. The investigation was carried out by Helen Butterworth, People Specialist in the respondent's HR team. At that investigation hearing, Ms Lattaway explained that the claimant had interacted with her in a way that had made her feel uncomfortable.
48. In particular, Ms Lattaway explained that the claimant had asked her on Tuesday 2 June 2020 whether she knew of anyone who could clean his (the claimant's) house and then asked her (Ms Lattaway) whether she wanted to clean it. Ms Lattaway explained that she said "no" to both of those questions.
49. Later on in the same shift on 2 June 2020, the claimant made a proposition to Ms Lattaway that if she were to find him a three bed flat to rent then the claimant would give Ms Lattaway a finder's fee. Ms Lattaway said that she would "keep an eye out".
50. Ms Lattaway also reported that during the shift on Wednesday 3 June 2020, the claimant offered to buy her a drink and asked her what she liked. Ms Lattaway appeared to interpret this as the claimant asking her to go to the pub and she explained that she didn't really drink at all. The claimant then asked Ms Lattaway what was her favourite thing to do and Ms Lattaway replied that she liked holidays and then just "laughed it off". An hour later, the claimant approached Ms Lattaway again and asked her if she liked Greece to which Ms Lattaway said she had never been. At that point the claimant offered to take Ms Lattaway on holiday "all inclusive" and that Ms Lattaway "would not have to pay". The claimant explained that he was a guest at a wedding and could take someone along with him. Ms Lattaway laughed and thought the offer was a joke at which point the claimant said he was being serious and asked Ms Lattaway for her private email address and private telephone number. Ms Lattaway explained that she felt in that situation that she had to give the claimant her personal contact details because he was in a management position. Ms Lattaway said she did not know what else she could do in those circumstances. The claimant is two stages up in the hierarchy from Ms Lattaway. She would report to a Team Manager who would report in turn to a Shift Manager – the same position held by the claimant.
51. Also on Wednesday 3 June 2020, Ms Lattaway explained to Miss Butterworth that after the shift had ended the claimant went to her car and pulled up in front of her and said thank you for the shift. There were numerous other colleagues going in the same direction and the claimant only approached Ms Lattaway. As Ms Lattaway was making her way home, the claimant pulled up next to her and gestured for her to pull her window down. Ms Lattaway then just drove off.
52. On Saturday 6 June 2020 at 4pm Ms Lattaway received a text message which was from the claimant. The claimant said in that text message that he "just want[ed] to know if [Ms Lattaway] like[d] chocolate". Copies of the text

messages are page 158 of the bundle which shows the claimant texting Ms Lattaway as follows:

“Hi Kyle just wanted to know if you liked chocolate”.

Ms Lattaway replied as follows:

“Wrong number. but yes I like chocolate.” Ms Lattaway also explained ***“that she was not “Kyle” and that she was in fact “Kayleigh”.***

53. At that point the claimant apologised and said he had been ***“given this number. Really sorry”.*** Ms Lattaway replied ***“it’s fine”.***
54. Ms Lattaway also told Miss Butterworth that James Allison (Warehouse Operative) saw the claimant pull up in front of her car. The claimant explained that although she did not wish to get anyone into trouble, she explained that when she thought about what had happened she ***“[felt] really uncomfortable so went to see Andy in Fresh”.*** The Andy referred to is Andrew Rotherforth a Shift Manager in the Fresh Warehouse.
55. On 8 June 2020, the claimant attended an investigation hearing in connection with the matters raised by Ms Lattaway. Minutes of that meeting are at pages 98 to 103 of the bundle. Again, no issue was taken by the claimant regarding the accuracy of those notes. The Investigation Manager was Mr Ryan Mears, Warehouse Manager – Fresh. In addition to Mr Mears and Andy Rotherforth, Miss Butterworth, People Specialist, also attended the meeting as a note taker. The claimant has signed the minutes to confirm that they reflected a true account of the points discussed. This meeting took place at 6 o’clock on 8 June 2020, some 30 minutes after the investigation meeting with Ms Lattaway.
56. Mr Mears was not the claimant’s line manager sine Mr Mears was the Warehouse Manager of the Fresh Warehouse not the Ambient Warehouse. Mr Mears had little direct contact with the claimant apart from occasionally working on the same project. Mr Mears recalls in his witness statement (paragraph 5) that when the claimant commenced his role at the RDC he was ***“really up beat”*** and had interesting ideas.
57. Mr Mears explains at paragraph 6 of his witness statements that he was asked by the People Team to conduct an investigation into allegations that the claimant had engaged in inappropriate conduct amounting to sexual harassment towards a colleague, Kayleigh Lattaway (Warehouse Operative). It was explained to Mr Mears that Ms Lattaway had raised concerns about the claimant’s conduct to her Shift Manager, Mr Andrew Rotherforth. It was Mr Rotherforth who had suggested that Ms Lattaway report the matter to the People Team.
58. In Mr Mears’ investigation meeting the claimant accepted that he had invited Ms Lattaway to a party because he didn’t know anyone else to ask. He described it as a “bachelor party”. The claimant also explained that when he had seen Ms Lattaway in the car park he had simply said thank you for her efforts during her shift. The claimant explained that the bachelor party was to take place in August 2020. The claimant explained that he did not “want to look stupid in front of friends” if he turned up to the bachelor party without anyone with him (bundle page 100). The claimant said he asked Ms Lattaway for her personal email and telephone number so that he could ask her formally to the party, invitation to which was by email only. The claimant explained that he had asked Ms Lattaway for her personal contact details while she was working doing

picking. The claimant also accepted that he had offered money to Ms Lattaway should Ms Lattaway find a residential property suitable for him. The claimant said that he had also asked other employees about cleaning, referring to Mr Cousins. He said that he had also offered a finder's fee for a property to a co-worker (Adriana Thompson) who worked for Wincanton – a logistics contractor to the respondent. The claimant said at the investigation meeting with Mr Mears on 8 June 2020 that he had not offered to pay for Ms Lattaway's holiday and that she would have to pay for it herself. This was in direct conflict with the evidence of Ms Lattaway.

59. The claimant also accepted that he had contacted Ms Lattaway in the evening on her personal mobile number to ask her if she liked chocolate. The claimant explained that he got biscuits or chocolate for colleagues who had helped him out. This was a treat and by way of a thank you.
60. The claimant explained that when he approached Ms Lattaway in her vehicle he was going home with Mr Jieman – his USDAW trade union representative. The claimant explained that he left the car park first and that it was next to Ms Lattaway's car at a subsequent junction. The claimant denied attempting to speak to Ms Lattaway at the junction.
61. Mr Mears decided in the light of the investigation meetings to suspend the claimant on basic pay so that the respondent could carry out a further investigation. Mr Mears emphasised that no decision had been made at this point. Suspension was to allow the investigation to take place.
62. Mr Mears followed up the investigation with a letter to the claimant of 8 June 2020 (bundle page 104). That letter reflects Mr Mears' decision to suspend the claimant on basic contractual pay until further notice.
63. On 10 June 2020, an investigation hearing took place by telephone with Mr Jimmy Allison, Warehouse Operative. That investigation hearing was conducted by Ms Butterworth, People Specialist. Mr Mears explained that he could not precisely recall why he had not undertaken that investigation hearing himself, but assumes it was because of availability at the time. At page 106 of the bundle, Mr Allison confirms that the claimant had driven up to Ms Lattaway in the car park before he pulled his window down and then thanked her for her shift. Ms Lattaway had subsequently told Mr Allison that the claimant had pulled up next to her at a junction shortly after leaving the car park and asked Ms Lattaway to pull down her window. Mr Allison described Ms Lattaway as "shaken by the incident" (bundle page 106). Mr Allison also reported the fact that Ms Lattaway had said to him that the claimant had pulled up alongside her car at a junction shortly after leaving the car park; that the claimant was in the wrong lane and that the claimant had asked Ms Lattaway to pull her window down. Mr Allison also said that Ms Lattaway had asked her if she knew a cleaner and would she clean his house and he also confirmed that Ms Lattaway said that the claimant would pay for Ms Lattaway to go on holiday with him to Greece.
64. On 7 June 2020, at approximately 18:10, Ms Lattaway approached Mr Rotherforth, Shift Manager – Fresh, in his office. A witness statement was taken from Mr Rotherforth on 10 June 2020. In that statement, Mr Rotherforth explains that Ms Lattaway was "physically shaking and upset" on 7 June 2020 as a result of interaction with the claimant. She referred to the claimant as "a coloured man" who had been texting her and also following her from the

Ambient department. Mr Rotherforth in his statement reflects the minutes at page 108 of the bundle in that he immediately corrected Ms Lattaway after she had referred to the claimant as the “coloured” manager. He says that he immediately explained to her that it was not the correct terminology to use when describing race. Mr Rotherforth explained to her that Ms Lattaway should refer to an individual as “black, mixed race, Asian or non-specific” (bundle page 108). Ms Lattaway immediately apologised for using the incorrect terminology and thereafter proceeded to describe the manager in question as “black”. Mr Rotherforth says that he understood that Ms Lattaway was raising the allegations but did not know the name of the alleged perpetrator. It was for that reason that she referred to Mr Falomo in the way that she initially did. Mr Rotherforth at paragraph 9 of his witness statement makes clear that he did not understand Ms Lattaway to be meaning to cause any offence by her original use of the terminology “coloured”. Mr Rotherforth relies in part for that understanding on the fact that Ms Lattaway immediately corrected her language and apologised. That conversation is set out at pages 108 to 109 of the bundle.

65. Ms Lattaway gave a similar account to Mr Rotherforth as she subsequently did to Mr Allison. Ms Lattaway again explained that the claimant had approached her on Thursday last week. The claimant had asked Ms Lattaway for her personal telephone number and personal email which she gave to him. Following this, the claimant asked her if she liked to drink whereupon Ms Lattaway said that she did not drink. She was then asked by the claimant what she did like and she replied holidays and was subsequently offered by the claimant to be taken on holiday by him all expenses paid. Ms Lattaway also complained that on the Thursday or Friday night the claimant had pulled in front of her car and made suggestions that she wind her window down and engage in conversation. After leaving the car park Ms Lattaway explained that the claimant pulled up beside her once again and tried to engage her in conversation.
66. Subsequently, Ms Lattaway explained that she started to receive text messages from a number she did not recognise but which turned out to be that of the claimant. Ms Lattaway told Mr Rotherforth on Sunday 7 June (as reported in the witness statement dated 10 June 2020) that she was not happy about the attention the claimant was giving to her and that she wanted it to stop.
67. On 11 June 2020, Mr Mears interviewed Adriana Thompson from Wincanton. Wincanton is a service provider to the respondent providing logistical services. The Wincanton depot is based on the RDC Stockton site. Mr Mears and Ms Butterworth interviewed Adriana Thompson on 11 June 2020. The notes of that meeting are at pages 112 to 115 of the bundle. Ms Thompson had little to add to the matter. However, she did not corroborate the claimant’s statement in his interview with Mr Mears on 8 June 2020 that the claimant had also asked Ms Thompson to help him find a flat in return for which he would provide her with a finder’s fee. Ms Thompson explicitly denied having a conversation with the claimant in which he had indicated to her that he would provide her with a finder’s fee if she was able to help him identify a suitable property in which the claimant would live. This directly contradicted the claimant’s account. In the light of this conflict of evidence, the Tribunal preferred the evidence of Ms Thompson, not least because Ms Thompson had no reason whatsoever to deny that any such conversation had taken place.

68. On 12 June 2020, Mr Mears produced his investigation report (bundle pages 114 to 116). This report related to the investigation that Mr Mears had carried out into alleged wrongdoing by the claimant between 8 June and 12 June 2020. The outcome of Mr Mears' report was that he considered that the claimant did have a case to answer and he recommended that the matter proceed to a formal disciplinary meeting (bundle page 115).
69. On 12 June 2020, Mr Burrows, who had been appointed as the disciplinary manager, wrote to the claimant (bundle page 117). In that letter Mr Burrows set out the five allegations of gross misconduct to which the claimant was expected to respond. They were:
- (1) Having approached Ms Lattaway and asked her if she knew anyone who could clean his house and then proceeding to ask her if she would come and clean his property.
 - (2) Approaching Ms Lattaway with a proposition of finding the claimant a three bedroomed flat and paying Ms Lattaway a finder's fee.
 - (3) Asking Ms Lattaway if he could buy her a drink and whether she would come on holiday with him to Greece all expenses paid.
 - (4) Asking Ms Lattaway for her personal mobile number and personal email address and then sending a text message asking if she likes chocolate.
 - (5) That he had driven around Ms Lattaway's car and pulled up next to her in the car park to thank her for her shift and then proceeded to follow her out of the car park, pulling up next to her vehicle and gesturing for her to pull her window down.
70. Mr Burrows indicated in his letter that this may amount to a serious breach of Morrison's Respect in the Workplace Policy, including but not limited to harassment. Mr Burrows enclosed the investigation documentation together with a copy of the claimant's text message to Ms Lattaway. The claimant was directly informed that the allegations were sufficiently serious that a potential outcome of the disciplinary hearing could be his dismissal for gross misconduct (bundle page 118).
71. On 15 June 2020, the claimant's disciplinary hearing took place. Mr Burrows attended as the disciplinary manager, Ms Austin was the note taker. The claimant was in attendance as was his trade union representative, Mr Jieman. The notes of the disciplinary hearing are at pages 119 to 132 of the bundle.
72. The claimant explained that he had approached a couple of people to look for someone to come in to clean his house twice weekly. He explained that he was looking for specific people to do that kind of work and had asked three other people, including Alex Pop and Alex Pop's cousin. The claimant had said he had also spoken to one of the corporate cleaners.
73. Regarding the offer of a finder's fee, the claimant accepted that he asked the claimant, who he considered to have local knowledge, to help him find a house for which he would provide a finder's fee. The claimant said that Ms Lattaway would **"keep her eye out"**.
74. The claimant further explained that he asked Ms Lattaway whether she preferred chocolate or biscuits to which Ms Lattaway had said that she didn't like either. The claimant explained that the question of holidays came up out of

something that Ms Lattaway had said and the claimant said that he could help with that.

75. The claimant denied that he had suggested to Ms Lattaway that she might be interested in cleaning his house. The claimant explained that he was looking for “Eastern Europeans” to do the job **“as he knew they would be able to do that kind of job and do it properly”**. The claimant explained that was one of the reasons he approached Alex Pop. The claimant explained that the reason he gave chocolate or biscuits to team members was recognition. He described that as cultural and something he had always done.
76. The claimant denied asking Ms Lattaway to have an alcoholic drink with him. He explained that he did not drink. The claimant (bundle page 122) says that he named holidays as something Ms Lattaway might like and that the claimant laughed. The claimant said that he offered Ms Lattaway the opportunity to come on holiday “paid for”. The claimant explained that someone was having a stag and that **“it’s paid for”**. The claimant alleges (and Ms Lattaway denies) that she said “okay”. It is in that context that the claimant says that he asked for the claimant’s phone number and email. Mr Burrows asked the claimant to expand on what the holiday consisted of.
77. The claimant said it was “like a stag do” a party for married and unmarried people that had meant to be in February but had been shifted to August due to the pandemic. The stag do according to the claimant was for “females and males” and he was entitled to take two guests. The claimant’s explanation for why he specifically asked Ms Lattaway was that he didn’t know anyone so he thought he would ask her and did not expect her to say yes. The claimant confirmed he had not asked anybody else to go on the stag do with him. The claimant said that Ms Lattaway had indicated that she would want to go with him. He said that he did not force her to give him her personal contact details and that it was a normal conversation with talking and laughing.
78. The claimant also said that he requested the email and phone numbers because of the holiday. However, the claimant went on to accept that he did text the claimant using the personal mobile number he had obtained during the course of the previous day asking whether Ms Lattaway liked chocolate. The claimant’s evidence on these points was rather cloudy. The claimant appeared to be saying on one occasion that Ms Lattaway had already said that she didn’t like chocolate but then subsequently the claimant sent her a message asking her whether or not she did. Similarly, the claimant’s account that he asked for the claimant’s personal email and phone number solely in relation to the holiday was somewhat undermined by the fact that he accepts that the day after he obtained those details he texted her on a matter which did not relate to the holiday in any way.
79. The Tribunal prefer the reported account of Ms Lattaway to the evidence of the claimant. Ms Lattaway gave a consistent account during the management phase whereas the claimant did not. The Tribunal accept that Ms Lattaway did not express any interest in going on holiday with the claimant. The claimant was a virtual stranger to Ms Lattaway; there was no personal relationship between them either inside or outside the workplace; there was a very significant age gap between Ms Lattaway (who was in her 20s) and the claimant (who was in his 50s); and the claimant was a senior manager two levels up from Ms Lattaway who was at the bottom of the organisational hierarchy as a Warehouse Operative. When rejecting the claimant’s evidence where there was

conflict with the reported account of Ms Lattaway, the Tribunal also took into account that the claimant's description of the holiday changed at various stages of the management phase from a wedding to a stag do. They are obviously two very different events with two very different connotations.

80. The claimant also accepted that he had stopped in front of the claimant's car in the RDC car park. He said that he stopped in front of her and said "thank you for today". The claimant denied asking Ms Lattaway to wind her window down. He claimed that he was "dancing" explaining that he danced with his hands. The Tribunal finds that the claimant was not dancing with his hands. The Tribunal prefer the reported account of Ms Lattaway that the claimant was gesturing for her to wind her window down so that the claimant could once again engage her in conversation.
81. During the course of the disciplinary hearing, the claimant raised for the first time the matter of his race. Although the matter was pleaded as relating to the claimant's ethnic/national origin as Nigerian (African) it is also put on the basis of the protected characteristic that the claimant is black. During the disciplinary hearing the claimant said that he felt that if he wasn't black "Kayleigh wouldn't have done this" (bundle page 126). The claimant's position was that it was "**no big deal asking her**" and on that basis the claimant says "suddenly things changed" and that it must be because he is black that Ms Lattaway reported unwanted conduct to Mr Allison and Mr Rotherforth. The claimant's position was that during his conversations with Ms Lattaway there was no reaction from her "nothing gave [him] any clue". There was no anger and no non-willingness to talk and the text message which he had sent received a reply which included a laughing emoji. The claimant also said that in the warehouse people said things to each other which were a lot worse than he had said to Ms Lattaway and nothing was ever done.
82. Mr Jieman, on behalf of the claimant, raised Ms Lattaway's reference to the claimant as a "coloured man". This Mr Jieman says shows Ms Lattaway's initial perception of the claimant in discriminatory terms. Mr Jieman also asked for sight of CCTV footage which he said would show that the claimant did not follow Ms Lattaway out of the car park, but rather Ms Lattaway left the car park after the claimant and so the claimant could not have been following Ms Lattaway. Mr Jieman also submitted that there was no sexual element to the harassment and that it was simply a cultural difference "gone wrong". Mr Jieman referred to employment law and the definition of sexual harassment. Mr Burrows asked Mr Jieman to put employment law on one side and to look at the respondent's domestic policies under which Mr Burrows was obliged to manage these disciplinary issues. Mr Jieman also made the point at length that for harassment to be demonstrated he considered that there is "a need for the other person to know its unwanted". The claimant said that he considered Ms Lattaway as "super sensitive".
83. Mr Burrows then adjourned the hearing to make further enquiries.
84. On 18 June 2020, Mr Burrows, again assisted by Ms Austin as note taker, had a further investigation hearing with Ms Lattaway. This was undertaken by telephone. Mr Burrows asked Ms Lattaway why she gave her personal details to the claimant. Ms Lattaway explained that she "panicked and felt put on the spot". Mr Burrows asked Ms Lattaway whether the claimant had specified the type of holiday on which he had invited her. Ms Lattaway said it was about being a guest "at a wedding and could take a plus one". Ms Lattaway explained

that she became uncomfortable. She knew that the claimant had her personal phone number and personal email and then the car incident when he pulled up in front of her and beeped his horn. She explained this took place at the roundabout at the A19.

85. On 22 June 2020, an investigation hearing took place at which Ms Butterworth, Mr Burrows and Ms Austin attended. The purpose of the meeting was so that Mr Burrows could be sure that the text message sent to Ms Lattaway had come from the claimant's phone. Ms Butterworth explained that she had searched the address log at site and the number from which the text messages had been sent to Ms Lattaway matched the number on record for the claimant.
86. Also on 22 June 2020, Mr Burrows invited the claimant to a reconvened disciplinary hearing to take place on 24 June 2020. That letter also set out once again the allegations against the claimant and enclosed copies of further documentation including training records, the Respect in the Workplace Policy as well as the record of the meetings on 18 and 22 June 2020. Again, the claimant was informed that one potential outcome given the seriousness of the allegations was his dismissal for gross misconduct (bundle page 143).
87. On 24 June 2020, the disciplinary hearing reconvened. The notes of that meeting, which were signed by both Mr Burrows and the claimant, are at pages 144 to 149 of the bundle. In that meeting Mr Burrows explained his decision and his rationale.
88. Mr Burrows' decision was that the claimant should be dismissed summarily without notice for gross misconduct.
89. **Allegation 1** – cleaning his property. Mr Burrows accepted that the claimant had asked other colleagues in addition to Ms Lattaway (Mr Pop and Mr Pop's cousin) and to that extent the claimant was not targeting Ms Lattaway. However, Mr Burrows was concerned that the claimant was racially stereotyping East Europeans for the purposes of approaching colleagues to carry out cleaning activities for him.
90. **Allegation 2** – finder's fee for three bed accommodation. Mr Burrows told the claimant that he was not progressing with this allegation. Mr Burrows was satisfied that the claimant had not targeted Ms Lattaway in relation to this matter which, although not the best use of company time, was not a matter Mr Burrows thought considered appropriate for disciplinary action.
91. **Allegation 3** – drinks and all expenses holiday to Greece. Mr Burrows explained that he found this was not a wedding but a stag do. The Tribunal agree with that finding. Mr Burrows noted that the claimant said that the offer of drinks, chocolate, biscuits and the holiday were said by the claimant to be gestures of thank you for work done by colleagues and as such a cultural matter. However, Mr Burrows pointed out that there was a company policy regarding recognition mechanisms in place on the site of which the claimant had been made aware. Mr Burrows explained that he considered it to be inappropriate to offer a colleague two levels below him in the hierarchy an all-expenses paid foreign holiday. Mr Burrows was satisfied that as part of his induction the claimant, as a leader in the business, should be following the company's recognition scheme rather than anything that he was used to doing in a different workplace or culture. Mr Burrows referred to the discrepancy and the type of holiday (wedding as opposed to a stag do) and to the initial denial by the claimant as to whether or not it was fully paid or whether Ms Lattaway

was to pay for it herself. Mr Burrows was satisfied that someone other than Ms Lattaway would be paying for that for the holiday. The Tribunal agree with those findings.

92. **Allegation 4** – asking junior subordinate colleague for personal telephone and email details. Mr Burrows explained that when a manager asks for details from a subordinate the subordinate is likely to feel that they need to supply them. Mr Burrows referred to the fact that Ms Lattaway’s evidence was that she “panicked” and felt that she had to pass her details on because of the claimant’s seniority in the workplace. Mr Burrows also said that he did not accept that Ms Lattaway had agreed to go on holiday with the claimant the claimant had contended. Mr Burrows was satisfied that Ms Lattaway at no stage indicated that she was willing to go on holiday with the claimant. Mr Burrows did not find it credible that Ms Lattaway agreed to go on the holiday. The Tribunal agrees with those findings.
93. Mr Burrows also had regard to the fact that the claimant’s explanation for seeking personal contact details was in connection with the holiday whereas the day following being given the personal contact details the claimant contacted Ms Lattaway for a completely different reason, namely to ask her whether she liked chocolate. Mr Burrows considered asking a junior subordinate for personal contact details to be an abuse of management authority. Although Mr Burrows accepted that Ms Lattaway could have explicitly said “no”, the context had to be taken into account which is that this was a request from a senior manager in the workplace putting Ms Lattaway in a very difficult position with which she felt uncomfortable.
94. **Allegation 5** – driving towards her car in the car park at the end of shift to thank her for her shift, then following her out of the car park, pulling up next to her vehicle at a red light and gesturing for Ms Lattaway to wind her window down. Mr Burrows acknowledged that upon further investigation it was clear that it was Ms Lattaway who had followed the claimant out of the car park and that at the junction it was the claimant who changed lanes to pull alongside Ms Lattaway’s car. In those circumstances, Mr Burrows did not see the need to identify any CCTV recordings since he accepted the point that Mr Jieman had made, namely that it was the claimant who had left the car park first.
95. Mr Burrows concluded that the claimant had harassed Ms Lattaway and that his behaviour was because Ms Lattaway was female. In particular, Mr Burrows was satisfied that the claimant had harassed Ms Lattaway by offering an all expenses holiday in Greece to accompany him on a stag do; asking for personal contact details; approaching the claimant in the car park; and sending uninvited text messages to the claimant.
96. Mr Burrows had regard to the claimant’s mitigation. Mr Burrows did not accept that any part of Ms Lattaway’s reasons for raising the claimant’s conduct with Mr Allison and reporting it to Mr Rotherforth was in any way influenced by the colour of the claimant’s skin. The Tribunal agree. Mr Burrows did not accept that the fact that Ms Lattaway referred to the claimant initially and inappropriate terminology as a “coloured man” was enough to suggest that the complaints were motivated by the claimant’s colour. Mr Burrows was satisfied that Ms Lattaway made the complaint because she felt uncomfortable and wanted the attention the claimant was paying her to stop. In relation to the contention that worse things were said on the shop floor and nothing was done about it, Mr Burrows’ position was that the claimant, as a level 3 manager, should be taking

steps to manage any such inappropriate behaviour and reporting it to Mr Burrows as site manager. Mr Burrows did not accept that cultural differences explained the offer of a free holiday, obtaining personal email/mobile phone details, sending unsolicited text messages or pulling up to the alongside Ms Lattaway's car at a road junction.

97. In those circumstances, Mr Burrows concluded that the claimant had conducted himself in a way that was not in accordance with the expectations of a level 3 manager; that it was a serious breach of the Respondent's Respect in the Workplace Policy; that a final written warning was insufficient; and that the claimant therefore should be summarily dismissed.
98. By letter dated 24 June 2020, Mr Burrows confirmed his decision given verbally to the claimant earlier that day. The letter confirming the claimant's summary dismissal and reasons for that decision is at pages 150 to 153 of the bundle. In that letter, Mr Burrows confirmed his conclusion that the fact that Ms Lattaway had not said explicitly "no" to the claimant (other than to the request in relation to cleaning the claimant's accommodation) was not sufficient to conclude that the claimant did not or should not know that his conduct was unwanted. The claimant had said that it was similar to approaching a "nice lady" in a shopping mall then walking away if she did not want to talk to him. Mr Burrows was not satisfied that this was an appropriate analogy to the circumstances of this particular case. Although the matter was not sexual harassment in Mr Burrows' assessment at the time, he was satisfied that it was serious harassment and a serious breach of the respondent's Respect in the Workplace Policy.
99. Mr Burrows in his letter also pointed out the aggravating features of the claimant's conduct, including that Ms Lattaway was plainly uncomfortable; had only given her personal contact details because she felt obliged to give it to a senior manager; did not agree to go on holiday with the claimant; did not agree to receiving texts about chocolate or anything else from the claimant; and had not agreed to the claimant pulling up alongside her in his car.
100. Finally, the claimant was informed that he had the right of appeal against Mr Burrows' decision to summarily dismiss him within 10 days of receipt of the letter (bundle page 153). The claimant did not appeal Mr Burrows' decision to summarily dismiss him.
101. Mr Burrows and Mr Mears gave evidence in relation to the support that was provided to the claimant when he commenced employment with the respondent and, in particular after Mr Metcalfe – his original buddy – resigned and was reallocated to project work on a Toolkit compilation on the day shift by Mr Burrows prior to Mr Metcalfe's notice period ending. Mr Burrows' evidence, which the Tribunal accepted, was that the claimant was given 12 weeks' support from Mr Metcalfe prior to Mr Metcalfe being re-assigned to the day shift after he resigned. Mr Burrows explained that there is no set period of time over which a new shift manager would be allocated a buddy.
102. However, Mr Burrows' evidence was that it was unusual for a new Shift Manager to receive as long as 12 weeks of "buddy" support. Mr Burrows' evidence was that it was more often than not that a shift manager would receive a buddy for around two weeks and then would learn on the job and ask for support in specific areas if required. Mr Burrows therefore considered 12 weeks to have been sufficient time for the claimant to get up to speed with the respondent's processes and Mr Burrows did not think that he would require

another buddy after that period. Mr Burrows also points out that there were plenty of colleagues on site to support the claimant such as the Shift Managers in the Fresh Warehouse and his Team Managers all of whom had very significant experience of the RDC processes over many years. Mr Burrows also points out that at no stage during the claimant's employment did he actually flag up that he required more support, including at his probationary review meeting on 1 June 2020 when he actually expressed himself as satisfied with where he was in terms of the level of support available to him.

103. Mr Mears' evidence was that had he been asked to provide the claimant with additional support or assistance he would have done so. Mr Mears says that he would also have been available if asked to respond to any queries that the claimant might have. Mr Mears acknowledges that he was not the direct line manager of the claimant but points out that Mr Raper and Mr Burrows would both be available to the claimant if he needed additional assistance. Mr Mears also points out that at no stage did the claimant ever complain to him about not receiving the necessary support. The Tribunal accepts that evidence.
104. Mr Burrows also told the Tribunal, and the Tribunal accepted his evidence, that Mr Metcalfe handed in his resignation for personal reasons. The claimant's suggestion that it was because Mr Metcalfe did not want to work alongside a black man was rejected forcefully by Mr Burrows who says that Mr Metcalfe resigned for personal reasons wholly unrelated to work, let alone to the claimant. It was Mr Burrows' decision to ask Mr Metcalfe during his notice period to move to day shift in order to help with a project called "back to basics". The purpose of that project was to collate the site's documentation on its various processes in one place and to create a toolkit for the team. The team were told about this project and Mr Metcalfe attended the night shift to present his progress on the project. Mr Metcalfe started working on the day shift on 18 March 2020. In those circumstances, Mr Burrows points out that the claimant would have been aware what Mr Metcalfe was doing during his notice period on day shift. Mr Burrows adds that had Mr Metcalfe made a request that he did not wish to work with the claimant because of the claimant's race, Mr Burrows would have commenced a formal for breach of the Respect in the Workplace Policy.
105. The claimant also complains that he did not receive sufficient support from Mr Burrows, Mr Raper and Mr Mears after Mr Metcalfe left the business. In particular, a complaint that he was not allocated a new buddy. Mr Burrows' position was that the claimant had already had a far longer period with an assigned buddy than was normally the case and the claimant did not in any event request a replacement buddy whether to Mr Burrows or, to the best of Mr Burrows' knowledge, anybody else.
106. Mr Burrows also points out that Mr Metcalfe had also on occasion been required to manage 6 Team Managers instead of three. This was a temporary measure when there was a three month gap between Mr Metcalfe during the day shift and an employee being recruited on to his role on the night shift. Mr Metcalfe is white British. Mr Burrows also believes that Mr Metcalfe's absence did not add greatly to the claimant's workload whilst a new Shift Manager was recruited to replace Mr Metcalfe. This is because when the claimant was not on shift his Team Managers – who were very operationally experienced within the Ambient Warehouse – were able to work independently without much supervision from Mr Metcalfe.

107. Mr Burrows also points to other white British comparators who had been asked to manage six Team Managers due to business circumstances like the claimant. Mr Metcalfe's predecessor, Mr Micklewright, had also been responsible for six Team Members for some 20 weeks following the claimant's dismissal. Mr Micklewright identifies as white British. Mr Burrows' evidence is also that he did not require the claimant to manage six employees because he was black, as the claimant alleges. That had no bearing Mr Burrows says on his decision making whatsoever. The reason and the sole reason why the claimant was required to manage six employees is for the same reason that it happened to other Shift Managers – a temporary gap in the managerial resources available at the RDC. The Tribunal accepts that considerations of race played no part whatsoever in Mr Burrows' decision to require the claimant to manage six Team Managers consequent on the resignation of Mr Metcalfe and before a new Shift Manager could be appointed.
108. Mr Burrows also says that Mr Mears was not responsible for providing any support to the claimant, so any criticism of Mr Mears in that respect is misplaced. Mr Mears was not in the claimant's reporting line, not least because he worked in the Fresh Warehouse which had different operations to the Ambient Warehouse. Mr Mears' role would therefore be confined to answering ad hoc queries that the claimant might have had if Mr Raper or Mr Burrows were not on shift.
109. Mr Burrows also rejects the fact that Mr Rotherforth is an appropriate comparator in relation to the extension of the claimant's probationary period. The claimant contends that Mr Rotherforth, who was white British, did not have his probationary period extended whereas the claimant, who was black, did. Mr Burrows' evidence was clear that Mr Rotherforth's probationary period was not extended because he delivered against his 90-day, plan unlike the claimant who did not. Similarly, the engagement levels on the night shift in the Fresh Warehouse had been poor prior to Mr Rotherforth's appointment. Mr Rotherforth during his probationary period and afterwards had committed to and succeeded in raising and improving the engagement and morale of his team to ensure compliance with the respondent's processes. Mr Rotherforth was successful at engaging his colleagues to such an extent that his team continues to have the highest engagement levels on the night shift. Mr Burrows points out that when Mr Rotherforth resigned from his post, colleagues petitioned for him to stay such was his success in the role. Indeed, that petition was led by the claimant's representative in these proceedings, Mr Jieman.
110. Mr Burrows deals in his supplemental statement with other contentions raised by the other allegations of race discrimination that the claimant puts forward in these proceedings. Mr Burrows' supplemental statement primarily deals with matters that were raised for the first time at a preliminary hearing on 31 August 2021. To the extent that the supplemental statement address matters which had not been raised before then, the Tribunal was content to admit that evidence from Mr Burrows' supplemental statement as well as the evidence in the supplemental statements of Ms Austin and Mr Rotherforth.
111. Mr Burrows acknowledges that he may well have required the claimant to change his shift pattern on short notice. The claimant says on two days' notice. However, Mr Burrows' evidence, which the Tribunal accepts, is that it is objective operational reasons, and only those reasons, which dictate when Mr Burrows needs to change a Shift Manager's shift pattern on short notice. This

is reflected in the contracts of employment of the Shift Managers which contain a contractual right allowing the respondent to change patterns on short notice. This is typically required to cover sickness absence or annual leave. The need for a Shift Manager to be on site is because a Shift Manager is a senior role and is needed on site at all times to deal with matters such as health and safety concerns that might need to be escalated.

112. In relation to the claimant's allegation that his Team Managers (James Thompson, Kevin Walker and Dave Walker) would ignore tasks delegated by the claimant and laugh at him, Mr Burrows said that he never received any complaint from the claimant about his Team Managers laughing at him or ignoring him. Similarly, Mr Burrows says that he never saw a Team Manager act in that way towards the claimant. Mr Burrows does, however, acknowledge that the Team Managers within the claimant's management authority could be difficult but those difficulties had manifested themselves with other Shift Managers both before and after the claimant's period of employment. The other Shift Managers identify as white British. Mr Burrows' evidence was that these Team Members were difficult to manage regardless of personal characteristics of the Shift Manager whether protected or not.
113. Mr Burrows also deals with the comparators that the claimant identified at the preliminary hearing on 31 August 2021.
114. The claimant identifies Chris Porteous (Warehouse Operative), Sean Reeves (Warehouse Operative) and Ian Sutton (an employee of Wincanton Plc) as comparators.
115. Dealing with each in turn. Mr Burrows was unable to identify any difficulties with Mr Porteous' conduct in respect of which the respondent either took action short of dismissal or no action at all. Mr Rotherforth, who was Mr Porteous' line manager between September 2019 and April 2021, also gave evidence that he was not aware of Mr Porteous ever engaging in misconduct. Ms Austin has also given evidence (witness statement paragraph 13) that she has checked Mr Porteous' personnel file and could not see any information which would indicate why the claimant felt Mr Porteous was a suitable comparator, because she could not find any evidence of any alleged wrongdoing by Mr Porteous. There was a suggestion that Mr Porteous "took somebody's wife" which may well have led to some scandal in the workplace, but there was no suggestion that there was anything non-consensual about that happening and no evidence of any workplace misconduct involving Mr Porteus. In those circumstances, the Tribunal finds that there is simply nothing with which the claimant can compare his circumstances and treatment in the workplace with that of Mr Porteus.
116. Mr Burrows also gave evidence, along with Ms Austin, that Mr Sutton was not an employee of the respondent at all. Mr Sutton was employed by Wincanton Plc who provided distribution services to the respondent under contract. At no stage did he act as an agent for the respondent. Mr Burrows was aware in general terms of an inappropriate comment made by Mr Sutton to a driver who worked at the site who was also employed by Wincanton Plc. Mr Burrows fairly points out that the decision-making in relation to Mr Sutton would be a matter for Wincanton and not for the respondent and that being so he cannot be a legitimate comparator. The respondent has no control over Wincanton employees and no input into their recruitment, shift patterns, disciplinary or capability processes.

117. Subsequent to the claimant's dismissal, Sean Reeves was also alleged to have harassed Ms Lattaway. In particular, he sent her a text message to the following effect: "do you fancy a shag?" The claimant says that this is at least as bad if not significantly worse, than his conduct towards Ms Lattaway in respect of which he was dismissed. Mr Burrows, who took the decision to dismiss the claimant, was not involved in the decision-making in respect of Mr Reeves' text message. Mr Burrows explained that he only knew Mr Reeves by name and not by face and that he would not have realised what had happened or what action had been taken against him.
118. Mr Rotherforth was involved in the matter of Mr Reeves. His evidence was that the incident occurred on or around 26 October 2020 after the claimant had been dismissed. Mr Rotherforth explains that Ms Lattaway was adamant that she did not want any disciplinary action to be taken against Mr Reeves. Ms Lattaway had not been upset by the messages and had remained calm and collected throughout the meeting during which she read out the message. Mr Rotherforth nevertheless said he was required to speak to Mr Reeves in these circumstances. Mr Reeves' position was that he had not sent the message but it had been sent by his friends whilst he was drinking after he had fallen asleep. Mr Rotherforth did not consider disciplinary action was required in respect of Mr Reeves because it was a one-off act which had been sent as a private message outside of working hours and had been sent from one junior colleague to another, unlike the claimant's situation where it was sent from a manager two levels above Ms Lattaway and only two levels below the level of Site Manager.
119. Mr Burrows, having familiarised himself with Mr Reeves situation, was also of the view that he would not have considered Mr Reeves' conduct to be as serious as the conduct of the claimant. He would, however, have determined that the matter should proceed to a disciplinary investigation if it had fallen within his managerial authority. Mr Burrows points out that the key differences between the cases is that Mr Reeves is a Warehouse Operative on the same level as Ms Lattaway, whereas the claimant was a Shift Manager of whom higher standards can legitimately be expected and who was trying repeatedly to engage in personal interaction with a much more junior colleague. Mr Burrows explained that he would expect a much higher standard of a Shift Manager as they are supposed to set an example to their team; and a junior colleague could feel more intimidated/afraid to speak out where inappropriate behaviour comes from a senior manager. Moreover, Mr Reeves' comment was a one-off act outside of working hours compared to the claimant who had engaged in a series of unwanted conduct both inside and outside the workplace.
120. Mr Burrows said that at no stage had he witnessed or had reported to him by the claimant or anybody else any failure by the Team Managers to carry out instructions given to them by the claimant. Mr Burrows refers to the fact that the claimant was very positive about his relationship with the team as of 1 June 2020 during the course of the probationary review meeting. The claimant said that he was at that stage "**happy**" about where he was with the team. Similar evidence was given by the other management witnesses including Mr Mears and Mr Raper.
121. The allegation of sabotage was unclear, but Mr Burrows' view as supported by Mr Rotherforth was that it would be counter-productive for Team Managers to sabotage or alter the claimant's work planning schedule. To do so would just make matters more difficult for the Team Managers themselves. To that extent,

they doubted that that would happen or had happened and also repeat the point that at no stage prior to the disciplinary hearing was there any suggestion to that effect. The Tribunal rejects the claimant's allegation that the Team Managers sabotaged the claimant or altered his work planning schedule. Such contentions are plainly inconsistent with the claimant's account at his probationary review meeting on 1 June 2020 of his relationship with his team.

Relevant law

Discrimination and harassment

122. Section 39(2) Equality Act 2010 provides:

An employer (A) must not discriminate against an employee of A's (B) —

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

123. Section 40(1)(a) Equality Act 2010 provides:

An employer (A) must not, in relation to employment by A, harass a person (B) —

(a) who is an employee of A's;

124. The two concepts of discrimination of harassment are then defined in other provisions, namely section 13 (direct discrimination), and section 26 (harassment).

Direct discrimination – section 13 Equality Act 2010

125. Section 13 provides as follows:

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

(2)

(3)

(4)

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

126. To be treated less favourably implies some element of comparison. The complainant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected

characteristic. The case of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case: section 23 Equality Act 2010.

127. It is for the claimant to show that the hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the Tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.
128. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of “diminishing any eloquence the cumulative effects of the primary facts” might have on the issue of the prohibited ground: **Anya v University of Oxford** [2001] IRLR 377.
129. Unreasonable conduct by the employer is not of itself sufficient to constitute less favourable treatment. However, unreasonable conduct which adversely affects the employee may be evidence of hostility which in turn may justify inference of discriminatory prejudice.

Harassment – Section 26 Equality Act 2010

130. Section 26 provides:
 - (1) A person (A) harasses another (B) if —
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of —
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - (4) 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.
131. The unwanted conduct must be related to the protected characteristic. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a Tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to race. This is wider than the phrase “because of” used elsewhere in the legislation and requires a broader inquiry, the necessary relationship between the conduct complained of and the protected

characteristic is not established simply by the fact that the claimant is of a particular race and that the conduct has the proscribed effect.

132. Unwanted conduct is just that. Conduct which is not wanted or “welcomed” or “invited” by the complainant. (See ECHR Code of Practice on Employment, paragraph 7.8). This does mean that express objection must be made to the conduct before it can be said to be unwanted. The Tribunal must be alive to the very real possibility that a person’s circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object expressly or impliedly to what they now say, in the course of litigation was objectionable and unwanted conduct. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted.
133. In **Grant v HM Land Registry** [2011] IRLR 848, CA, it was held by Elias L J (para 47) that the words “intimidating, hostile, degrading, humiliating or offensive environment” should not be cheapened as they are an important control to prevent trivial acts causing upset being caught by the concept of harassment.

Detriment

134. When considering whether an employee has been subjected to a “detriment”, Tribunals should be guided by the Judgment of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists “if a reasonable worker would take the view that the treatment was to his detriment”. It was further held that in that case that “an unjustified sense of grievance cannot amount to “detriment””.

The reason why

135. In complaints of direct discrimination, the less favourable treatment must be “because of” the protected characteristic.
136. It is common to refer to this underlying issue as the “reason why issue”. Therefore, if there has been less favourable treatment or a detriment, the question for an Employment Tribunal will be “why?”. The perpetrator’s state of mind will normally be critical. In assessing this it is necessary to apply the law as stated in Judgments of the House of Lords in the cases of **Nagarajan v London Regional Transport** [1999] I.C.R. 877; **Chief Constable of West Yorkshire Police v Khan** [2001] I.C.R.1065 and of the Supreme Court in **R (on the application of E) v Governing Body of JSF and the Admissions Appeal Panel of JSF and others** [2010] IRLR 136. In cases where the reason for less favourable treatment is not immediately apparent, it is necessary to explore the mental processes, conscious or unconscious, of the alleged discriminator to discover what facts operated on their mind. In considering whether the necessary link has been established, it is enough that the protected characteristic had a significant influence on the perpetrator’s acts. Therefore, the protected characteristic need not be the only reason for the treatment provided it is “a” cause. Further, a respondent will not be able to escape liability by showing an absence of intention to discriminate.

Burden of proof

137. Section 136 Equality Act 2010 provides that:

(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.

138. This lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the Tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.
139. In cases where the Tribunal is not in a position to make positive findings, section 136(2) means that if there are facts from which the Tribunal could properly conclude, in the absence of any other explanation, that A had treated B less favourably, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the Tribunal must consider all the evidence, not just that adduced by the claimant but also that of the respondent. That is the first stage, which is often referred to as the “prima facie” case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that it did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A’s explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.
140. If a Tribunal is satisfied that the reason given by the employer for the treatment is genuine and that it does not disclose conscious or unconscious racial discrimination that is the end of the matter.

Submissions

141. Mr Jieman provided written submissions on behalf of the claimant which he supplemented orally. Mr Singer made oral submissions. Although we have not set out either set of submissions, we have considered both sets of submissions in the light of the evidence and the relevant legal principles.

Conclusions

142. The Tribunal have come to the following conclusions in respect of the allegations of direct race discrimination and harassment.
143. The Tribunal has already referred to the case of **Madarassy** which requires “something more” than a difference in status and a difference in treatment, whilst acknowledging paragraphs 18 to 19 of **Deman v CEHR** that not a great deal more is required. Deman also has regard to the fact that it is unusual to find direct evidence of direct discrimination.

Direct race discrimination claims

Allegation 1 - Not being given sufficient support.

144. The Tribunal has found as a fact that the claimant was adequately supported during his employment. The Tribunal has accepted the evidence of Mr Burrows in particular that a buddy for 12 weeks was well in excess of what was usually afforded to new starters in management positions. Accordingly, we have found that Allegation 1 has no basis in fact.
145. We have also found that had the claimant requested more support either before, at or after his probationary review meeting then the respondent's more senior managers would have been more than happy to have provided it. The Tribunal accepts the evidence of Mr Burrows in particular where he is clearly supportive of the claimant having recruited him and had high hopes not only for the claimant's success in the role of Shift Manager but had had discussions about potential promotion to Warehouse Manager if the claimant made a success of his Shift Manager role.
146. It is difficult to see how Mr Burrows' mindset is consistent with a denial of support to the claimant. In particular, after Mr Metcalfe was re-assigned to day shift during his notice period, it was because the respondent was aware that the claimant had received a much longer than normal period with a buddy that he did not seek to replace Mr Metcalfe with another buddy to be given to the claimant. Again, the Tribunal accepted the evidence of Mr Burrows that had the claimant asked for a replacement buddy it would have been looked at constructively.
147. There was also evidence from the claimant that felt he could confide in Mr Rotherforth. In those circumstances, the Tribunal consider it highly likely that if the claimant had felt that there was a failure to give support, let alone a failure to give support based on race, he would have mentioned that to Mr Rotherforth in the context of their trusted relationship.
148. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 2 – Extension of the probationary period.

149. Plainly the respondent accepts that the claimant's probationary period was extended and that so doing amounted to a detriment.
150. However, the Tribunal has accepted the respondent's evidence as to the "reason why" the respondent, and Mr Burrows in particular, took the decision to extend rather than pass the claimant's probationary period at the review meeting on 1 June 2020. None of those reasons had anything whatsoever to do with race. The reasons were recorded in the contemporaneous documentation and those reasons are all objective, operational and race neutral.
151. In particular, Mr Burrows sets out in his letter confirming the reason for extending the disciplinary period (bundle pages 92 to 93) that he took into account the following considerations: engagement – the claimant needed to develop stronger working relationships with his team, including ensuring he got the names of his team members right when he communicated with them; the claimant's failure to deliver against his own 90 day plan – that the claimant had

not delivered on what he had indicated in terms of the first 90 days of his employment with the respondent and in particular had not used his 5s and/or six sigma qualifications to improve engagement levels and service standards; not ensuring that processes are followed – the claimant had failed to ensure that, for example, shipping was done on time and the required processes were adhered to and managed. None of those considerations have anything to do with the claimant's race.

152. During the course of the probationary review meeting the claimant said nothing by way of contradiction to the areas that Mr Burrows identified as needing improvement before the probationary period could be successfully passed. On the contrary, the claimant at the probationary review meeting on 1 June 2020 was candid. He gave himself only 20 out of 50 in terms of how well he thought he had done over the initial six months of his employment. The claimant also candidly accepted that if he could start again with his employment he would have dealt with matters differently. As the claimant said, he realised that he was wrong and needed to understand.
153. Although the claimant is to be commended for such insight, his own self-assessment supports the conclusion that no part of Mr Burrows' conscious or subconscious thought processes when deciding to extend the claimant's probationary period engaged any matters or race. Even if we had found (which we did not) that the burden of proof passed to the respondent, we would have been satisfied with Mr Burrows' race-neutral explanation for his decision to extend the claimant's probationary period and that his explanation had nothing whatsoever to do with the claimant's race.
154. The Tribunal was also satisfied that Mr Rotherforth was not a valid comparator for the claimant in relation to the decision to extend the claimant's probation. Mr Rotherforth had a different line manager, Mr Mears. Mr Mears is white British and he himself had his probationary period extended. The Tribunal has accepted that the reason why Mr Rotherforth did not have his probationary period extended was because there were no concerns about his performance. Unlike the claimant, Mr Rotherforth had delivered on his 90 day plan.
155. Furthermore, Mr Rotherforth had achieved conspicuous success in engaging with his team, again unlike the claimant who had not done as well as even the claimant accepted he might have done. The Tribunal noted that Mr Jieman, the claimant's representative, had petitioned for Mr Rotherforth to stay at the RDC when he had initially resigned his employment. Mr Jieman would not have done that had there been any concerns about Mr Rotherforth's suitability for that role.
156. In coming to these conclusions, we have had regard to **Olalekan** and the need to examine the mental processes of decision of the decision maker – Mr Burrows. Far from considering Mr Burrows being influenced by matters of race either subconsciously or consciously, the Tribunal accepted that Mr Burrows, having recruited the claimant, had a vested interest in his success, and the Tribunal also accepts that the offers of support and confidence expressed in the claimant by Mr Burrows while extending the claimant's probationary period at the meeting on 1 June 2020 were entirely genuine. It would, after all, have been open to Mr Burrows to have dismissed the claimant at the probationary review meeting for not having succeeded in all aspects of his role within the initial assessment period of three months. Rather than do that, Mr Burrows provided the claimant with another three months and offered support to help the claimant reach the necessary standard.

157. It is also telling that the claimant accepted that he got the names of his team members wrong and that that was not something that was helping him in his ability to engage with the team. The claimant also accepted that he had made mistakes. As is clear from page 89 of the bundle, there was a frank discussion about turning things around and Mr Burrows had reflected on what he could have done differently to have helped the claimant to reach the required standard within the probationary review period. Those were not the actions of someone who wanted to get rid of the claimant whether on the grounds of race or at all.
158. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 3 – the claimant being responsible for six managers.

159. It was common ground that the claimant had been required to be responsible for six Team Managers. However, the Tribunal finds that there is no basis on which to reverse the burden of proof in relation to this allegation.
160. The Tribunal finds that the uncontested evidence of Mr Burrows – that staffing shortages wholly explain his decision to require the claimant to manage six Team Managers and that white British Shift Managers had both before and after the claimant been required to do likewise – provide a complete and race neutral explanation for that situation arising.
161. Both the claimant's predecessors and successors were white British and they had also had to manage six or more managers for similar or longer periods than the claimant. Paragraph 13 of Mr Burrows' witness statement makes this clear and the Tribunal has accepted his evidence on this point. Mr Metcalfe and Mr Micklewright, both white British, had to manage two groups of three managers due to staffing shortages. This was because staffing issues at the respondent meant that there was from time to time a gap in the available managerial resource. That is plainly a non-discriminatory explanation and we accept it is the whole reason why the claimant had to manage two sets of three team managers for a period when Mr Metcalfe had resigned and was either on project work or the respondent was awaiting a successful appointment to replace Mr Metcalfe in the Ambient Warehouse.
162. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 4 – the team managers were refusing to carry out delegated duties.

163. The Tribunal finds that there is no basis in fact for this allegation.
164. This matter was raised in further particulars set out at page 39(iii) of the bundle which had been ordered by Employment Judge Green at the preliminary hearing on 18 January 2021. As page 39(iii) reflects, there is nothing in the way of specific dates or specific allegations of a failure to carry out delegated tasks on the part of Team Managers, let alone anything from which the Tribunal can infer that race played any part in any failure to carry out delegated tasks.
165. There is therefore nothing in respect of which the burden of proof could be reversed. Put simply, there is not a shred of evidence in support of this contention. Indeed, when the claimant was cross-examined about the Walker brothers, who were acknowledged to be difficult employees before, during and

after the period during which they were managed by the claimant, the claimant's own position in respect of the behaviour of his reports was that it was,

“Nothing to do with change, the whole six of them were not happy with the leadership team.”

And that “team managers were hostile with the leadership team”

166. It was therefore the claimant's own evidence that any hostility or difficult behaviour by his reports towards him was not focused on him alone. Rather, it was the claimant's own evidence that it was part of their continuing hostility towards the leadership group as a whole. If the hostility was not specific to the claimant, it follows that it could not be specifically related to his race.
167. In reality, there was a group of disgruntled Team Managers who were generally difficult and who are, as it happens, no longer employed by the respondent. Indeed, Mr Rotherforth accepted that he had problems with the same group of people and Mr Rotherforth as we have indicated above identifies as white British.
168. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 5 – a threat of a one-to-one meeting with Mr Burrows if the claimant failed to falsify shipping reports.

169. The Tribunal find that this allegation is based on a misunderstanding by the claimant and has no basis in fact.
170. The Tribunal accepts the evidence of Mr Burrows that what he was asking not just the claimant, but managers as a whole, to ensure that the shipping records reported the factual reality of goods still in the warehouses at the RDC and produce/goods that had already been shipped from the warehouses at the RDC. Mr Burrows, as Site Manager, became aware that goods had been leaving the RDC but they were not being marked as having left on the shipping reports. That left Mr Burrow in an unsatisfactory position because the shipping reports were not reflecting the factual reality of what had left the RDC and what remained there. Put simply, Mr Burrows as Site Manager could not rely on the shipping reports to provide him with an accurate picture of the goods that was onsite the RDC at any one point in time.
171. Perfectly understandably, Mr Burrows needed to have an accurate picture of what was still onsite and what had already left the site. Mr Burrows was therefore doing the precise opposite of asking managers to falsify the shipping reports. Rather, he was asking managers to ensure the accuracy and integrity of the data which would then provide him with an accurate (not false) picture of what was currently onsite and what had already been shipped.
172. Having rejected the factual basis for this allegation the Tribunal must inevitably conclude that there can be no issue of discrimination because of race. The allegation is simply not grounded in fact.
173. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 6 – not providing a buddy after Mr Metcalfe's departure.

174. It was common ground that the claimant was not given a new buddy when his existing buddy, Mr Metcalfe, resigned.
175. However, the Tribunal has found that the reason why the claimant was not automatically given a new buddy once Mr Metcalfe had resigned was entirely due to the fact that the claimant had already had a buddy for 12 weeks when Mr Metcalfe handed in his notice.
176. The Tribunal has accepted Mr Burrows' uncontested evidence that it was unusual for a Shift Manager to be assigned a buddy for anywhere near 12 weeks from their appointment. That is why Mr Burrows did not automatically assign the claimant a new buddy. That is a full and complete explanation for the treatment alleged and it has nothing whatsoever to do with the claimant's race.
177. There was simply no need automatically to replace Mr Metcalfe and accordingly the respondent's failure to do so could not be regarded as a form of omission by the respondent in the sense that it was not a departure from normal practice. Furthermore, the claimant admitted in cross-examination that he never asked for a replacement for Mr Metcalfe and we have found that had he asked the senior management at the site would have supported the claimant. The Tribunal also notes Mr Burrows' open offer at the probationary review meeting for the claimant to ask for any support he required. The claimant did not ask for a replacement buddy when that offer was made.
178. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 7 – the claimant being referred to by Ms Lattaway as a “coloured man”.

179. It was common ground that Ms Lattaway on one occasion in a private conversation with Mr Rotherforth on 7 June 2020 referred to the claimant as a “coloured man”.
180. The Tribunal acknowledges that there is a broad definition of being put under a disadvantage for the purposes of section 13 of the EqA. However, there are limits and the detriment must exist according to Brightman LJ in Jerimiah page 10, it must be apparent to a reasonable worker.
181. The Tribunal accepts the respondent's submission that the claimant could not have a reasonable sense of grievance in relation to Ms Lattaway's initial reference to him as a coloured man. Ms Lattaway was simply trying to identify the claimant and was unaware that the terminology that she was using was inappropriate. The claimant was unaware of Ms Lattaway's use of words on 7 June 2020 at the time. He only became aware of it when preparing for these proceedings.
182. The claimant was not under any “fear” that Ms Lattaway could do anything to him. Moreover, she was picked up immediately by her Shift Manager, Mr Rotherforth, who properly educated her on the correct terminology. Ms Lattaway's reaction, far from being indignant, was one of apology and she subsequently referred to the claimant as “black” once she had been corrected.
183. The Tribunal finds that Ms Lattaway was simply doing her best to navigate the sensitive area of terminology in the context of race relations and that she changed her behaviour immediately. As noted, it was not until the claimant saw

this reference in the notes after disclosure in these proceedings that he raised it as an issue. The claimant makes no reference to Mr Rotherforth's immediate and proactive management. It is also noteworthy that the claimant himself was prepared to refer to Eastern Europeans as a set of nations who were good at cleaning and in that context this reflects what would be his own reasonable sense of grievance.

184. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.
185. ***Allegation 8 – being held accountable for faults when the claimant was not on site.***
186. The Tribunal finds that this allegation has no basis in fact,
187. The Tribunal accepts the evidence of Mr Burrows at paragraph 58 of his witness statement in which he denies that he held the claimant accountable for faults when the claimant was not onsite. The claimant said that an email was sent between Christmas 2019 and June 2020 which detailed the faults for which the claimant says he was held accountable. This was a difficult contention on which the claimant was likely to succeed, not least because this period covered the virtual entirety of his employment.
188. The only email that Mr Burrows was able to identify was the email from himself to the entire Ambient team (bundle pages 82 to 85) and that email refers to shipping levels. Mr Burrows was telling the team as a whole not to take their eye off the ball. In his evidence, Mr Burrows candidly accepted that he did not know if the claimant was onsite at the time of this error but he also fairly points out, and the Tribunal has accepted, that he did not hold the claimant personally accountable for any particular issue and nor was any management or disciplinary action taken against any colleagues as a result of the errors Mr Burrows had identified. This was a routine, generalised message on a day to day work-related and important matter on which Mr Burrows was addressing the team as a whole.
189. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 9 – Shaun Carson telling the claimant that his probationary period was being extended.

190. The Tribunal find that this allegation has no basis in fact.
191. The claimant complains that Mr Carson, Warehouse Operative, had been given confidential information about the claimant, specifically that someone had told Mr Carson that the claimant's probationary period was to be extended. The claimant said that his conversation with Mr Carson took place about three weeks before his probationary review meeting with Mr Burrows on 1 June 2020.
192. The Tribunal has found that, on the balance of probabilities, this conversation did not take place. Alternatively, the Tribunal has found that even if it did take place, Mr Carson had not been given any confidential information about the claimant's probationary period from any senior manager, including Mr Burrows and Mr Raper.

193. The claimant criticises the respondent for “not doing anything about the leak” and contends that this failure was direct race discrimination. The Tribunal accepted Mr Carson’s evidence, which was not challenged by Mr Jieman in cross-examination, that Mr Carson had a good relationship with the claimant and had invited him out socially in recognition of the fact that he was aware that the claimant had only recently moved to the area. The Tribunal’s conclusion that this conversation did not take place is fortified by the evidence of that he only made up his mind to extend the claimant’s probationary period during the week immediately prior to the review meeting on Monday 1 June 2020. The Tribunal also accepts Mr Burrows evidence that he only told Mr Raper, the Interim Ambient Warehouse Manager, of his decision to extend the claimant’s probationary review on the Sunday of the weekend immediately before the probationary review meeting i.e. on 31 May 2020.
194. In those circumstances, neither Mr Burrows nor Mr Raper would have been in a position to tell Mr Carson what the outcome of the review was likely to be on the timeline contended for by the claimant which was that he spoke to Mr Carson three weeks before the review took place on 1 June 2020. In these circumstances there was no leak of confidential information and so nothing that required investigation.
195. It was suggested at one point that it may have been said as a joke by Mr Carson. Even if the Tribunal was wrong in accepting the evidence of Mr Carson that the conversation with the claimant did not take place, the Tribunal would have come to the conclusion that the such a joke, while in bad taste, plainly had nothing to do with the claimant’s race. It would simply be a reflection of the workplace banter the Tribunal heard about in evidence, particularly the propensity for junior colleagues to wind up their more senior colleagues.
196. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 10 – changing in the claimant’s shifts on purpose.

197. This allegation was extremely vague and therefore it was impossible for the respondent to defend it. No times, dates, names of perpetrators or descriptions of specific incidents were identified by the claimant. The only relevant direct evidence that the Tribunal heard was that given by the respondent’s witnesses to the effect that if Team Managers (or anyone else) were to mess about with the claimant’s planning schedules, they would just be making their own working lives more difficult – something that it was common ground that they were unlikely to do.
198. Accordingly, we find this allegation of race discrimination is not well-founded.

Allegation 11 – change of shifts on two days’ notice.

199. The Tribunal accepted the evidence of Mr Burrows that any change to the claimant’s shifts would have been for objective organisational reasons wholly unconcerned with considerations of race. The Tribunal also finds that it was commonplace for changes on short notice to be operationally necessary in circumstances such as sick or annual leave. That affected shifts generally and wholly explained the reason why the claimant may have had short notice

changes to his shift schedule along with the rest of his colleagues in similar circumstances.

200. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Allegation 12 – the claimant’s dismissal.

201. In **Bahl v The Law Society & Anor** [2004] EWCA Civ 1070, LJ Simler P highlighted that the Employment Tribunal should not take a mechanistic approach to the drawing of inferences and that people often act unreasonably for reasons unrelated to protected characteristics.
202. As the respondent points out this is not an unfair dismissal claim. Had it been, the Tribunal may well have had concerns about the proportionality of the decision to dismiss. However, even accepting there is sufficient to reverse the burden of proof, the Tribunal is satisfied that the respondent has shown that it has not contravened section 13 Equality Act 2010. The respondent has shown to the Tribunal’s satisfaction that it did not directly discriminate against the claimant in relation to his dismissal. The Tribunal concludes that there were cogent reasons to criticise the claimant’s behaviour and to regard that behaviour as conduct which seriously contravened the respondent’s Respect in the Workplace Policy. The Tribunal has carefully examined Mr Burrows’ reasoning and has accepted his evidence as both credible and reliable.
203. The high watermark of the claimant’s case is Mr Reeves. Mr Reeves, who is white British, was not dismissed despite sending a message to Ms Lattaway asking her whether she “wanted a shag?” The decision to take no action in respect of Mr Reeves post-dated the claimant’s dismissal. Accordingly the claimant must put this as a hypothetical comparator evidenced by subsequent treatment.
204. Mr Burrows was not involved in the decision-making regarding Mr Reeves. He says he has to trust his team and he has to stay away from such incidents because he might be needed for a disciplinary hearing or an appeal hearing. Mr Burrows very candidly said that he might have considered the matter required management action if it had fallen within his area of direct management authority, but he was equally clear that he did not regard Mr Reeves’ conduct as being as serious as the conduct for which the claimant was dismissed. Mr Burrows was also very candid in that he simply could not say what he would have done had the matter come before him at a disciplinary hearing since he would need to be apprised of all the facts and the context before reaching any decision.
205. Furthermore, the Tribunal accepts the respondent’s submission that Mr Reeves’ situation is in not materially the same circumstances as that which appertained to the claimant. Ms Lattaway behaved differently in response to Mr Reeves; Mr Reeves was a Warehouse Operative at the same level as Ms Lattaway; the claimant in contrast was two management levels senior to Ms Lattaway; the claimant was a senior manager expected to lead by example; and Mr Reeves was only involved in a one-off act which he denied doing himself (he said it was sent from his phone by a friend after a night out) whereas the claimant was involved in a course of conduct detrimentally affecting Ms Lattaway.

206. Most fundamentally, the Tribunal accepts that Mr Burrows' thought processes were not influenced to any extent by matters of race including the fact that the claimant is black.
207. Whereas Mr Reeves may be a valid comparator, Mr Sutton is not. His treatment takes us nowhere because he was employed by a completely separate company, Wincanton Plc. There can simply be no relevant inferences drawn between the decision of a separate employer and that of the respondent.
208. Mr Porteous was not seriously pursued by the claimant as a comparator. Indeed, the claimant could not really pursue Mr Porteous as a valid comparator because the claimant was unable to identify (as was the respondent) any misconduct that Mr Porteous had committed in the workplace. In those circumstances, there is simply nothing in respect of which to draw a comparison.
209. Mr Burrows' findings are in large part based on facts agreed by the claimant. There was no dispute that the claimant asked for Ms Lattaway's personal mobile number and personal email. The claimant never denied that he asked the claimant to go on holiday to Greece. The Tribunal has found that the claimant did tell Ms Lattaway that she would not need to pay for the holiday to Greece. The Tribunal also finds that the claimant was inconsistent about the nature of the holiday, representing it to Ms Lattaway initially as a wedding whereas when questioned during the investigation he accepted it was a stag/bachelor party. Similarly, the claimant accepts that whereas he gave the reason for requiring the claimant's email address and mobile number so as to arrange the holiday, the day following he got those details he sent a message which had nothing whatsoever to do with the proposed holiday.
210. Put simply, the Tribunal finds that a white British Shift Manager would also have been dismissed by Mr Burrows in the same or similar circumstances.
211. The Tribunal does not accept Mr Jieman's submission that there is an obligation on Ms Lattaway to make it explicitly clear that conduct is unwanted before it can be legitimate for an employer to take disciplinary action including dismissal. There was a plain and obvious power imbalance between the claimant and Ms Lattaway. The Tribunal accepts the respondent's submission that there is a lack of insight by the claimant. For example, at page 126 of the bundle where the claimant's makes a comparison with a "nice lady" that he might meet in the shopping mall and that if, and only if, the "nice lady" indicates explicitly that she did not wish to have a conversation would the claimant be required to walk away.
212. The Tribunal concludes that the claimant either knew or ought reasonably have realised that his conduct was unwanted. In circumstances where a senior manager is approaching a much more junior subordinate at work, the Tribunal finds that the claimant ought to have been alive to the prospect that Ms Lattaway was highly likely to feel intimidated and pressurised due to the workplace hierarchy and that Ms Lattaway was likely to have been inhibited from explicitly rejecting the claimant's advances. The Tribunal notes that the claimant contradicted himself by at one stage denying that he had intended to make advances towards the claimant and then giving the "nice lady" example which was plainly being described as a more than platonic approach.
213. Accordingly, the Tribunal finds this allegation of race discrimination is not well-founded.

Harassment claims

Being asked to fight a Walker brother

214. The evidence was that the Walker brothers were difficult to manage and that predecessor and successor managers had all had difficulty with them. The Tribunal concludes that there is simply no substance to the claimant's allegation that the invitation to fight with one of the Walker brothers was to any extent influenced by matters of race.
215. Accordingly, the Tribunal finds this allegation of race related harassment is not well- founded.

Breach of confidentiality

216. It was unclear to the Tribunal precisely what this allegation was said to be. It was extremely vague and the Tribunal dismisses it on that basis. It was simply not possible for the respondent to defend an allegation of a breach of confidentiality made in such vague terms.
217. At paragraphs 10 to 11 of his witness statement, Mr Rotherforth did his best to respond to this allegation. The allegation is that Mr Walker asked Mr Rotherforth about the contents of a conversation that Mr Rotherforth had with the claimant. Unfortunately, the claimant has not specified what Mr Walker and Mr Rotherforth were allegedly discussing which makes it impossible for Mr Rotherforth to respond in a meaningful fashion. In any event, the Tribunal accepts Mr Rotherforth's evidence that if Mr Walker had asked him to disclose details of a confidential nature in relation to the claimant he would have declined to discuss it with him.
218. Accordingly, the Tribunal finds that this allegation of race related harassment is not well-founded.

Mr Carson divulging the decision to extend the claimant's probationary period

219. The Tribunal has dealt with this matter above. Its factual conclusion is that this comment was not made. In any event, it was not related to race.
220. Accordingly, we find that this allegation of race related harassment is not well-founded.

Sabotage by Team Managers

221. The Tribunal has rejected as a matter of fact that there was any sabotage by the Walker brothers or any other Team Manager. We have dealt with this matter above and the Tribunal has rejected the likelihood of there being any sabotage because it would simply make the Team Managers' own jobs more difficult. Again, and similar to the allegation of breach of confidentiality by Mr Rotherforth, this allegation is so vague and lacking in specificity or detail that it is simply not possible for the respondent meaningfully to respond to it.
222. In the circumstances the Tribunal is satisfied that the claimant was not treated less favourably in any respect because of his race.
223. Accordingly, the Tribunal finds that this allegation of race related harassment is not well-founded.

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

Employment Judge Loy

Date 22 September 2022

JUDGMENT SENT TO THE PARTIES ON

23 September 2022

Mrs. T. Hussain
FOR THE TRIBUNAL OFFICE

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