



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr M Loizou

Optivo

Heard at: London South Employment Tribunal

**On: 4-7 October 2022
18 November 2022 (in Chambers)**

**Before: EJ Webster
Ms Forecast
Ms C Oldfield**

Appearances

For the Claimant: In person
For the Respondent: Mr R Fitzpatrick (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim for direct sexual orientation discrimination and direct perceived sexual orientation discrimination are not upheld.
2. The Claimant's claims for sexual orientation harassment are not upheld.
3. The Claimant's claims for victimisation are not upheld.

REASONS

4. In an ET1 presented on 2 April 2020 the claimant brought claims for direct discrimination, harassment and victimisation and unfair dismissal. By an ET3

presented on 21 August 2020 and amended with permission on 22 June 2021 the respondent refuted all such claims. Subsequently, the claimant's claim for unfair dismissal was struck out by EJ Phillips in a Judgment dated 25 February 2021.

5. The claimant was employed as a tax manager from 22 July 2019 until his dismissal on 24 January 2020. On 6 August he raised concerns with his manager at a meeting that he was being bullied and that he had been called Pushti which means 'gay' in Greek. He subsequently made several more allegations about various colleagues. This tribunal claim arises out of those grievances and concerns and how they were dealt with by the respondent. The respondent dismissed the claimant on 24 January 2020 for failing his probation period.

The Hearing

6. The claim was held wholly in person save that Mr Fitzpatrick attended via video link on 5 October due to a train strike. The Tribunal held a day in chambers on 18 November to make its decision. The parties were not required to attend on that day.
7. We were provided with the following documents:
 - (i) A bundle, running to 690 'paginated' pages and 709 electronic pages;
 - (ii) The Respondent's chronology;
 - (iii) Witness statements for the following:
 - a. The Claimant
 - b. Mr. Alvino Pereira, (AP)
 - c. Ms. Helen Sterling, (HS)
 - d. Ms. Jackie Pauley, (JP)
 - e. Mr. Jonathan Vaciannia, (JV)
 - f. Mr. Paul Waters, (PW)
 - g. Mr. Rommel Faytaren, (RF)
 - h. Mr. Stephen Heyes, (SH)
 - i. Mr. Uzair Khan, (UK)
 - j. Ms. Joanne Stewart (JS)
8. All of the above people were available to give evidence save for Mr Waters who could not attend as his son was unwell in Spain. We have therefore attached very little weight to his statement though we have read it.

9. The Claimant had prepared a 212 page witness statement. It was apparent from initially looking at the statement that much of what was included was, what can best be described, as submissions and legal argument as to how the evidence the Claimant was providing fitted within his legal claims. The difference between evidence and submissions was explained to the Claimant and the Tribunal asked the Claimant to edit his statement so as not to include submissions and to make it a manageable length for the purposes of the hearing.
10. The Claimant told us that he would struggle but he did attempt that exercise whilst we read other statements on the first morning. He then provided the Tribunal with a hard copy version of his statement with pencil lines through some paragraphs. However it was not an extensive reduction. The Tribunal did read the Claimant's witness statement with those reductions but it focussed primarily on that information which was factual as opposed to submission-like. The statement was, at times, difficult to follow and was very repetitive thus sometimes making it difficult to discern what evidence the Claimant was intending to impart.
11. So that the hearing could proceed the Tribunal agreed with Mr Fitzpatrick that it would not assume that the Respondent agreed with everything in the Claimant's witness statement if it was not challenged. Instead we have adopted the approach that the Respondent had to put the key disagreements of fact that went to the issues in the case to the Claimant if it wished to challenge them. We adopted this approach as it was in the interests of the Overriding Objective to allow the respondent to challenge the relevant evidence as opposed to ensuring that every word of the Claimant's 212 page statement had to be challenged if disagreed with. Had that approach been taken, the hearing would have to have been adjourned and as a litigant in person who had already been given a short opportunity to revise his witness statement, we felt that it was unlikely that an adjournment of any length would lead to the claimant being able to amend his statement in an appropriate and meaningful way.
12. Throughout the hearing the Tribunal assisted the Claimant with asking questions if they lacked clarity or if the Claimant needed assistance. This is a normal step to assist litigants in person particularly in such a long, complex case.
13. The Respondent made an application to strike out some parts of the Claimant's claims on the basis that they were not properly particularised or advanced. That application was refused with full reasons given at the time which are not repeated here. However, for completeness we record the clarification that was made by the Claimant in response to that application in the List of Issues set out below (in bold).
14. The details of the Claimant's case were lengthy and complex and often confusing even though the claimant had been employed for a relatively short

period of time. By necessity our Judgment will deal only with the findings of fact that we consider relevant to our conclusions. Where we do not make reference to matters or evidence provided that does not mean that they have not been considered, it means that we did not find them relevant to our conclusions.

15. All of our conclusions are reached on the balance of probabilities.

List of Issues

Liability: Jurisdiction

16. To the extent that any of the acts and/or omissions complained of occurred prior to 6 December 2019, do these, together with the later acts and/or omissions amount to a course of conduct extending over a period within the meaning of section 123(3)(a) Equality Act 2010?

17. To the extent that any of the acts and/or omissions do not amount to a course of conduct extending over a period within the meaning of section 123(3)(a) Equality Act 2010, would it be just and equitable in the circumstances for the Tribunal to extend time under section 123(1)(b) Equality Act 2010?

Sexual Orientation Claim

18. *Protected Characteristic*

a. The Claimant relies on the protected characteristic of sexual orientation. For some allegations, the Claimant relies on the fact that he is heterosexual. For other allegations the Claimant relies on an alleged perception among some of the Respondent's employees that he was gay.

19. The Claimant alleges the following employees of the Respondent perceived him to be gay:

- Alvino Pereira
- Uzair Khan
- Helen Sterling
- Chantel Clavier
- Jonathan Vaciannia
- Rommel Faytaren
- Stephen Heyes

Direct Discrimination

20. For the avoidance of any doubt, the Claimant, as he confirmed at the TCMD on 25 February 2021, does not bring or make allegations of direct discrimination against all or any of Jackie Pauley, Paul Waters or Rowena Beard.

21. Did the Respondent do the following acts and/or omissions:

17.1 Did Stephen Heyes do or omit to do the following (the references to 'paras' below are to relevant paragraphs from the Claimant's Schedule 1 Summary of Case document):

- (i) Fail to get back to the Claimant after the Claimant informed him on 20 August 2019 of the allegation at paragraph 21.1 below (para b);
- (ii) Delay meeting with the Claimant to discuss allegations in his email of 20 September until 8 October 2019 (para d);
- (iii) On 8 October 2019, fail to ask the Claimant what happened and instead denied any wrongdoing towards the Claimant (para f);
- (iv) In his consideration of whether to dismiss the Claimant and, as reflected in his letter of 28 January 2020 dismissing the Claimant
 - (a) fail to consider and / or comment on the amendments to the minutes of the Stage 1 meeting prepared by the Claimant;
 - (b) fail to consider and / or comment on the non-comment of these amendments in the Stage 1 and 2 Reports;
 - (c) fail to supply the Claimant with signed and dated witness statements;
 - (d) fail to consider and / or comment on the non-provision of these witness statements with the Stage 1 and 2 Reports;
 - (e) fail to consider and / or comment on the matters in the Claimant's appeal of 6 January 2020 against the Stage 1 decision;
 - (f) fail to consider and / or comment on the non-comment of the matters in the Claimant's appeal of 6 January 2020 in the Stage 2 Report?
- (v) Between 8 to 24 January 2020, advise the Claimant that his probationary review will take place after his grievance appeal and then changed his stance and arrange for it to take place before his grievance appeal (para t);
- (vi) Subsequently arrange for the Claimant's probationary review meeting to take place on the same day as (but after) the grievance appeal meeting (para u);
- (vii) Subsequently hold the probationary review meeting on 24 January 2020, being the same day as the Grievance Appeal Hearing, but 5 ½ hours later, despite the Claimant's objections (paras v and w);
- (viii) Dismiss the Claimant on 24 January 2020 (para w);

17.2 With regard to the following named or unnamed members of the Respondent's HR team, did any of them do any of the following in relation to the Claimant's grievance appeal:

- (a) Prepare the Minutes of the Stage 1 meeting on 12 November 2019, (Rashaan Badoo) (para h);
- (b) Fail to acknowledge safe receipt of his appeal of 6 January 2020 against the Stage 1 grievance decision, causing the Claimant to have to chase Human Resources (Adrian Prescod);

- (c) The date and time Human Resources advised the Claimant of meetings (**The Claimant clarified at the outset of this hearing that he meant that he was frequently communicated with by HR on a Friday or just before time off thus leaving him anxious and worried. He felt that this was deliberate or thoughtless. It is dealt with at para 377 in his witness statement**);
 - (d) Human Resources (Adrian Prescod) failing to reply to the Claimant's appeal email of 20 January 2020 (paras v and w); and
 - (e) Human Resources initially appointing one of individuals named by the Claimant in his grievance to Chair the Stage 2 appeal meeting.
18. Did the acts set out at paragraph 5 above amount to less favourable treatment of the Claimant compared to a hypothetical heterosexual man who was not perceived to be gay. (Note: the Claimant questions whether any comparator is needed in this case).
19. Did the relevant employees perceive the Claimant to be gay?
20. If any of the acts set out at paragraph 5 did take place, was that because of the Claimant's sexual orientation?

Harassment

21. Did the Respondent do the following acts/omissions:
- 21.1 Did AP call the Claimant 'Pushti' twice at some point between 22 July 2019 and 19 August 2019 (the Claimant alleged that Pushti means "Gay" in Greek);
 - 21.2 Did Alvino Pereira send a 'sexual orientation email' to several employees regarding the Claimant between 22 July 2019 and 19 August 2019;
 - 21.3 Did Alvino Pereira call the Claimant a 'cock' and subject him to threatening behaviour between 21 August 2019 and 19 September 2019;
 - 21.4 Did Helen Sterling, during the period 23 September to 8 October 2019, (when the Claimant temporarily moved to the 5th floor), quote or refer to the alleged abuse that the Claimant received from Alvino Pereira, as referred to at 9.1 and 9.3 above;
 - 21.5 Did all or any of Helen Sterling, Chantel Clavier, Jonathan Vaciannia and Rommel Faytaren during the period 23 September 2019 to 8 October 2019, openly shout at the Claimant, including by making comments about his salary in comparison to theirs, and "give him a hard time";
 - 21.6 Did Uzair Khan say the following to the Claimant:
 - 21.6.1 "I know how much your net pay is" on 9 October 2019;
 - 21.6.2 "I also have a photo of you without your beard on" on 10 October
 - 21.6.3 "I have a nice face" on 10 October 2019;
 - 21.7 Did Uzair Khan say the following to Rita Patel on 10 October 2019 about the Claimant and within his earshot:
 - 21.7.1 "When he sticks up for himself it turns you on".
22. Did the conduct set out at paragraph 21 above amount to unwanted conduct towards the Claimant?

23. Did the conduct relate to the Claimant's sexual orientation? The Claimant relies on the fact that he is heterosexual for the allegations at paragraphs 21.1, 21.2, 21.4, 21.5, 21.6 and 21.7; and the alleged perception he was gay for the allegations at paragraphs 21.3, 21.4, 21.5, 21.6 and 21.7.
24. Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
25. Was it reasonable for the Claimant to regard it as having that effect?

Victimisation

26. Did the following amount to a protected act within the meaning of Section 27(2) Equality Act 2010:
- 26.1 Making an allegation of sexual orientation discrimination to Stephen Heyes on 20 August 2019; and
- 26.2 Repeating that allegation (made to Stephen Heyes on 20 August) at the Formal Grievance meeting on 12 November;
27. Did the complaints referred to by the Claimant in paragraphs 14 include false information or contain false allegations given in bad faith?
28. Was the Claimant subjected to the following detrimental treatment because he had done the protected acts:
- 28.1 Victimisation during the period from 21 August 2019 to 11 November 2019; DBF **The Claimant clarified at the outset of the hearing that he was referring to the conduct of his grievance process overall and in particular in that he alleges they failed to properly investigate his complaints/grievances, and failed to provide him with a report which answered his questions. He relied specifically on paragraphs, d), b) and f) of the Summary of Case document.**
- 28.2 Victimisation during the Formal Grievance process from 12 November 2019 to 24 January 2020, – the Stage 1 and 2 investigations and reports, including Human Resources, and Management. **The Claimant clarified at the outset of the hearing that he was referring to the failure to deal with his appeal properly and failed to provide a proper report. H relied specifically on paragraphs h), i), j) k) and m) of the Summary of Case document.**
- 28.3 Dismissal on 24 January 2020.

Remedy

Financial Losses

29. If the Claimant succeeds in any part of his claim, what is the extent of the Claimant's losses arising from such of the alleged breaches as are established? In particular:
- 29.1 What remedy is it just and equitable for the Claimant to receive by way of compensation for his financial losses? The Claimant claims the following losses:
- 29.1.1 Loss of Unfair Dismissal Protection
 - 29.1.2 Loss of Long Notice Rights;
 - 29.1.3 Loss of Earnings and Benefits to date;
 - 29.1.4 Loss of Future Earnings and Benefits;
 - 29.1.5 Interest on Loss of Earnings and injury to feelings; and
 - 29.1.6 An uplift for an alleged failure to follow an ACAS Code. The Claimant says in this regard that the Respondent has failed to act fairly, promptly or to conduct a proper or through investigation; he says he will provide further details in regard to this in his witness statement.
- 29.2 Has the Claimant mitigated his losses, in whole or in part?

Other

30. Should the Tribunal make an award for the Claimant's injury to feelings? If so, at what level?
31. What interest, if any, should the Claimant be awarded
32. Should the Tribunal make any award in respect of legal costs

Facts

Background

33. The Respondent is a housing association providing housing across London, the South East and the Midlands. The Claimant was employed by the Respondent as a tax manager at the Respondent's offices in Croydon from 22 July 2019 until his dismissal during his probation period, on 24 January 2020. The Claimant says that he was dismissed because of the allegations he made. The Respondent says that he was dismissed because he had not passed his probation due to the way in which he made the allegations, the volume of the allegations and the impact they had on his colleagues.
34. The main premise of the Claimant's case is that many people at his place of work thought that he was gay. As a result of that, he alleges, people made rude comments about him and subsequently he alleges that his grievances about the rude behaviour were dealt with badly. This, he says, amounted to direct discrimination and harassment.
35. Further, somewhat confusingly, he also says that some people treated him badly because he was heterosexual. The essence of this claim, insofar as the Tribunal could ascertain, was that as a heterosexual man he ought not to have been subjected to the negative treatment because he was heterosexual and not gay. He also claims that when he alleged the mistreatment, he was subsequently victimised as set out in the list of issues above.

36. His allegations are about many different members of staff from different teams and different floors of the building. His role was a standalone role that had been newly created so he did not, from a work point of view, easily fit within a specific team.

Observations

37. The Claimant did not work for the Respondent for long. From quite soon into his employment, he raised serious concerns about his colleagues' behaviour. As a very general overview, the allegations are primarily that colleagues, in a large, open plan office made different, quite random comments about the claimant. The comments ranged from being directly about or to the Claimant, to being overheard conversations about emails or situations that the Claimant says were about him. The number of colleagues he has made allegations about are numerous. Many of them gave evidence to us as part of this Tribunal. Several of them deny really knowing who the Claimant was or even being aware of him, let alone that they had perceptions or knowledge about his sexuality. Largely we accepted their evidence as we found that they were genuine, their accounts of events were generally in accord with each other, and we found their sense of confusion and upset caused by the allegations against them to be genuine in all the circumstances.

38. The Claimant says that he attended the police station during his grievance process because he thought that his internal grievance had been reported by the respondent in some way to the police. We explore that further below. Nevertheless we note it here because the fact that he appears to have gone to the police in these circumstances caused us some concern regarding his reliability as a witness. He appears to have begun to think that there was some sort of report about him to the police or some discussion of events involving the police that preceded his employment by the respondent. We had no evidence of either but mention it here as it is pertinent of our overall impression of the claimant as someone who seemed to interpret events or believe comments made around him as being indicative of a wider conspiracy against him to the extent that he believed that colleagues had made a report to the police that somehow involved him but which the police were unwilling to divulge.

39. Whilst there are some issues and concerns with the processes followed by the Respondent which we outline below, we broadly accepted the numerous Respondent's witnesses' account of events that such strange and out of context comments were not said about or to the Claimant.

40. We find that based on the evidence we heard that none of the individuals accused by the Claimant had given any thought whatsoever about his sexuality. We find that it was simply not a question that had entered their minds. They did not socialise with the Claimant, they hardly spoke to the Claimant and when they did he hardly responded. We were satisfied by the evidence of numerous

witnesses that a person's sexuality was simply not a topic of conversation or speculation within that working environment. There was no evidence given of any inappropriate 'banter' about this issue or in fact that anybody knew or thought that they knew what the claimant's sexuality was.

41. The claimant relies upon his application form or registration form with the respondent in which he ticked that he was a heterosexual, single man. He says that this could have led to speculation about his sexuality though it is not clear why he thought this. Further there was no evidence that the majority of his colleagues were aware of this form. Respondent witnesses confirmed that such information was equalities monitoring information and was not shared. No evidence was provided that suggested that the claimant's information was shared outside HR.

Grievances/Time line

42. Despite the short period of employment, this claim is detailed and the timeline not particularly straightforward as the claimant has been unable to provide dates for when certain incidents occurred and his witness statement is not always straightforward to follow. Instead he has given date ranges. We have tried insofar as possible to deal with matters in chronological order but that has not always been possible.
43. The Claimant brought 3 grievances/complaints. The first was a conversation with his line manager Stephen Hayes on 20 August 2020 in which he said that he had been called a 'puff' in Greek ('pushti) by Alvino Pereira.
44. The second was an email to Stephen Hayes on 20 September (p338) that was dealt with informally. In that email he alleged that he had been bullied by various colleagues. He did not mention that he felt that this was due to his sexual orientation or people's perceptions of it. He did not mention sexuality at all.
45. The third was a formal grievance on 11 October (p356). The formal grievance was investigated by JP. The grievance raised allegations against Uzair Khan giving specific incidents and dates. The Claimant also says he raised various other points at the meeting but that is disputed. The Claimant did not mention that he felt any of the allegations occurred due to his sexual orientation or people's perceptions of it.
46. A written grievance outcome was sent to the Claimant on 24 December 2019. JP did not uphold any of the Claimant's grievances. The Claimant appealed the outcome on 6 January 2020 .
47. The grievance appeal was considered by Paul Waters. A meeting to discuss the appeal was scheduled on the same day as the claimant's probationary review meeting on 24 January 2020. That meeting went ahead in the claimant's absence and the grievance appeal was dismissed.

48. The claimant was dismissed by letter dated 28 January 2020. He appealed against that dismissal. That appeal was considered by Rowena Beard and not upheld. The outcome letter from that appeal is dated 10 March 2020 (677-678).

First Complaint – Conversation with Stephen Heyes ('SH') 20 August 2019

49. The Claimant had a conversation with SH at a routine catch up meeting. SH says that he organised it as a catch up. There are no notes of this conversation. Both agree that the Claimant said he had been called either 'pushti' or 'puff in Greek' by Alvino Pereira ('AP'). SH says that the claimant told him he had been 'collared' by the lift. The Claimant denies ever saying that.

50. Following the meeting SH spoke to two members of staff that work with or near AP and AP himself. It is not clear exactly what SH asked these colleagues either from his witness statement or the evidence he gave us. We think it is more likely than not, particularly given AP's confirmation in cross examination before us that he did not hear the specific allegations against him until he was interviewed by Jackie Pauley ('JP'), that SH's conversation with him was more general. We do accept however that SH did speak to AP and his colleagues with regard to whether there had been any difficulties in the relationship with the Claimant. We think that this was a genuine attempt by SH to see if something untoward was happening albeit he did not tell AP what the specific allegations were at this point. We also accept that the two colleagues he spoke to told SH that they had not heard anything untoward.

51. SH says he followed up with the Claimant after he had spoken to AP and his two colleagues, SH says in his witness statement that the Claimant told him not to take it any further. We accept that this conversation occurred. We also consider that it must have occurred between 20 August and 20 September as otherwise the Claimant would not have then decided to email again with further concerns. It is clear that SH did take the first complaint seriously. He spoke to three people and he offered the claimant the chance to move desks whilst he looked into it which the claimant refused. We accept that in these circumstances it is more likely than not that as per paragraph 10 of SH's witness statement that he did feedback to the Claimant that he had looked into it but could find no corroborating evidence and the claimant indicated that he did not want to take it any further. This is backed up by the Claimant's subsequent email on 20 September which says that he was willing to put up with the behaviour for a bit more because he thought AP was leaving the business – indicating that he had decided not to take it any further rather than that he had felt ignored by SH. There was therefore some contact and feedback between SH and the claimant on this matter between 20 August and 8 October. SH did not ignore the claimant's concerns or fail to support him or take it seriously.

Second Complaint – email 20 September (p338)

52. The Claimant's first written complaint was in the form of an email to Stephen Hayes on 20 September. That email alludes to a conversation during their meeting on 20 August indicating that at the meeting the Claimant had told Stephen Hayes that he was being bullied.
53. In the email the Claimant alleges that he is being bullied by multiple members of staff and in particular, AP. As a result of this email, SH emailed him back on the same day to say that he would look into his concerns and expressing sympathy and concern for the claimant. He suggested, and the claimant agreed, that the claimant would move desks whilst the matter was being looked into. The claimant moved to the 5th floor.
54. The Claimant did not give further details in writing. There was then a delay until 8 October which was the Claimant's 12 week probationary review meeting. SH explains that the delay in meeting the claimant to discuss the matter was caused by his work load. We accept that explanation. Whilst the claimant has made serious allegations in his email, SH does not ignore that and takes immediate action to relocate the claimant. We therefore consider that there must have been a good reason for the subsequent delay in actually meeting with the claimant. We also accept that during this period SH took steps to speak informally to a colleague, Joanne Paine, about the allegations to ascertain whether anything untoward had occurred to her knowledge. He was not ignoring the claimant or his concerns.
55. SH says that at the meeting on 8 October he discussed the situation with the Claimant and asked him what was happening but the Claimant was not able to give significant further detail. The Claimant says that SH did not ask him 'what had happened' but simply launched into telling him that he had not found anyone to corroborate what he was saying and denying the allegations.
56. From the email dated 20 September and the notes of the meeting it appears that the claimant did not give many specific details. He did raise the issue of Rita Patel shouting about Peter Harling not checking the Claimant's CV. No other specifics are given in the notes of the meeting. It is clear that the Claimant feels that the bullying he perceived from the 9th floor has followed him to the 5th floor and SH notes that the Claimant is repeatedly saying that he just wants to be able to get on with his job.
57. It is possible that SH did not ask the specific question of 'what happened' but it is clear from the notes of the meeting, which the Claimant had the opportunity to review and amend (which he did) that there was a general discussion about what was happening to him and what his allegations of bullying were in more specific terms. We accept that SH told the Claimant that he did not think that what was being alleged had occurred as this is indicated in the notes by SH saying

"I told Marios that I was very surprised by what he was saying and that I have known the people he talks about for a long time and had never seen anything that would suggest they'd behave in that way."

58. SH says that he will forward the Claimant's email to HR but that if the Claimant experienced anything further, he should try and see if he can find anyone to corroborate the incident and he should seek help from SH or HR. We accept that SH gives a view that he is genuinely surprised by the allegations against colleagues he has worked with for some time. Nevertheless, he does not dismiss them, but suggests that should anything further happen, then the claimant should try to obtain more information and witnesses to corroborate what he was saying.

59. SH did not take the situation any further because the claimant then submitted his formal grievance to Adrian Prescod.

The Grievance

60. The Claimant moved back to the 9th floor. He emailed Adrian Prescod on 11 October with a formal grievance. That email was as follows:

Dear Mr Prescod

On the 9 October 2019, I moved back to the 9th floor after a short stay on the 5th floor. I moved to the 5th floor because I was being bullied and abused during my time on the fifth floor as explained in my email of 29 September 2019, to my line manager Stephen Hayes. Due to a shortage of places on the fifth floor, I return to the ninth floor and since returning Uzair Khan has been "in my face". He has made the following comments:

- i. On 9 October he shouted out, "I know how much your much net pay is" – I presume he knows because he is on a similar amount. I really don't care if he knows or what anyone makes, I just think he is "being in my face".
- ii. On 10 October he shouted out "I also have a photo of you without your beard on", meaning he is taking photos of me. Why? .
- iii. On 10 October he shouted out to Rita "When he sticks up for himself it turns you on".
- iv. On 10 October he shouted out that "I have a nice face". Why and why can't he leave me alone?

I have returned to the ninth floor and the bullying is still going on.

What I find staggering is that a few weeks ago, I explained to him the tax functions of the companies in the group. The day after he thanked me for my help and that he repeated to Rowena Beard what I had said. I didn't know what he meant by this. I subsequently found out that he had apply for a position in the firm which he was successful. After helping him and thanking me, he subjects me to this behaviour as well!

Is it possible for you to speak to him to leave me alone.

Kind regards

Marios

The Grievance Investigation

61. Jackie Pauley ('JP') was appointed to investigate the Claimant's grievance. She met with the Claimant on 12 November 2019. The notes of that meeting are at pages 412-415. The Claimant's amendments to those notes are at pages 416-

422. JP said that she acknowledged receipt of the revised notes and would take them into account. She now says that she does not agree that the Claimant's additions to the notes are an accurate reflection of what was said, particularly with regard to the allegation that AP called the Claimant a 'cock'.

62. The Claimant was sent the minutes on 9 December 2019 (p451) and he responded on 16 December 2019. His response was detailed and long. In those amendments, he raises the allegation that AP called him a 'cock' and he also provides information about other witnesses to events such as Janette Jones. There are numerous new facts contained in the amendments but these are the two main ones that were focussed on by the Claimant in his cross examination of JP. JP accepted in evidence that the changes were significant. She accepted that she was unclear in her response to him when she received the amendments and that she ought to have replied in detail saying what she did and did not accept in the amendments. She accepted that she also could have been clearer as to how she was going to treat the amendments with regard to her conclusions.

63. Her response simply says that she will take them into account. Her evidence at paragraph 12 of her witness statement was that the changes were minor and the notes were accurate. However this is clearly incorrect and she accepted that in cross examination.

64. She says now that this did not mean that she accepted them. We find her evidence around this point unconvincing. We consider that had she or her HR support read the amendments properly, she would almost certainly have said that the events such as AP calling the Claimant a cock had not been raised during the meeting. JP's original communications and her account in her witness statement could be seen to support the Claimant's case that he did raise them during the meeting and so his amendments were accurate, accepted by JP but nevertheless not investigated by JP.

65. However, we find it more likely than not that JP just didn't read the amended notes properly at the time because they were relatively long and detailed and they were not going to take them into account. We do not consider that the amendments made by the claimant that included new allegations accurately reflect what was actually discussed at the meeting. We reach this conclusion because we consider that had these significant and quite shocking comments actually been said during the meeting then the notetaker and JP would have asked the Claimant follow up questions about the allegations and have remembered them being raised by the claimant during the meeting. We also consider that they would have been noted in the original set of minutes. JP with the support of the HR team, investigated and considered other allegations thoroughly and spoke to many people about the allegations that they had noted. We see that they had nothing to gain by deliberately omitting or ignoring these allegations had they actually been made during the meeting. They were willing

to take the claimant's allegations seriously and investigate them properly. We therefore consider that the claimant's amendments to the minutes are incorrect and that he did not raise the allegation that AP called him a cock or that Janette Jones was a witness to events at the meeting itself.

66. However, it is a clear failing of JP that she and her HR support did not properly consider the claimant's amendments or respond to them appropriately. This has been compounded by JP continuing to assert that such amendments were minor in her witness statement when this is clearly not correct.
67. We were provided with no evidence at all to link JP's or HR's failings to the Claimant's sexuality or the respondent's perceptions of the claimant's sexuality. No discussion regarding the claimant's sexuality takes place during the meeting. The written grievance does not make reference to the claimant's sexuality or that he considers that the behaviour towards him is discriminatory or in any way related to or caused by his sexuality. The only element that concerns or could concern sexuality is the allegation of the use of the word Pushti. We accept that this word is inherently linked to sexuality but the claimant has done nothing to demonstrate that thereafter, the fact that he alleged he had been called Pushti meant that any of the respondent witnesses thought of him or treated him in the way that they did because they believed he was gay or, as his case is pleaded, in some cases because they believed him to be heterosexual.
68. As well as speaking to the claimant, JP spoke to 10 people as part of her investigation. They were: AP, UK, HS, Janette Jones, SH, Waseem Iqbal, Rita Patel, Asha Pillai, Chantal Clavier and Peter Harling. All of the individuals refuted the allegations and comments made and several of them said that they barely knew the Claimant. We had notes of all of the interviews with them and several of them gave evidence before us.
69. None of the notes of those meetings or the detail of what investigation had been undertaken by JP were provided to the claimant with the grievance outcome letter. Her outcome letter simply set out that his grievance was not upheld with reasons. It did not provide any detail of the investigation undertaken.
70. The management report about the grievance dated 22 January 2020 compiled by JP (pg 604-610) was also not provided to the claimant. That report concluded that:

"I have concerns regarding the seriousness and number of allegations made by Marios against co-workers which have been unsubstantiated. And the allegations made by him during the investigation against members of the People Team. Again unsubstantiated. On balance of probabilities I believe these allegations are of a vexatious nature, and should be subject to investigation accordingly."

71. This report and the grievance investigation notes were not provided to the claimant at any stage until he brought these proceedings. No useful explanation was given by JP or SH or JS as to why that decision was made. Given the detailed information contained and the way that it informed the subsequent decision regarding the claimant's appeal against his grievance outcome and the decision to fail his probationary review, we believe that it would have been good practice to provide the claimant with the basis for those decisions so that he could comment on the information gathered. We address this further in the section on dismissal below.

Timing of correspondence from HR

72. The outcome letter to the claimant's grievance was sent by JP on 24 December. That does seem like difficult timing for an individual who was about to be on leave over the Christmas period as he would not be able to discuss the outcome with anyone at work or seek support. JP said that she sent it then because the Claimant had been chasing the outcome and she did not want to hold it up. We accept that explanation. We accept that it may have felt thoughtless to the Claimant but we do not consider that there was any malice in JP's actions in this regard.

73. It is not clear to us exactly which other emails the claimant relied upon as being inappropriately sent on a Friday afternoon by HR. We understand the point made, but we consider that if the emails were sent within working hours, it was not inappropriate for them to correspond with him at this time unless he had expressly asked for them not to which he did not.

The police

74. It was the Claimant's case that he started to hear colleagues talking about the police being involved with his grievance. He then went to the police himself in late December to see if any reports had been made that referred to him or on his behalf. The information regarding his allegations to the police are hard to discern in terms of what his interactions with the police tell us about the respondent's actions and what they contribute to his claims before us. What we can say is that he appears to suggest that there is some element of collusion between the police and the Respondent and that something to do with a police investigation about a domestic issue was being discussed at work. We find that although this was referred to in evidence before us and referred to in the Claimant's appeal against the dismissal, the Claimant has not provided us with information that allows us to find that it was relevant. We think that the evidence given to us on this point was confused and confusing. The following excerpts from the Claimant's witness statement (paras 244-246) demonstrate this. There was other information in the claimant's statement about the comments made by the 4 individuals referred to. The below excerpts are not the totality of the claimant's evidence on the point but meant to be indicative of the nature of that evidence and to provide some of the context as to why we felt

that the evidence on this point tended to show that the claimant was not always a reliable witness in terms of his perception of what was occurring around him.

"244. From paragraph 243 above, the Police know me and that it related to a "Domestic issue" and that Optivo decided to enquire into it further. However, as far as I am concerned, "What has the Domestic issue got to do with my grievances"?"

245. I believe that the Firm made the enquiry because they were trying to find something "Bad" about me, so as to undermine me and all my grievances. I found their behaviour unfair, unsupportive, disrespectful, and in breach of their "Core Values" and "Code of Conduct Policy", which make references to support, respect and fairness.

246. The comments about the Police were made by 4 different individuals, and not by one individual- one individual can mislead you but not four - and given this, and the fact that 2 of the comments made used the word "Domestic" - something that was true but I had never discussed this with anyone while I was at Optivo, and which I have got nothing to worry about - I was sure that the Police were involved in my grievances. This information could only have come from the Police.

The Grievance Appeal

75. The Claimant appealed against the failure to uphold his grievance on 6 January 2020 (p521-528). He sent that email on 6 January at 09.10 in the morning. He received a written response from Adrian Prescod at 10.28 on 8 January 2020 (pg 529). That email makes reference to the fact that the Claimant had been given oral confirmation of Adrian Prescod's receipt of the appeal earlier that day. The claimant alleges that no acknowledgement was received. That is clearly not correct. Acknowledgement was received but 2 days after the claimant sent it. We do not accept that there was a significant delay in AP acknowledging receipt of the Claimant's appeal. He had verbally acknowledged it soon after he received it (which the Claimant accepted) and then when the Claimant chased him, he subsequently acknowledged it in writing. We do not think that 2 days delay constitutes a failure to acknowledge receipt.

76. Initially, Rommeal Fayteren (RF) was emailed and asked to consider the appeal. The Claimant states that the fact that RF was appointed to hear the appeal was discriminatory. We find that RF was originally appointed but that was because the person appointing him did not know the detail of the complaint and that it referred to colleagues who sat near RF. Further we accept the respondent's evidence that RF was not named or referred within the Stage 1 grievance thus making it difficult to immediately identify any possible conflict of interest on the part of RF. The Claimant said in cross examination that RF sat close to some of the colleagues he was complaining about and therefore him handling the grievance was inappropriate. The respondent disagrees but, as a result of the Claimant's concern, Joanne Stewart (JS), Head of HR, appointed John Waters (JW) to deal with the appeal instead. She said that she did this

because the Claimant raised it as a concern and she wanted to reassure him as he seemed very anxious. She did not do it because she had any actual concern about RF but because the Claimant asked her to. We accept this explanation as wholly plausible in all the circumstances.

77. We do not accept the claimant's point that the fact that the change in personnel handling the grievance was done without any objection was somehow a detriment. It was not clear how he said it was detrimental to him. We considered whether he believed that the lack of objection perhaps indicated that his concerns about RF were correct, but it is not clear then how the change in personnel in those circumstances would then be detrimental. We did not glean from his evidence or submissions how else he perceived the decision to change the person investigating his grievance on his request, was negative for him.

78. A summary of the grounds of appeal as set out in the minutes of the appeal hearing is:

"1. I have not been provided with signed and dated statements from the witnesses as evidence as to what was said at these meetings:

2. He didn't get the opportunity to speak to all witnesses (Nicolette Bertone).

3. I am not happy with the investigation carried out and the findings of the investigation."

79. The claimant also alleges that Adrian Prescod's failure to acknowledge an email on 20 January where the claimant asks for the meeting to be rescheduled amounts to an act of discrimination. There were two emails from the claimant to HR dated 20 January 2020. One was requesting confirmation as to whether the police were involved (addressed to JS) and one was an appeal against the probation hearing being heard on the same day as the appeal hearing against his grievance outcome (addressed to Ms Smith).

80. Ms Stewart responded to the first one stating that Adrian Prescod was the HR person with overall conduct of his case and that she had forwarded the email to him. Adrian Prescod then responded later that day confirming that the police were not involved in his grievance.

81. It is correct that Adrian Prescod did not respond to the email containing the appeal against the probation hearing meeting being heard on the same day as the grievance appeal meeting. Ms Smith responded saying that Adrian Prescod would respond and we accept that he did not do so specifically on this matter. The Claimant states that this meant he did not know whether the meeting would be going ahead that day or not as he had appealed against it happening. However, we note two things that undermine that assertion. Firstly, we accept JS's evidence that Adrian Prescod's failure to respond was down to two possible factors; that this was either an oversight or because Adrian Prescod

believed that the claimant understood the position given the other conversations that had already occurred regarding his probationary meeting. That conversation had concluded on 13 January when the claimant received an email from SH confirming that the probation meeting would go ahead on the same day regardless of the fact that the grievance appeal would not have been concluded at that point. We believe that it is plausible that Adrian Prescod felt that the claimant understood that the meetings were both going ahead on the same day. Both explanations are plausible. On balance we consider that his failure to acknowledge receipt of this particular email was an oversight. This is because he responded to the other correspondence from the claimant and was dealing with several issues about this situation that day.

82. Secondly, we accept that the claimant was contacted on the day of the grievance appeal hearing to see if he would attend and he said he would not. He was therefore in no doubt that the meeting was going ahead.
83. We accept that it would have been better practice if Adrian Prescod had responded and stated that the meeting would be going ahead regardless of the claimant's email asking for it to be rescheduled. Nevertheless, we accept JS's evidence that the lack of an acknowledgement email by Adrian Prescod to that particular email from the claimant, did not occur because of the claimant's sexuality or perceived sexuality. We were provided with no evidence to suggest that this was a factor in Mr Prescod's actions and we find it implausible given his other email to the claimant that day, and the tone and content of his other emails to the claimant, including one suggesting that the claimant avail himself of the Employment Assistance Programme because he was worried about his wellbeing.
84. John Waters (JW) conducted the appeal meeting in the absence of the claimant on 24 January 2020. The claimant objected to the fact that his 22 week probationary review meeting was scheduled to take place on the same day and therefore refused to attend both meetings. JW called the claimant before the meeting to try to ascertain whether he would attend but the claimant refused. Attending the meeting were John Waters, Adrian Prescod, JP and Uju Ajiduah. The minutes of that meeting were provided to us.
85. Adrian Prescod had interviewed Ms Bertone and relayed to JW during the meeting what she had said about the situation. Minutes of the interview with Ms Bertone were not provided to the claimant.
86. At no point does JW address the points raised in the amended minutes that were not dealt with or acknowledged by JP either. As we did not hear from JW it was difficult to ascertain why he chose not to address these matters, His witness statement parrots JP's original written evidence to the Tribunal that there was little of any substance in his suggested amendments which JP has now conceded is not correct.

87. The outcome of the grievance appeal was set out in a letter dated 24 January. It does not uphold the claimant's appeal and concludes that JP's investigation was thorough and detailed and her conclusions were correct. It does not address the claimant's clear appeal ground that some issues he had raised were not considered by JP or covered in the outcome letter. It also does not include the fact that it was not the respondent's normal policy to send signed witness statements as part of the grievance process though we accept that this was considered at the appeal meeting as recorded in the minutes.

Specific allegations

88. We are only going to deal with the allegations made that are matters for us to determine in the List of Issues. They are as follows:

- (i) That AP called the C Pushti twice.
- (ii) That AP send a 'sexual orientation email' to several employees regarding the Claimant between 22 July 2019 and 19 August 2019;
- (iii) That AP called the Claimant a 'cock' and subject him to threatening behaviour between 21 August 2019 and 19 September 2019;
- (iv) That Helen Sterling, during the period 23 September to 8 October 2019, (when the Claimant temporarily moved to the 5th floor), quoted or refer to the alleged abuse that the Claimant received from AP, as referred to;
- (v) That all or any of Helen Sterling, Chantel Clavier, Jonathan Vaciannia and Rommel Faytaren during the period 23 September 2019 to 8 October 2019, openly shouted at the Claimant, including by making comments about his salary in comparison to theirs, and "give him a hard time";
- (vi) That Uzair Khan said the following to the Claimant:
 - A) "I know how much your net pay is" on 9 October 2019;
 - B) "I also have a photo of you without your beard on" on 10 October
 - C) "I have a nice face" on 10 October 2019;
- (vii) That Uzair Khan say the following to Rita Patel on 10 October 2019 about the Claimant and within his earshot:
 - A) "When he sticks up for himself it turns you on".

89. There were other allegations which the claimant made and which we heard evidence on and which were considered by the respondent during the grievance process. However we have not considered those in any detail as they did not assist our decision making.

90. Although we have considered and analysed each pleaded allegation in turn. We believe that it is helpful to explain that part of our decision making process on the veracity of the allegations was based on us looking at the overall set of allegations and the type of allegations. We consider that the type and number

of allegations that the Claimant made about other people, when considered together, demonstrates that his evidence is largely unreliable and undermines his credibility overall. Many of the comments, he says, were witnessed by several people and yet some of those people did not even know his name and everyone denies ever overhearing anything even approaching a conversation about the Claimant. We have, before writing this paragraph, analysed each in turn, but on doing so we reached the conclusion that the Claimant's thoughts and beliefs about what happened during this period are not credible.

91. In addition, we found that the Claimant frequently failed to provide any context or detail to the allegations. Despite the seriousness of his allegations he provided no dates for many of them. Whilst we accept that specific dates can be difficult to recall or may have less importance for some people, his inability to provide dates or even a week or day of the week even at the time that he made the allegations to the respondent, supports our conclusion that that his allegations were unreliable.
92. Further, whilst the comments allegedly made by people were sometimes detailed, the context from which they arose was not provided at all. For example, he alleges that someone stood up and shouted, across a crowded office, that they knew how much he was being paid. To allege that such a matter happened is one thing, but to not be able to explain the background to such an incident (e.g. a conversation amongst colleagues about the unfairness of people's pay) demonstrates again to us that the Claimant's evidence was unreliable.
93. We now turn to the detail of each allegation. We deal with the allegations against AP (AP) first.
94. AP was asked about the Pushti comment by JP. He told JP that he did not say it. Nobody else overheard him say it. AP did confirm that he knew what it meant in Greek. AP was also asked about the matter by JP in her investigation. He told her that he did not say it. Nobody else in JP's investigation had overheard him saying it.
95. We find, on balance, that AP did not say Pushti at all. We accept AP's evidence that he did not know what the Claimant's sexuality was nor that he had thought about it. He worked with the Claimant but did not know him well. He had worked for the Respondent for a long period of time and he was and remains well respected by colleagues and has a clean disciplinary record with no history of negative comments against colleagues or comments about people's sexuality generally. There was also no evidence before us that there was a wider culture of negative 'banter' at the respondent. People described conversations and jokes amongst colleagues but nobody, whether before us or during the internal investigations, suggested a negative or bullying atmosphere and we had no evidence from the claimant to suggest that either. The claimant's evidence

described comments about him only. He did not seek to suggest that there was a more general negative atmosphere at the respondent.

96. We also accept AP's evidence in his witness statement that he knew and understood the Respondent's equality, diversity and inclusion policy and believed in it.

97. The evidence given by the claimant about the apparent threats of violence made by AP towards him was vague and implausible. The threats were unspecific in terms of what happened, when they happened or how they happened. He provides no context for the threats, instead saying that they occurred out of the blue. He also said that other staff members had witnessed it and had discussed it. Against this the witness evidence from the respondent witnesses we heard from and from the statements taken at the time during JP's investigation showed that nobody else had seen or heard AP talking about the claimant or threatening him at all. We find it implausible that had such events been occurring in an open plan office and people had been discussing them openly, that nobody JP interviewed would reference it or acknowledge it occurring. They did not even reference or acknowledge interaction of any significance between AP and the claimant let alone threatening behaviour which, by all accounts apart from the Claimant, would have been completely out of character for AP.

98. There was no evidence whatsoever that AP sent a 'sexual orientation email' to several employees regarding the Claimant between 22 July 2019 and 19 August 2019. Firstly, as stated above, we do not consider that AP knew or thought about the Claimant's sexuality at all. Secondly, the Claimant says he never saw the email and no such email has been disclosed in evidence. We accept that the Respondent has complied with its disclosure obligations for the purposes of this case and was under a duty of disclosure with regard to any such email. The Claimant bases his allegation that such an email exists on the fact that he overheard Asha Pillai say to AP "You sent an email calling Mario 'Gay'" (paragraph 65, C's witness statement). He also says that AP said to him "They can't sack me for that" and that this most probably referred to that email. One of the paragraphs of the claimant's witness statement says as follows:

"68. When he said it, I knew that Milka Harris had already visited HR with an email, and that it quite possibly related to me because of what Tracy Haines said to her, and that she started staring at me after saying it, however, I didn't know its contents and who sent it. But when Alvino Pereira made that comment to me, I realised that he had done something, and that it related to me, because he made the comment to me, and that it quite possibly related to the email that Tracy Haines was referring to. As mentioned above, it was only in December 2019 that I found out more, because of what Asha Pillai said to him."

99. The Claimant says it was only through Asha Pillai's statement that he was able to piece things together and he then makes reference to and asks questions about the alleged email in his appeal (p529-538). The questions about that email appear at page 533 in paragraph (iii). The appeal outcome letter (pg 627) does not respond to those specific points and is a very short letter. The fact that it is not referred to in the appeal outcome letter does not, in our view, make it any more credible that it happened.
100. We find on balance that the Claimant was not called a cock by AP. However we take this opportunity to comment on the grievance process. JP says that this comment was not dealt with in the grievance outcome because it was not raised by the Claimant during the hearing. However the Claimant states that he did and says that he raised in his comments on the notes that he sent to her. In response to those notes JP acknowledges receipt and says that she will take the comments into account. Before us she said that she does not recall him telling her about the cock comment and that she does not believe that if it had been said neither she or her two colleagues in the meeting would have forgotten it or missed it either in their notes or subsequently forgotten it as part of the facts. We accept this evidence. Whilst we think that it was very poor practice for her not to rebut his comments on the notes if they were not said in the meeting, we do accept her evidence to us that the complaints were not actually raised by the Claimant and therefore she did not ask anyone about them as part of her investigation.
101. The Claimant was unable to give any detail as to when this comment had been made. We find it implausible that had such a significant and hurtful comment been made, he would not have remembered approximately when it occurred or made a note or recorded it in some way. He has demonstrated at other points in the process e.g. concerning minutes that he expects others to keep notes and holds them to account where there are discrepancies or a lack of notes yet he has not kept evidence of any aspect of his allegations.
102. We find that Helen Sterling was not talking about either calling him a cock or Pushti or discussing his salary. She says that she did not discuss the Claimant with anyone at all other than when a colleague asked her who "Mario the tax guy" was. We accept her evidence. We refer to our findings about the plausibility of the other comments above. Again the Claimant was unable to give any detail of when her conversation with others was meant to have happened. Had he genuinely overheard colleagues discussing him in such a way we believe he would either remember when it happened or have made a note or reported it to the respondent sooner.
103. We find that the same applies to the other colleagues who are meant to have discussed the Claimant's salary. Firstly we do not accept that the majority of the people knew the Claimant's salary or gave it any thought. We heard from Uzair Khan (UK) that he had access to information about people's salaries but

he never commented on salary information because it would be unethical and would lead to disciplinary action against him, something he would not want to risk. We accept that evidence. If he had started talking about one person's salary we think that in the culture of the respondent someone would have remembered it or questioned it and they did not. Further we were provided with no evidence as to why any of them would discuss salary in this context, even though we understand that the Claimant was on a relatively high rate because of his role and experience.

104. UK also disputes that he talked about having a photo of the Claimant and did not say that he had a photo of the claimant with or without a beard on 10 October. Nor did he say that the Claimant had a nice face on 10 October. His answer to JP during the investigation was that he did not say things like that (e.g. commenting on people's appearance) and we accept that as plausible evidence. We note that he went on to say that he did not socialise with the Claimant at work. He said that the Claimant disappeared from the 9th floor one day and that save for a conversation about a new job that he was applying for within the Respondent, which the Claimant helped him with, he had not really had any direct conversations with the Claimant. Given the odd nature of the alleged comments we again find it implausible that had someone made such comments the claimant would not have remembered more detail or one of his colleagues would have remembered them being made.
105. There were no photos on the internal HR system or payroll system that could be accessed that might have suggested that the Claimant misunderstood the mention of a photograph. There is no question of the Claimant misunderstanding the context – we find simply that it would have been odd for someone who hardly knew the Claimant to say any of the above comments to him in the workplace and we therefore consider, on balance of probabilities, that this did not happen.
106. The same is particularly true for the comment that UK is meant to have said, across a crowded office to Rita Patel, that if he [the Claimant] stands up for himself it turned her on. Such a comment would presumably have been heard by others in an open plan office and would have been noted given its offensive content. We think in particular that Ms Patel would have remembered such a comment and possibly even complained about it. She did not recall that comment when interviewed by JP. We find on balance that this comment was not made.
107. We rely on the notes of the interview with Ms Patel where she says that she had a very good relationship with UK and that nobody in the workplace would talk like that although they did enjoy a joke on occasion. She also went on to comment that she did not think the Claimant was very well and said why. She noted, unprompted, that he was a loner and that he did not say good morning to people who said good morning to him.

108.

22	RP	No ML is very private, he doesn't disclose any of his information to anyone. Secondly anyone who says good morning you never get a response. He finds anyone talking to each other is disturbing him. At one stage he decided to change floors without asking his manager so we didn't see him for a month. Then the manager told him to sit apart from the team. Janette [Jones] (JJ) she always talking very loudly joking about things. I don't know why ML is taking things on himself because it never directed to any specific people in person.
24	RP	No. I have seen him after I've come back from holiday. I was away 24 October and came back 10 November. He's really been behaving funny something wrong with him. Not acting as his normal self.
25	JP	When you say ML is not acting not like himself, like what for example
26	RP	Any kind of noises that's taking place he puts two hands on his head shaking. Whenever I'm making any moves he staring at me. I was feeling cold and I decided to get on top of the desk to close the aircon vent, and no one was staring at me but him

109. We have reminded ourselves that it is often newcomers who raise issues about unhealthy cultures within workplaces. To take the approach that if you have worked with someone for a long time that you therefore believe them can be dangerous. However on the facts and information provided to us during this case, we find, on balance, that the longevity of many people's employment and the size of the workforce reflects well on the respondent having a healthy and respectful team atmosphere and that team members were trusted. We also consider that the investigation was relatively thorough in that 10 people were interviewed and JP clearly took the allegations seriously.

Dismissal

110. The Claimant was dismissed on 24 January 2020 for failing his probation period. The 22 week probationary review meeting was held on the same day as his grievance appeal meeting. The Claimant refused to attend either meeting on the basis that both meetings occurring on the same day was too much and was unfair and that the probation meeting should not be held until the grievance appeal had been determined.

111. Originally, SH agreed to postpone the probation review meeting until after the grievance appeal had been concluded. However, he changed his mind. We conclude that the decision to proceed with the probation review meeting on that day despite previously agreeing otherwise was prompted by JP's Grievance Report sent to the managers on 22 January. That report concluded that the Claimant's allegations were vexatious. This report is what motivated SH to change his mind and not to wait until the outcome of the grievance appeal before proceeding with the probation review meeting. We do not accept SH's evidence that he did not consider JP's report when dismissing the claimant. That is implausible given the timing of the production of the report and his subsequent decision, no doubt made with HR support, to renege on his

agreement to postpone the probationary review meeting until after the grievance appeal outcome. However, we accept that SH did not scrutinise the report or its methodology but focused on JP's conclusion that the allegations were probably vexatious. This fed into his observations and concerns regarding the claimant's behaviour overall.

112. We find that the real reason for the claimant's dismissal was the genuine belief by JP and SH that the allegations were vexatious in nature, the volume of allegations made, the number of people against whom the allegations were made, the way the allegations were vague and kept expanding, the fact that there had been absolutely no corroboration of any of the matters complained of by the claimant and the subsequent detrimental effect that it had on individuals within the team. We accept SH's evidence that additionally he considered that the atmosphere within the office had become uncomfortable and damaging to the team's morale. We find this plausible given the effect it had on the witnesses before us and the genuine shock that several of the witnesses expressed when asked about the comments by JP during the investigation.

113. SH's witness statement gives details of the upset that AP had relayed to SH as evidenced by the email to him from SH at (p573). It also details that another colleague felt bullied and stressed and frightened by the claimant. After receiving the outcome to his grievance letter, the claimant approached various people to ask what he had said and to whom. We were provided with the Skype message that Rita Patel sent SH.



Guess what - today I was all positive until Marios fired e-mail about his outcome for Grievance, which was not to his satisfaction. He asked if Jackie Pauley had interviewed me and I told him no. then he asked if any other person, interview me and I told him HR. Then he wanted answers to other things and I got so stressed that I went upstairs to HR. Came downstairs and he bombarded me again. Wanting dates when I was seen and what was on the statement that I signed. It was so frightening.

You know that then HR called him since he bullied me, Waseem and Nicolette. He was so mad that HR warned him to not approach us.

Now wants to take Grievance out on the firm and Jackie Pauley,

was it this morning HR called him after you'd been upstairs to see HR

Yes this morning just after 10 mins that we had walked in. He was so crossed that you would think that he would have hit you but he controlled himself.

114. SH said that he himself had found the claimant aggressive on occasion and we accept SH's account of the claimant's behaviour towards him and his colleagues. We accept this because we had several different accounts of this type of behaviour in evidence and because the claimant's evidence to us has

been unreliable. We also accept that it was this behaviour that informed SH's decision as to whether or not to pass the claimant's probation.

115. We do not condone the fact that the respondent cut corners with the information provided to the Claimant both with regards to the communications with JP over the minutes, and the failure to provide the claimant with the management report into his grievance or any of the evidence relied upon. Had this been an unfair dismissal claim under the Employment Rights Act 1996, then we consider that the respondent would find it difficult to defend failing to provide such information to the claimant. However the claimant has provided no evidence whatsoever that any procedural failures by the respondent occurred because of his sexuality or were related to it in any way. He did not state that it was at the time either. The only matter relating to sexual orientation that he actually raised at the time was the allegation of being called Pushti.

116. We accept the claimant's case that it was poor practice to have two such important and potentially lengthy meetings on one day. The fact that the outcome of one may not have been linked to the outcome of the other does not detract from the fact that each meeting would have been inherently difficult for the claimant and the respondent would have known that. Nevertheless, we consider that the decision to do this was motivated by JP's conclusion that the grievances were vexatious and that SH could not see any other resolution to the situation other than dismissal because the claimant no longer appeared to trust any of the colleagues he would have to have continue working with and several of them found the claimant untrustworthy. They gave him the opportunity to attend both meetings and he continued to attend work on that day demonstrating that he was not too unwell to attend at least one of them. However he refused to attend despite knowing that they were going ahead and that his job was at risk.

Dismissal appeal

117. The Claimant appealed against his dismissal but did not attend the appeal meeting and in his absence the Respondent reviewed his dismissal but upheld the decision as the appeal letter did not provide any new information or evidence that persuaded them that the decision was incorrect. We accept that the real reason for the dismissal was as set out in the appeal letter and as set out below.

As detailed in Steve Heyes' probation outcome letter, the decision to terminate your employment during your probation period was not because you raised a grievance nor was it due to incapability. Central to the decision to terminate your contract was the unacceptable conduct you displayed in making a number of serious unsubstantiated allegations against your colleagues; involving others in trying to corroborate the allegations after you had received your grievance outcome letter; and this behaviour not being in line with Optivo's CORE values.

The Law

118. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

119. The EHRC Employment Code states that ‘a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred’ – para 15.32. If such facts are proved, ‘to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully’ – para 15.34.

120. The leading case on this point remains *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc* 2007 ICR 867, CA; and confirmed in *Hewage v Grampian Health Board* 2012 ICR 1054, SC.

121. In the case of *Igen*, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then ‘shifts’ to the respondent to prove on the balance of probabilities, that the treatment in question was ‘in no sense whatsoever’ on the protected ground.

122. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd* 2003 ICR 1205, EAT, gave guidelines as follows:

- (i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail
- (ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that ‘he or she would not have fitted in’
- (iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal
- (iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn
- (v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

- (vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information
- (vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice
- (viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent
- (ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act
- (x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground
- (xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment
- (xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct discrimination – s 13 Equality Act 2010

123. s 13 EqA “(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.”

124. The less favourable treatment must be because of a protected characteristic. This requires the court or tribunal to consider the reason why the claimant was treated less favourably: what was the respondent’s conscious or subconscious reason for the treatment?

125. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

126. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so “there must be no material difference between the circumstances” of the claimant and any comparator. (*section 23(1), EqA 2010*).

127. Section 23 EqA provides:

- (1) *On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.*
- (2) *The circumstances relating to a case include each person’s abilities if –*

on a comparison for the purposes of section 13, the protected characteristic is disability...

128. In *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment... Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

129. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls:

'[...] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant [...]

130. Since *Shamoon*, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in *Martin v Devonshire's Solicitors* [2011] ICR 352 at [30]:

'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35-37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009, para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'

131. S26 (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.

(5) The relevant protected characteristics are—

....

sexual orientation

Victimisation – s27 Equality Act 2010

132. S27 (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

133. The case of *Obasuyi v Royal Mail Group Ltd ET Case No.1801023/14*, held that where the employee was dismissed for making ‘a horrendous and completely unacceptable accusation’ of racism against a senior manager, the fact that it was made in good faith meant that his subsequent dismissal for making that comment was an act of victimisation .

134. In *Martin v Devonshires Solicitors* an employment tribunal dismissed the claim of victimisation, accepting the respondent’s argument that it was not the allegations themselves that were the reason for dismissal but a number of factors about the allegations and the way that they were made. These included the fact that the allegations were false; that they arose from the employee’s mental illness, which she did not recognise; and that similar behaviour was likely to occur in the future with a risk of significant workplace disruption. On appeal, the EAT upheld the tribunal’s finding that these features of the allegations were properly separable from the allegations themselves.

s123 Equality Act 2010 - Time limits

135. (1) *Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of*

(a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

(a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

(3) *For the purposes of this section—*

(a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

(4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) *when P does an act inconsistent with doing it, or*

(b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

136. On the question of whether it is just and equitable to extend time the Tribunal should have regard to the guidance set out in *British Coal Corporation*

v Keeble and ors 1997 IRLR 336, EAT) and consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Conclusions and discussion

Jurisdiction: Time point

137. The events we have considered date from some time in August 2019 (the Pushti comment) until the claimant's dismissal on 24 January 2020. The respondent asserts that anything that occurred before 6 December is out of time taking into account the ACAS Early Conciliation period (5 March 2020 to 31 March 2020). The claimant presented his ET1 on 2 April 2020.

138. We conclude that the acts and omissions complained about by the claimant could, if found, form part of a continuing series of incidents that culminated in his dismissal as they are all part of an ongoing grievance process that commences with the initial complaint to SH and culminate in the decision not to uphold the claimant's grievance appeal and not to pass the claimant's probation. There are no significant gaps in time when the claimant is not pursuing his grievance or the respondent is not considering those concerns/grievances. The decision to dismiss and to not uphold the grievance appeal are after 6 December 2019 and we conclude that everything that preceded that forms part of the series of events.

139. We have found that many of the specific allegations against his colleagues did not occur, particularly those pleaded as acts of harassment. It is arguable that they were more stand-alone incidents as opposed to part of an ongoing series of events as nothing seems to logically connect the content of many of the allegations or the people making them. That said, if found to be true they would almost certainly have created an ongoing hostile environment for the claimant as the allegations about the bullying behaviour were ongoing and covered most of the claimant's period of employment without any significant gaps in time. Further they form the content of the grievances brought by the claimant and so were being considered by the respondent up until the claimant's dismissal. We therefore consider that they could be said to have formed part of a series of acts were they to be found to have happened and we have therefore considered them.

Sexual Orientation

140. We have found that the claimant's colleagues did not know the claimant's sexuality. We do not accept that HR shared his sexuality with anyone or that anyone accessed it from the HR system. We also conclude that the individuals who allegedly discriminated against the claimant did not consider the claimant's sexuality when considering how they interacted with him or when considering his concerns, grievances or probationary reviews.
141. The fact that the Claimant relied upon both being heterosexual and being perceived to be gay as underpinning the some of the same acts by the same people, sheds extreme doubt on the claimant's framing and understanding of the claims that he has brought.
142. The claimant relied upon hypothetical comparators. He stated that for his claim based on him being heterosexual, he did not need a comparator on the basis that he felt that his treatment ought not to happen to someone who was in fact straight or perhaps was more offensive to a straight person than a gay person. We think that what he meant by this was that it was more offensive for him to be treated in this way than it would have been if a gay man had been treated in this way. This is not how s 13 the Equality Act 2010 is drafted. The claimant must establish that the negative treatment was less favourable treatment than a gay person would have received in the same or very similar circumstances.
143. With regard to his claim based on his perceived sexuality claim, his comparator must be a man who was not perceived to be gay. The main problem that the claimant has is that, save for Mr Heyes and Mr Pereira, the claimant alleges that the individuals concerned acted in the way that they did both because he was heterosexual and because he was perceived to be gay. This makes establishing the alleged 'reason why' behind the treatment confused and confusing.
144. In general, because of our overall conclusion that the claimant's sexuality was not considered or formed part of any individuals' decision making processes in any respect whether consciously or unconsciously, we have not had to embroil ourselves in detailed considerations of a comparator in our conclusions. We have approached the question of why the respondent acted in the way that they did from a 'reason why' perspective to allow us to fairly consider the claimant's claims. Nevertheless, we note that the claimant's arguments on this point appear flawed in any event.

Direct Discrimination

Claims against Stephen Heyes (SH)

145. The claimant's claims regarding SH are that he perceived the claimant to be gay from 20 August 2020 when he was informed about the Pushti comments.
146. SH did not fail to get back to the Claimant after the Claimant informed him on 20 August 2019 of the allegation that he had been called a Pushti. He did contact him and have a conversation with him regarding his conversations with the individual concerned and his colleagues and the claimant agreed that he did not need to take it any further at that time.
147. There was a delay in SH meeting with the Claimant to discuss allegations in his email of 20 September until 8 October 2019. However it was a relatively short delay, the claimant was allowed to move desks in the interim and we accept Mr Hayes' explanation that the reason for the delay was his workload. We were provided with no evidence whatsoever that the reason why SH delayed his meeting was the claimant's sexuality. We find that although the Pushti comment was a comment regarding sexuality, we do not find that SH took into account the claimant's sexuality when deciding when to have the meeting with him. He had responded promptly on receiving the complaint, expressed that he was taking it seriously and put in place a plan to move the claimant's desk. Further, the written complaint dated 20 September made no reference to the bullying behaviour being related to the claimant's sexuality.
148. On 8 October 2019, SH may not have asked the Claimant what happened and explained why he thought that the allegations appeared not to have happened. However, the main purpose of the conversation with the claimant was to ascertain what had happened and this is reflected in the notes. Therefore although SH may not have asked that express question, it is clear that he wanted to find out what had happened and tried to do so. The Claimant has provided no evidence that SH's actions in this meeting occurred because of the claimant's sexuality, perceived or otherwise.
149. We accept that SH did not consider the following points when deciding whether to dismiss the claimant:
- A) fail to consider and / or comment on the amendments to the minutes of the Stage 1 meeting prepared by the Claimant;
 - B) fail to consider and / or comment on the non-comment of these amendments in the Stage 1 and 2 Reports;
 - C) fail to supply the Claimant with signed and dated witness statements;

- D) fail to consider and / or comment on the non-provision of these witness statements with the Stage 1 and 2 Reports;
- E) fail to consider and / or comment on the matters in the Claimant's appeal of 6 January 2020 against the Stage 1 decision;
- F) fail to consider and / or comment on the non-comment of the matters in the Claimant's appeal of 6 January 2020 in the Stage 2 Report?

150. We find that his failures to consider those matters were because they were, in his view, irrelevant to the decision of whether the claimant should pass his probation review. He did not base his decision on the fact or subject matter within the grievance or the detail of the way it had been investigated by JP. Instead, he considered the claimant's conduct, (which we find he agreed with JP was essentially vexatious) and the claimant's behaviour and manner during the grievance process. We accept SH's evidence that he felt that the claimant's behaviour was not in line with the respondent's core values and that his own relationship with the claimant had deteriorated to such an extent that he did not feel comfortable line managing him or sending him out to represent the respondent. Presumably because he did not trust him.

151. We find that SH's decision to dismiss the claimant was caused by the manner and way in which the claimant had brought his grievance and raised concerns regarding his colleagues. SH's actions were informed by the management report on the claimant's grievance outcome and the fact that JP felt that the claimant's grievances were vexatious. He did not however have regard to the way in which the claimant's grievance had been dealt with nor did he consider what information had been provided to the claimant at that point in time.

152. The failure to provide the claimant with the information that formed the basis for JP's conclusions or a copy of her subsequent management report which informed the grievance appeal outcome and the decision to dismiss the claimant was not good practice in all the circumstances. Nevertheless, we find that it was the perceived vexatious nature of the grievance and allegations and the way in which the claimant behaved during this period that caused SH to dismiss the claimant.

153. SH did advise the Claimant that his probationary review would take place after his grievance appeal and then changed his stance and arranged for it to take place before the grievance appeal meeting. We have found that the

reason for that was JP's management report stating that the claimant's grievance had been vexatious and unfounded. We do not consider that the reason why was the claimant's sexuality or perceived sexuality.

154. We make the same findings in respect of the similar allegations that SH subsequently arranged for the Claimant's probationary review meeting to take place on the same day as (but after) the grievance appeal meeting and proceeded with the meeting on the same day despite the claimant's objections.

155. SH did dismiss the claimant on 24 January 2020. We have found that the reason for that was the manner in which the claimant brought the grievance and his conduct of the situation and the fact that the grievances were perceived to be vexatious by SH and other managers at this time. We also consider that it was because of the reasons set out in paragraph 45 above. We do not consider that the reason why the claimant was dismissed was his sexuality or perceived sexuality as we do not consider that SH's considered the claimant's sexuality in reaching his decision and had no evidence from which to infer that motivation.

156. Of the acts that we have found occurred, we find that the claimant has failed to demonstrate that he was treated less favourably or even differently from an appropriate comparator (someone who SH perceived to be heterosexual) would have been treated in similar circumstances i.e. someone who had brought the same grievances and behaved in the same way during that process. He did not provide us with evidence that enabled us to conclude that in all the circumstances any of SH's actions were caused by the claimant's sexuality or perceived sexuality.

157. The bar to shift the burden of proof to the respondent is low. However the claimant must show something more than just difference in treatment. He has not provided submissions or evidence on how a comparator would have been treated in the same or broadly similar circumstances. We the Tribunal must consider, has the claimant established on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination? In our view, in relation to the actions of SH, the claimant has not established such a set of facts. Beyond the fact that the claimant told SH he had been called Pushti, he did not say at any point to anyone that he felt the treatment he was receiving was because of his sexuality or his colleagues' perceptions of his sexuality. The allegation of being called Pushti is, we accept, a comment inherently related to sexuality but we do not consider that the claimant's allegation that he had been called 'pushti' caused or informed SH to act or think differently towards the claimant. He has shown no difference in behaviour from SH before and after he knew about the Pushti allegation.

158. We have born in mind that in deciding whether there are sufficient facts to shift the burden of proof, it is important to bear in mind that it is unusual to find direct evidence of discrimination. Nevertheless, we have received no evidence that suggest that the claimant's sexuality was considered, known or perceived by SH at any stage of his dealings with him and therefore the claimant has not established facts from which we could conclude that the respondent has committed an act of discrimination and the claimant has not shifted the burden of proof.
159. If we are wrong in that, then we accept that the respondent has provided a plausible non-discriminatory explanation for SH's actions namely that it was the claimant's behaviour around the grievance that caused him to fail his probationary period. We accept that non-discriminatory explanation as being the reason why the claimant was treated as he was by SH. For these reasons all claims of direct discrimination by SH fail.
160. Turning then to the direct discrimination allegations against various members of HR. It was not in dispute that Rashaan Badoo prepared the minutes of the Stage 1 meeting on 12 November 2019. The claimant alleges that those minutes were inaccurate and did not include significant additional information about allegations he says he made during the meeting. We have found that the minutes of the meeting were broadly accurate and that if such significant additional allegations had in fact been made then JP and Rashaan Badoo would have remembered and noted them and asked more questions about them. The fact that they were not originally noted shows that they were not made in that meeting. Therefore RB's notes of the meeting were broadly accurate and no failures occurred. This therefore cannot amount to less favourable treatment.
161. There was no failure by Adrian Prescod to acknowledge receipt of the claimant's appeal of 6 January 2020. Adrian Prescod acknowledged receipt both orally and in writing on 8 January 2020.
162. We have found that there was no established pattern or motive behind the timing of HR's emails to the Claimant and that no evidence was provided to us that any such emails that were sent on a Friday afternoon had any motive or intent behind them (whether by HR or JP) and certainly that there was nothing to link the timing of any such emails to the claimant's sexual orientation or perceived sexual orientation.
163. There were two emails from the claimant to HR dated 20 January 2020. We found that Adrian Prescod did not respond to the email containing the appeal against the probation hearing meeting being heard on the same day as the grievance appeal meeting. However we find that the claimant has provided us with no evidence whatsoever to suggest that Adrian Prescod's failure to reply to that email was because of his sexual orientation or perceived sexual

orientation. We do not consider that the claimant has shifted the burden of proof to the respondent given that Ms Smith responded saying that Adrian Prescod would respond and we accept that he did not do so specifically on this matter. The Claimant states that this meant he did not know whether the meeting would be going ahead that day or not as he had appealed against it happening. However, we note two things that undermine that assertion. Firstly, we found that Mr Prescod's failure to respond was due to oversight.

164. Secondly, we accept that he was contacted on the day of the grievance appeal hearing by Mr Waters to see if he would attend and he said he would not. He was therefore in no doubt that the meeting was going ahead. He was in work and could have attended had he chosen to do so.

165. We accept that it would have been better practice if Adrian Prescod had responded and stated that the meeting would be going ahead regardless of the claimant's email asking for it to be rescheduled. Nevertheless, we accept JS's evidence that the lack of an acknowledgement email by Adrian Prescod did not occur because of the claimant's sexuality or perceived sexuality. We were provided with no evidence to suggest that this was a factor in Mr Prescod's actions and we find it implausible given his other email to the claimant that day, and the tone and content of his other emails to the claimant, including one suggesting that the claimant avail himself of the Employment Assistance Programme because he was worried about his wellbeing.

166. We find, that in respect of this incident, the claimant has failed to shift the burden of proof to suggest that the failure by Adrian Prescod to send an acknowledgement email to that particular email on 20 January was in any way linked to the claimant's sexuality or perceived sexuality. He has adduced no evidence that allow us to conclude that a heterosexual man who was not perceived to be gay, or a gay man, would have been treated differently in the same circumstances.

167. If we are wrong in that and the burden of proof has in fact been shifted, we accept the respondent's explanation for Adrian Prescod's conduct namely that the failure to send an email was either an oversight or was caused by the fact that he believed the claimant knew the situation.

168. The claimant's claims for direct discrimination on grounds of sexual orientation are not well founded and fail.

Harassment

169. We have made findings of fact above that none of the acts relied upon as being acts of harassment actually occurred. For completion we find that the following acts did not occur|:

- (i) Alvino Pereira call the Claimant 'Pushti' twice at some point between 22 July 2019 and 19 August 2019 (the Claimant alleged that Pushti means "Gay" in Greek);
- (ii) Alvino Pereira send a 'sexual orientation email' to several employees regarding the Claimant between 22 July 2019 and 19 August 2019;
- (iii) Alvino Pereira call the Claimant a 'cock' and subject him to threatening behaviour between 21 August 2019 and 19 September 2019;
- (iv) Helen Sterling, during the period 23 September to 8 October 2019, (when the Claimant temporarily moved to the 5th floor), quote or refer to the alleged abuse that the Claimant received from Alvino Pereira, as referred to at 9.1 and 9.3 above;
- (v) All or any of Helen Sterling, Chantel Clavier, Jonathan Vaciannia and Rommel Faytaren during the period 23 September 2019 to 8 October 2019, openly shout at the Claimant, including by making comments about his salary in comparison to theirs, and "give him a hard time";
- (vi) Uzair Khan say the following to the Claimant:
 - a) "I know how much your net pay is" on 9 October 2019;
 - b) "I also have a photo of you without your beard on" on 10 October
 - c) "I have a nice face" on 10 October 2019;
- (vii) Uzair Khan say the following to Rita Patel on 10 October 2019 about the Claimant and within his earshot:
 - a) "When he sticks up for himself it turns you on".

170. The Claimant's claims for harassment are not well founded and fail.

Victimisation

171. The Claimant relied upon two protected acts within the meaning of Section 27(2) Equality Act 2010:

- (i) Making an allegation of sexual orientation discrimination to Stephen Heyes on 20 August 2019; and
- (ii) Repeating that allegation (made to Stephen Heyes on 20 August) at the Formal Grievance meeting on 12 November;

172. *S27(2) Equality Act 2010 states that a protected act is*
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

173. We accept that the Claimant complained that he had been called Pushti which means 'gay' in Greek on both 20 August 2019 and 12 November 2019. We accept that this is a word which is inherently related to sexuality. By making that allegation and saying that it upset him, he is therefore, making reference to something in connection with the Equality Act and he is making an allegation that someone committed a possible breach of the Equality Act 2010. We therefore conclude that these two events satisfy the definition give at s27(2).

174. However,, as set out at S127 (3) Equality Act 2010 states that
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
175. The Respondent made written submissions regarding the victimisation claims, some of which we have copied below:
- “There are three options open to the Tribunal on victimisation:*
- a. First, to find that the allegations made were true, in which case arguments of good faith / bad faith are irrelevant. The Respondent argues that the allegations cannot be made out;*
 - b. Second, to find that the allegations made were untrue but, likely for reasons related to the Claimant’s health, were made in good faith. This is a difficult matter as the Claimant does not claim to have made the complaints due to ill health, indeed he argues the opposite, and there is no evidence as to the Claimant’s health at the material time. The allegations made are also incapable of being a result of a misunderstanding: either they occurred, or they did not. However, the question of health was raised by individuals at the time and the Tribunal may be of the view that certain allegations made point towards ill health. The Respondent argues that, if this is the case, that this case is on all fours with **Martin v Devonshire**; or*
 - c. Third, to find that the allegations were untrue and made in bad faith, in which case the Claimant’s case must fail.*
176. In answer to those submissions, the Claimant denied that he was unwell and maintained that his allegations were true. We were provided with no medical evidence with regard to the claimant’s state of health.
177. We have concluded that the allegations were untrue. The claimant was not called ‘pushti’. This is not a case where we can find that a comment was misinterpreted or misheard. The case before us is either that it was said it was not and we have found that it was not said.

178. It has been very difficult to ascertain why the claimant made that allegation, or, for that matter, any of the subsequent allegations about his colleagues' behaviour. He maintains that they all happened and they form the basis of this case. We have found as fact that none of them happened. His basis for making his allegations are that he overheard people talking about him on frequent occasions, sometimes shouting across an open plan office about him. We have found those allegations wholly unfounded and implausible for the reasons already set out above. They are therefore false allegations.
179. The question for the Tribunal then is whether or not he made the allegations in bad faith. We are not sure that it is quite as simple as the respondent asserts; that the claimant has to have been unwell to genuinely believe that what he is saying was true and therefore not made in bad faith.
180. We have found the claimant an unreliable witness overall, at least in part because of his subsequent allegations and apparent belief that the police were somehow involved in his grievance. We have found that none of that occurred either.
181. The Tribunal are not medical experts nor did we have any medical evidence to suggest that the Claimant was mentally unwell at the time or that his current ill health. We were provided with one fit note from his GP for the period 4 December to 8 December stating that he is off sick due to 'stress related problems'. The claimant narrates that he has since developed depression due to the treatment he received from the respondent. He does not suggest that he had suffered from it beforehand.
182. We have carefully considered the case of Martin v Devonshire Solicitors where a conclusion was reached that the Claimant was mentally unwell despite her protestations that she was well. However, in reaching that conclusion, the respondent in that case and subsequently the Tribunal had the benefit of significant amounts of medical evidence stating that the claimant was unwell and suffered from psychotic episodes. We have no such evidence and in the absence of any acceptance or submissions to that effect, find that we cannot find that the claimant was unwell or made the allegations because he was unwell.
183. That does not necessarily then mean, though that the allegations were made in bad faith. There are other reasons as to why an individual may believe something has occurred when it has not that do not include ill health. Mistakes and misinterpretations are made by people for all sorts of different reasons. The claimant has maintained throughout that he genuinely believed that all of the comments were made. We are not sure on what basis the respondent suggests that he would have been motivated to deliberately make up these allegations if he was not unwell. We the Tribunal have struggled to find any such motive particularly when the claimant had worked there for such a short period of time

and there was and is no obvious benefit to making things up about his colleagues. It has not been suggested that the claimant was attempting to set the respondent up for a tribunal claim for example.

184. On balance, we find that the claimant was not acting in bad faith as we see no possible motive for such behaviour and have had no such motive suggested to us. We conclude that he believed that people were talking about him and that included a genuine belief that he had been called pushti. The basis for that belief is not clear but in the absence of there being any clear motive for making such allegations up, we find, on balance that the claimant genuinely believed that his colleagues were talking about him but was and is mistaken in that belief.

185. We then go on to consider whether, because of the protected acts, the claimant was subjected to a detriment. The claimant relies upon several acts.

186. The first set of acts is summarised as *“The Claimant clarified at the outset of the hearing that he was referring to the conduct of his grievance process overall and in particular in that he alleges they failed to properly investigate his complaints/grievances, and failed to provide him with a report which answered his questions. He relied specifically on paragraphs, d), b) and f) of the Summary of Case document.”*

187. We have concluded as fact that SH did get back to the claimant after the meeting on 20 August 2019 (paragraph b) and he did tell him what he had found out. We have also concluded that SH was supportive on both occasions when the claimant reported problems to him.

188. We have also concluded that AP did not call the claimant ‘Cock’ (paragraph d) nor that this particular behaviour was reported to the respondent during the meeting on 20 September or in the formal grievance investigation meeting. We accept that it was raised by way of an amendment to the minutes which was subsequently ignored but we do not accept that the claimant raised this at the time.

189. We do not accept that there was a substantial delay in SH meeting with the claimant (paragraph d). In all the circumstances 18 days does not seem substantial when the claimant had been moved desks in the interim and had been assured by SH that his concerns were being taken seriously. However, if we are wrong in that, we find that the delay was in no way caused by the fact or content of the claimant’s grievance but by SH’s workload. SH was supportive to the claimant, he spoke to colleagues about the allegations, he suggested that the claimant move, he informed him of how to raise his concerns formally and his emails and correspondence with the claimant was warm and supportive.

190. We do not accept that SH was not warm and supportive on 8 October 2019. We accept that he expressed a view as to whether he believed the claimant's assertions because of the information he had been given by colleagues when investigating the situation informally. However he did not seek to dismiss the claimant's concerns but told him that if they occurred again he should provide more information or corroborative evidence to allow them to properly consider it and he told him how to submit a formal grievance which the claimant then did.

191. Overall, we have found that the respondent dealt with the claimant's grievance seriously and investigated it thoroughly. SH considered it informally, speaking to several people and feeding back to the claimant and then JP considered it formally and interviewed 10 people regarding the allegations. We accept that JS failed to properly consider and responds to the amendments to the notes that the claimant made. That error followed through the grievance appeal and the allegations raised in those amended minutes were never considered or addressed. However we have concluded that this was because those allegations were not made at the original meeting and they were then missed or ignored by JP subsequently. However the failure to properly deal with those amendments and additional points was not caused by the fact that the claimant had made complaint in reference to the Equality Act. That failure was an oversight caused by a combination of the claimant failing to raise it either in his grievance or during the meeting itself when he should have done and subsequently by JP's failure to read the amendments properly.

192. We also found that on the outcome of the grievance, the respondent did not convey to the claimant the methodology behind the investigation upon which they had based their decision. JP refers simply to speaking to all the witnesses but does not say who she has spoken to nor does she provide the subsequent grievance report to the claimant which forms the basis for the subsequent decisions regarding his grievance appeal and to an extent, informs SH's decision to dismiss as already discussed. The claimant states in his appeal that JP failed to provide him with signed witness statements for the people interviewed. We have accepted the respondent's explanation that this was because people were worried about confidentiality because of the claimant's behaviour and that it was not their normal practice to provide such information.

193. However any failure in 'procedural fairness' here does not occur because the claimant made either of the disclosures he relies upon as protected acts. It occurs because of a combination between the respondent's processes in this regard not being particularly robust as to what information should or should not be shared with those complaining and the manner in which the manner of the claimant's grievances as opposed to its content. By that we mean the vagueness of some of the allegations, the strangeness of the numerous allegations which went far beyond the protected act relied upon, the lack of

corroboration from anyone concerning any of the behaviour complained of and the way in which the claimant behaves towards his colleagues during this period in time. It is not because of the reference within the claimants' grievances to him being called Pushti.

194. The next section of the claimant's victimisation claim is "During the Formal Grievance process from 12 November 2019 to 24 January 2020, – the Stage 1 and 2 investigations and reports, including Human Resources, and Management. The Claimant clarified at the outset of the hearing that he was referring to the failure to deal with his appeal properly and failed to provide a proper report. H relied specifically on paragraphs h), i), j) k) and m) of the Summary of Case document.

195. We have found that the minutes of the Stage 1 meeting on 12 November were broadly accurate and that the claimant's significant amendments do not reflect what was discussed at the meeting (paragraph h).

196. We have accepted that the respondent failed to properly consider the claimant's amendments to those minutes (paragraph i). As already stated we consider that this failure was a mistake by JP but that any such failure was not caused by the fact that the claimant had made an allegation of discrimination but because he had not discussed these points at the original meeting and JP did not sufficiently consider the amendments thereafter in oversight. There was no causative link.

197. We have already dealt with the allegations that JP's grievance outcome letter to the claimant failed to properly address the amended minutes and did not include any signed and dated witness statements above (paragraph j).

198. Paragraph (k) repeats complaints already dealt with above but also states that the report found that the claimant's allegations were unsubstantiated and vexatious. We accept that this conclusion arose because of the manner of the claimant's grievance and his behaviour around it. We do not repeat the points already made on this. We do not consider that the respondent acted in this way because the claimant submitted a grievance that made reference to the Equality Act 2010.

199. Paragraph (m) in essence repeats the above complaints about Stage 1 and the grievance outcome but applies it to Stage 2 and the appeal. The outcome letter from the appeal was brief. We accept that Mr Waters did not deal with the claimant's amended minutes. The outcome letter also did not address the fact that it was not their normal practice to provide signed and dated statements from witnesses – though we accept that this was the case and that it was considered as an issue at the appeal meeting which the claimant did not attend. It does address the fact that Ms Bertone was spoken to as part of the appeals process to check whether her evidence would change the outcome of

the grievance and it does state that PW had reviewed the overall grievance investigation and process and outcome and found it to be reasonable, thorough and that he the grievance policy and procedure had been followed.

200. Any lack of detail or brevity in the letter was not caused because the claimant having made a complaint by reference to the Equality Act. The claimant's grievance and appeal were dealt with seriously and thoroughly.

201. As an overall conclusion on the procedural failings that are alleged, we agree with the respondent's submissions that as a general, overarching point, the respondent's overarching behaviour in response to the claimant's grievances and his erratic and somewhat bizarre behaviour over this period was to act with compassion and to thoroughly investigate his grievances. They did not dismiss his concerns even when he started talking about police involvement but attempted to get as much as detail as possible and find as much information as they could about the numerous allegations being made by the claimant. The protected act relied upon was one small aspect of those allegations. The claimant was not saying overall that he was being discriminated against or bullied because of his sexual orientation. Being called Pushti was one allegation amongst many in a general bullying claim that had no merit or supporting evidence. The Respondent took those claims seriously but as a result of that they found that the claimant's grievance was totally unfounded and that the impact of him bringing the grievances as whole, was vexatious and damaged the working environment.

202. We conclude that the claimant's dismissal did not occur because he had raised a grievance that made reference to the Equality Act 2010 or alleged that it was being breached. The respondent took that complaint seriously. We find dismissal occurred because the claimant's allegations were wholly false, the claimant appeared to be fantastical as his allegations escalated and he started to talk about police involvement, and his behaviour was disrupting the workplace because he was making other staff wary about working with him because he appeared to making things up about them. We accepted SH's evidence to the tribunal that colleagues were scared that accusations would be made against them and AP was affected to the extent that he had to be referred to the employee support programme. We also accept that SH himself was concerned regarding his own working relationship with the claimant as his line manager and that given the fact that the claimant was still in his probationary review period, it was appropriate to consider all of these matters when deciding whether to pass the claimant's probation or dismiss him. In that respect we accept that as in *Martin v Devonshire*, the claimant was not dismissed for the doing of a protected act but because the allegations were wholly false, the claimant was unable to accept that they were false and that as a result of his behaviour the employment relationship was no longer tenable.

203. Following our conclusions above we find that all of the claimant's claims for victimisation pursuant to s27 Equality Act 2010 are not well founded and fail.

Employment Judge Webster

Date: 10 January 2023