EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nicholas George	**v**	**Openreach Limited**

Heard at: London Central (via video)

On: 9,10 and 11 March 2022

Before: Employment Judge P Klimov
Tribunal Member D Keyms
Tribunal Member D Shaw

Representation:

For the Claimant: in person

For the Respondent: Mr. S. Proffitt (of Counsel)

JUDGMENT having been sent to the parties on 14 March 2022 and written reasons having been requested by the claimant on 14 March 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. By a claim form presented on 26 May 2020 the claimant brought complaints of direct race discrimination, harassment, victimisation and unfair dismissal.

2. The claimant listed various episodes going back to 2015, which he claims were acts of direct race discrimination, harassment and victimisation by the respondent.

The claimant relies on his colour (black) for the purposes of his discrimination claims.

3. The claimant also claims that his dismissal was unfair and an act of direct race discrimination, racial harassment and victimisation by the respondent. The respondent presented a response resisting all claims.

4. There were two preliminary hearings, on 20 August 2021 and 8 December 2021, at which the claimant's claims were clarified and the final list of issues agreed, attached as Annex A to this judgment ("the **List of Issues**").

5. On 17 February 2022, the claimant wrote to the Tribunal seeking the respondent's response to be struck out for failure to comply with the witness statements exchange order. The application had not been dealt with until the final hearing. It was considered by the Tribunal at the hearing and refused for the reasons explained later in this judgment.

6. The claimant represented himself at the hearing and Mr Proffitt appeared for the respondent.

Evidence

7. The claimant gave evidence and was cross-examined. The claimant also called evidence of Mr P. Humphrys. The respondent decided not to cross-examine Mr Humphrys and his evidence was taken as read. There were four witnesses for the respondent: Mr A. Medley, Mr A. Hodgkiss, Mr K. Miller and Mr D. Kelly. All gave sworn evidence and were cross-examined. The Tribunal was referred to various documents in the bundle of documents of 402 pages the parties introduced in evidence.

Findings of Fact

8. The claimant was employed by the respondent, a large provider of telecommunication services, as a Customer Service Engineer, from 13 September 2007 until his dismissal on 29 May 2020.

9. The claimant worked in the South London area ("**patch**"). He was allowed to park his van in the respondent's South London depot ("**exchange**"), instead of parking at his house. The claimant walked to the South London exchange to collect his van in the morning and began his shift from the exchange at 8am.

10. In 2014 Mr Gerry Swietochowski became the claimant's manager.

11. On 20 April 2017, Mr Swietochowski issued an initial formal warning to the claimant for unsatisfactory attendance.

12. In July 2018, the respondent received two complaints from a customer regarding the claimant's conduct carrying out a job at the customer's house. Following a disciplinary investigation, at the disciplinary hearing on 12 November 2018 chaired by Mr. A Hodgkiss, the claimant was issued with a 12-month final written warning for unprofessional behaviour (leaving the job without informing the customer and swearing at the customer).

13. The claimant appealed the warning. On 10 January 2019, his appeal was heard by Mr K. Miller. Mr Miller dismissed the claimant's appeal.

14. On 14 February 2019, the claimant raised a grievance against Mr Swietchowski. The claimant alleged that he was subjected to bullying and harassment by Mr Swietchowski, in particular because Mr Swietchowski: (i) prevented the claimant from attending training, (ii) wrongly accused the claimant of falsifying timesheets in relation to start and finish shift times, and (iii) disturbed the claimant by calling him when he was on bereavement leave. As part of his grievance the claimant was also sought to re-open the disciplinary matter, which resulted in his final written warning.

15. On 15 February 2019, the claimant went of sick leave with stress.

16. The claimant's grievance was investigated by Mr Ian Young. As part of the investigation, Mr Young had a telephone meeting with the claimant on 7 May 2019. The meeting was initially planned for 25 March 2019, but had to be postponed due to the claimant's union representative being on annual leave and then again, due to the claimant being signed off sick with stress. Mr Young also had a meeting with Mr Swietchowski on 21 May 2019.

17. On 10 June 2019, Mr Young issued his determination of the claimant's grievance. He did not uphold the claimant's grievance. Mr Young found that Mr Swietchowski did not bully or harass the claimant. He found that Mr Swietchowski did not prevent the claimant from attending the training, and that the training had been cancelled or re-scheduled for work demands reasons, that Mr Swietchowski had legitimate reasons to raise the matter of the claimant's wrongly recording his start and end shift times, and that there was no bullying or harassment in Mr Swietchowski attempting to contact the claimant while he was on bereavement leave, because Mr Swietchowski was following the respondent's policy and his voice messages were supportive. Mr Young recorded in the outcome of the grievance a Point of Learning for Mr Swietchowski "*to ensure he informs his team members of the reason for any training course that are cancelled, i.e. due to high work stacks*". Finally, Mr Young decided that it was not appropriate to re-open the issues concerning the concluded disciplinary case.

18. On 13 June 2019, the claimant appealed the outcome of his grievance. Mr Miller was appointed to hear the claimant's appeal. As by that stage Mr Swietchowski had left the respondent, Mr Miller attempted to contact the claimant to see if he still wished to progress his grievance to the appeal stage.

19. On 25 July 2019, Mr Miller wrote to the claimant inviting him to the appeal hearing. On the same day, the claimant wrote to Ms Heather Palmer of the respondent's HR manager, stating that he believed that Mr Miller could not hear his appeal because Mr Miller had heard his appeal against the final written warning. Ms Palmer replied to the claimant stating that the grievance and the previous disciplinary were two separate matters, that Mr Miller was an experienced manager with the necessary authority to overturn the decision of Mr Young if he found that appropriate, and that she was satisfied that the claimant's concerns would be dealt with fairly and objectively. Therefore, she said, it was not warranted to replace Mr Miller as the appeal manager.

20. On 13 August 2019, Mr Miller heard the claimant's appeal at a meeting attended by the claimant and Ms Palmer. The claimant chose not to be accompanied. The claimant did not submit any new evidence. Following review of the existing evidence Mr Miller dismissed the appeal because he concluded that Mr Young's decision was correct.

21. Following Mr Swietchowski departure, Mr Medley became the claimant's line manager. In August 2019, Mr Medley went to see the claimant to introduce himself when the claimant was attending on a repair job at a customer's house. That was the only time that Mr Medley saw the claimant because shortly afterwards, on 2 September 2019, the claimant went off sick with stress and anxiety. The claimant remained on sick leave for 271 days until his dismissal on 29 May 2020.

22. On 2 September 2019, when the claimant did not turn up for work, and Mr Medley discovered that the claimant went off sick due to stress and anxiety, Mr Medley tried to contact the claimant to understand what had happened and how he was. The claimant did not respond to Mr Medley's calls and emails. Mr Medley became concerned and sought advice from HR. HR told Mr Medley to attempt to contact the claimant the following day, and if the claimant did not answer, to hand deliver a letter stating that if the claimant did not contact the respondent in the next few hours, they would have to alert the emergency services.

23. Mr Medley followed the HR advice. He hand-delivered the letter, and when the claimant did not contact him, Mr Medley alerted the emergency services. The emergency services arrived at the claimant's house. The claimant was in his house. The claimant was safe and well. He was unhappy that the emergency services had been alerted.

24. Throughout the claimant's absence Mr Medley attempted to keep in touch with the claimant, offering him support and inviting to take advantage of the respondent's support programme. The claimant declined. The claimant told Mr Medley that he did not wish Mr Medley calling him and would prefer to communicate via email. It was agreed that Mr Medley would email claimant once a week. In his emails Mr Medley sought to check how the claimant were and whether he required any

support. The claimant's replies were short and usually just stating: "duty of care acknowledged".

25. On 17 September 2019, Mr Medley held an absence review meeting with the claimant over the phone. At the meeting, Mr Medley offered the claimant a referral to Rehab Works, a counselling service, and mediation service. The claimant declined both offers. The claimant requested to be referred to occupational health, to which Mr Medley agreed.

26. The occupational health assessment took place on 24 September 2019. The OH report stated:

"Is the employee fit to continue in their current post?

I consider him fit for work. There appear to be unresolved issues relating to work-related stress acting as a barrier for his return. If these issues at work can be resolved I would anticipate he would be able to return to work."

27. On 15 October 2019, Mr Hodgkiss, the claimant's second line manager, wrote to the claimant inviting him to the second line review absence meeting on 23 October 2019, pursuant to the respondent's absence management policy. The letter contained a warning: "*You should be aware that if your current absence is likely to last for much longer, I will need to re-consider the arrangements for covering your job and your own future within BT because of the potentially significant impact on service.*"

28. On 21 October 2019, the claimant emailed Mr Clive Selley, the respondent's CEO, complaining of mistreatment by his managers over years. The claimant stated that he was uncomfortable to discuss his absence with his line managers as they were individuals he had issues with.

29. On 22 October 2019, Ms April Harrop from the respondent's HR escalations team responded to the claimant on behalf of Mr Selley, explaining that the old disciplinary cases cannot be re-opened, why Mr Medley had to alert the emergency authorities, and encouraging the claimant to use mediation for any remaining unaddressed issues.

30. The second line review meeting on 23 October 2019 did not go ahead and was re-scheduled for 11 November 2019. The meeting took place over the phone. The claimant's continuing absence was discussed. The claimant raised his past disciplinary cases.

31. The claimant said that he would not return to his patch due to the issues with the managers there and that he wanted to be moved to the Central London patch instead. Mr Hodgkiss said that he would consider moving the claimant and explained to the claimant that the move to Central London was impossible, because that patch was over-resourced. Mr Hodgkiss explained that a move to a

different patch could be arranged, but the claimant would have to change his parking arrangements, either to park his van in that new exchange or to become a convenience parker at the old exchange, however he would have to drive to the new exchange in the morning in his own time before the start of the shift. The claimant said that he was not willing to change his parking location or commute in his personal time. Mr Hodgkiss offered mediation. The claimant declined.

32. On 20 November 2019, Mr Hodgkiss emailed the claimant the meeting notes. On 25 November 2019, the claimant replied stating that he disagreed with the notes. The claimant said that he felt that transfer would be beneficial for him, and that he did not refuse mediation. On 28 November 2019, Mr Hodgkiss replied stating: "*As I discussed with you a move is not possible as you aren't willing to change your parking location or travel in your own time to another area.*" He also asked the claimant to confirm by 2 December 2019 if he was willing to consider mediation. The claimant did not reply. Mr Hodgkiss chased the claimant on 13 December 2019 by phone and email. The claimant did not respond to the call and did not reply to Mr Hodgkiss' email.

33. On 7 January 2020, Mr Hodgkiss wrote to the claimant inviting him to a meeting on 16 January 2020 to discuss his prolonged absence. The letter stated that Mr Hodgkiss was "*becoming concerned about your fitness and your potential ability to provide regular and effective service*". It went on to warn the claimant that "*One of the considerations following the meeting could be termination of your employment on the grounds of unsatisfactory attendance, which is referred to in the Attendance Procedure*".

34. On 11 January 2020, the claimant replied stating that he would not be able to attend the meeting due to stress. He enclosed a letter from his GP stating that there was no change in the claimant's medical condition.

35. On 23 January 2020, Mr Hodgkiss wrote to the claimant saying that if the claimant was unable to attend the meeting, a decision would have to be made in his absence and inviting the claimant to send written submissions by 30 January 2020.

36. On 28 January 2020, the claimant emailed Mr Hodgkiss and Mr Selley complaining about his history with the respondent's managers. The claimant said: "*Just to recap I have been victimised, harassed, bullied & threatened, now forced into a corner about the length of time I've been off work. I do not see this as good practise coming from Openreach. So I have no loyalty towards Openreach and no desire to continue to be treated in this manner by the company*". In concluding his email, the claimant said: "*Please inform me when I am able to collect my personal belongings from the van and the building in Rushey Green once you've concluded your decision. I hope this explanation passes your expectations*".

37. Following the review of the claimant's OH report, his submissions and other relevant documents on the file, Mr Hodgkiss decided to terminate the claimant's employment with notice.

38. On 5 March 2020, Mr Hodgkiss sent to the claimant a letter of termination and the rational for the decision. The letter stated that the claimant's employment would end on 29 May 2020. Mr Hodgkiss explained his decision that he had "*no confidence that [the claimant] wishes to return to work or in fact has any intention to return to work in the immediate or long term. This continues to have an impact on his team as they have to cover the jobs that [the claimant] is not completing. This has resulted in missed revenue for the business as we have not be able to sell work against [the claimant's] capacity or have had to use additional Over Time (O/T) to cover this*".

39. On 13 March 2020, the claimant appealed his dismissal. The appeal was heard over the phone on 16 April 2020 by Mr Kelly. The claimant attended with his trade union representative, Mr Dixon. The claimant did not submit any written grounds for appeal. Mr Kelly discussed the claimant's reasons for not returning to work, his issues with the managers, his request to be moved to a different patch and the parking arrangements.

40. Following the meeting, Mr Kelly made further enquiries with Mr Hodgkiss concerning the possibility of moving the claimant to a different patch. Mr Kelly decided not to uphold the appeal.

41. On 27 April 2020, Mr Kelly wrote to the claimant explaining his decision. As part of the appeal outcome, Mr Kelly offered the claimant a four weeks' job search across the entire BT group to maximise his chances to find an alternative role. The claimant did not take up the offer.

The Law

Striking out Claim

42. Rule 37 of the Employment Tribunals Rules of Procedure 2013 ("the **ET Rules"**) provides:

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
….
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
….

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

43. For a Tribunal to strike out for unreasonable conduct, it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible; and in either case, the striking out must be a proportionate response (see *Blockbuster Entertainment Ltd v James 2006 IRLR 630, CA*).

44. In *Bolch v Chipman 2004 IRLR 140, EAT*, the EAT set out the steps that a tribunal must ordinarily take when determining whether to make a strike-out order:

- before making a striking-out order, an employment judge must find that a party or his or her representative has behaved scandalously, unreasonably or vexatiously when conducting the proceedings, or another strike out ground is engaged.
- once such a finding has been made, the just must consider, in accordance with, whether a fair trial is still possible, as, save in exceptional circumstances, a striking-out order is not regarded simply as a punishment. If a fair trial is still possible, the case should be permitted to proceed.
- even if a fair trial is unachievable, the tribunal will need to consider the appropriate remedy in the circumstances. It may be appropriate to impose a lesser penalty, for example, by making a costs or preparation order against the party concerned rather than striking out his or her claim or response.

45. In *Emuemukoro v Croma Vigilant (Scotland) Ltd and ors EAT 0014/20* the EAT held that where a party's unreasonable conduct had resulted in a fair trial not being possible within that window, the power to strike-out was triggered. Whether the power should be exercised would depend on whether it was proportionate to do so. The proposition that the power could only be triggered where a fair trial was rendered impossible in an absolute sense would not take account of all the factors relevant to a fair trial.

46. In deciding whether to strike out a party's case for non-compliance with an order under Rule 37(1)(c), a tribunal will have regard to the overriding objective set out in Rule 2 of the ET Rules of seeking to deal with cases fairly and justly. This requires a tribunal to consider all relevant factors, including:

- the magnitude of the non-compliance
- whether the default was the responsibility of the party or his or her representative
- what disruption, unfairness or prejudice has been caused
- whether a fair hearing would still be possible, and
- whether striking out or some lesser remedy would be an appropriate response to the disobedience — (see *Weir Valves and Controls (UK) Ltd v Armitage 2004 ICR 371, EAT*).

47. Whenever a tribunal is considering a strike-out on the ground of non-compliance with prior orders pursuant to rule 37(1)(c), it must consider whether such an order is a proportionate response to the noncompliance.

Time Issue

48. Under **s123 Equality Act 2010** ("**EqA**")a claim 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.

    (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.

49. If a claim under the EqA is *prima facie* out of time, the Tribunal has a wide discretion to extend time where it would be "*just and equitable*" to do so.

50. In *Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule*.' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — *Pathan v South London Islamic Centre EAT 0312/13*.

51. The relevant principles and authorities were summarised in *Thompson v Ark Schools [2019] I.C.R. 292, EAT*, at paragraphs 13-21, and in particular:
    a. Time limits are exercised strictly;
    b. The onus is on the claimant to persuade the tribunal to extend time;
    c. The decision to extend time is case- and fact-sensitive;
    d. The tribunal's discretion is wide;

e. Prejudice to the respondent is always relevant;
f. The factors under s33(3) Limitation Act 1980 (such as the length of and reasons for the delay and the extent to which the claimant acted promptly once he realised he may have a claim) may be helpful but are not a strait-jacket for the tribunal.

Direct Race Discrimination

52. Section 13 of **EqA** states:

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

53. Race means colour, nationality, national or ethnic origin (s. 9 EqA)

54. Decisions are frequently reached for more than one reason. Provided the protected characteristic or, in a victimisation claim, the protected act, had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport [1999] IRLR 572, HL*).

55. The individual employee who carried out the act complained of must have been motivated by the protected characteristic. If he or she is innocent of any discriminatory motivation but has been influenced by information supplied or views expressed by another employee whose motivation is discriminatory, the correct approach is to treat the supply of information or view expressed by the other employee as the discriminatory action. (*CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439; [2015] IRLR 562, CA*.)

Comparators

56. Section 23 of EqA states:

"*On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

57. The relevant case law on the use of comparators for the purposes of s 13 EqA claims can be summarised as follows:
    a. The claimant does not need to point to an actual comparator at all. The claimant can say it is a hypothetical comparison.
    b. Even if the claimant does point to an actual comparator, a tribunal can still consider a hypothetical comparator as well.
    c. A hypothetical comparator is someone who is the same as the claimant in all relevant respects, except that he or she does not have the claimant's protected characteristic.
    d. The relevant respects are those things which might have affected the employer's decision.

e. Sometimes it is not necessary for a tribunal to think about a hypothetical comparison at all. Instead, it can be easier just to look at all the evidence and simply think about 'the reason why' the employer treated the claimant that way. (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285*.)
f. it can be good practice for the tribunal to cross-check its conclusion by constructing a hypothetical comparator and considering how the employer would have treated such a person (*Aylott v Stockton on Tees Borough Council [2010] IRLR 994, CA*)

Harassment

58. Section 26 EqA states:

(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.

59. Harassment is quite similar to direct discrimination. It involves bad treatment of the claimant because of a protected characteristic. It is considered that the words '*related to'* have a broader meaning than "*because of*", and a conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it.

Victimisation

60. Section 27 EqA states:

(1) A person (A) victimises another person (B) if A subjects BSto 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.

61. The claimant is protected when he or she complains about discrimination even if he or she is wrong and there has been no discrimination, unless the complaint was made in bad faith, i.e. a false allegation without the employee believing he/she was discriminated against.

62. The protection is against victimisation for raising a complaint of discrimination. The claimant is not protected against victimisation for simply complaining about unfairness. It is important to identify precisely what the claimant said which amounts to a 'protected act'. The protected act must have taken place before the detrimental treatment which is complained of.

63. As with direct discrimination, the discriminator may have been unconsciously motivated by the protected act. The person who subjects the claimant to a detriment needs to have known that the claimant did the protected act. If the person who subjects the claimant to the detriment does not do so because of the protected act (and may not even know of the protected act) but has been influenced or manipulated to carry out the detriment by a different person who is aware of it, the detrimental treatment is the manipulation or tainted information.

EqA Burden of Proof

64. Section 136 EqA states:

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

65. The guidance set out in *Igen v Wong [2005] ICR 9311* (approved by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054*) sets out the correct approach to interpreting the burden of proof provisions. In particular:

    a. it is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also *Ayodele v Citylink Ltd and anor [2018] ICR 748* at paras 87 - 106);

    b. it is unusual to find direct evidence of discrimination and *'[i]n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (para 79(3));

    c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));

    d. '*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'* (para 79(6));

    e. where the claimant has satisfied stage 1 it is for the employer to then prove that the treatment was "in no sense whatsoever" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));

    f. *'[s]ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

66. In ***Igen v Wong*** the Court of Appeal cautioned tribunals '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*' (para 51).

67. In *Madarassy v Nomura International PLC [2007] ICR 867* Mummery LJ stated that: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*' (para 58).

Unfair Dismissal

68. The law relating to unfair dismissal is set out in s.98 of the Employment Rights Act 1996 (**ERA**).

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
(a) The reason (or, if more than one, the principal reason) for the dismissal; and
(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

…..

(3) In subsection (2)(a)—
(a) "capability" , in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications" , in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

69. It is up to the employer to show the reason for dismissal and that it was a potentially fair one — i.e. one that fell within the scope of s.98(1) and (2) ERA and was capable of justifying the dismissal of the employee. A 'reason for dismissal' has been described as '*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*' — *Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.

70. If the employer shows that the reason for the dismissal is a potentially fair reason under s. 98(1) or 98(2) ERA, the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:
"*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

71. Procedural fairness is an integral part of the reasonableness test is section 98(4) of ERA. In deciding whether the adopted procedure was fair or unfair the tribunal must not fall into the error of substitution. The question is not whether the tribunal or another employer would have adopted a different and, what the tribunal might consider a fairer procedure, but whether the procedure adopted by the respondent "*lay within the range of conduct which a reasonable employer could have adopted*" (*Williams v Compair Maxam Ltd [1982] ICR 156*).

72. Capability is a potentially fair reason s.98(2)(a) ERA. The question may arise whether dismissal on account of an employee's record of long-term sickness absence should be characterised as a dismissal by reason of capability or some other substantial reason under s.98(1) ("**SOSR**").

73. In *Kelly v Royal Mail Group Ltd EAT 0262/18* the Mr Justice Choudhury (the then President of the EAT) observed: '*Whilst absence-related dismissals can fall under the rubric of capability within the meaning of S.98… there is no hard and fast distinction such that all absence-related dismissals must be so categorised. In the present case, the issue is not so much whether or not the claimant was capable or unable to do his work as a result of ill health, but that his attendance was unreliable and unsatisfactory. That, it seems to me, is perfectly capable of falling into the residual category of some other substantial reason. The failure by the respondent to label it as such in its pleaded case does not prevent it from relying upon that label at the hearing and nor does it preclude the tribunal from fixing upon that label in describing the reason for the dismissal*.'

74. The essential framework for considering whether dismissal on account of ill-health absence falls within the band of reasonable responses open to an employer was set out by the EAT in *Monmouthshire County Council v Harris EAT 0332/14*. There, Her Honour Judge Eady observed: '*Given that this was an absence-related capability case, the employment tribunal's reasoning needed to demonstrate that it had considered whether the respondent could have been expected to wait longer, as well as the question of the adequacy of any consultation with the claimant and the obtaining of proper medical advice*'.

75. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The Tribunal must not substitute its view for that of a reasonable employer. (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

Analysis and Conclusions

76. It was a unanimous decision by the Tribunal on all issues. In reaching our decision on the discrimination, harassment and victimisation claims we also considered the possibility of the putative perpetrators of the alleged discriminatory conduct being subconsciously motivated by the claimant's race in their actions, or being manipulated by others, who were so motivated.

Strike out Application

77. On the second day of the hearing the claimant raised the issue of the outstanding strike out application. The application was not in the bundle and the Tribunal was unable to locate it immediately. The claimant re-sent the application in afternoon of the third day of the hearing. At that stage of the proceedings the Tribunal had already heard from all witnesses. The Tribunal, therefore, decided to deal with the claimant's application as part of its deliberations on all substantive issues in the case. Both parties made submissions on the claimant's application in their closing arguments.

78. The claimant argued that the respondent was in breach of the Tribunal's orders by submitting its witness statements late (on 1 March instead of 26 January 2022), and by sending him the complete bundle late. He argued that the late submission of the witness statements and the bundle meant that he did not have enough time to prepare for the hearing.

79. The respondent said that the late submission of witness statements was due to a confusion with finalising the bundle. It argued that in any event the statements were sent to the claimant over a week before the start of the hearing. The statements were not lengthy, and the claimant had ample time to read them and prepare his questions.

80. The respondent further submitted that the bundle of 359 pages had been sent to the claimant on 27 December 2021, in line with the Tribunal's orders. After that only 40 additional pages of largely the claimant's documents were added to the bundle.

81. The respondent submitted that the late submission of its witness statements had not caused any prejudice to the claimant, a fair trial was clearly possible and striking out the respondent's defence would be disproportionate and not in accordance with the overriding objective.

82. The Tribunal applied the law as stated in paragraphs 42 - 47 above. It decided that in the circumstances striking out the respondent's response would be wholly disproportionate and against the overriding objective for the following reasons.

83. The late submission of the respondent's witness statement did not create any serious prejudice to the claimant. The total number of pages of the respondent's witness statements was 29. The claimant had a week to read through them and prepare his questions. He was given sufficient time to cross-examine the respondent's witnesses. At the end of each cross-examination the claimant said that he did not have any further questions to the witness. The bundle was provided to the claimant in time. Additional pages added to the bundle were largely the claimant's documents.

84. A fair trial was clearly possible, and it was a fair trial. Although the claimant argued that if had received the respondent's witness statements earlier, he would have been able to ask "better questions", he did not argue that the trial was unfair.

85. For these reasons the Tribunal rejected the claimant's application.

Claimant's credibility

86. The respondent submitted that the Tribunal should give no weight to the claimant's evidence because they lacked credibility. The respondent argued that the claimant was making up his evidence "on the hoof". The respondent referred to the claimant in his evidence:
    a. saying that the respondent's attendance policy was forced upon black employees because they were not going to read and understand it (albeit later withdrawing that allegation),
    b. alleging that Clive Selley (the respondent's CEO), whom the claimant never met, being personally involved in directing the alleged discriminatory treatment of the claimant,
    c. arguing that Mr Kelly, whom the claimant never met, and who did not know the claimant's race before or during the appeal meeting, decided to uphold the dismissal because of the claimant's race, suggesting that Mr Kelly checked the claimant's HR file to find out his colour before holding the appeal meeting,
    d. accusing all managers in his line of authority, including persons he had not met before the alleged discriminatory treatment, of being racists without substantiating his allegations.

87. We accept that the claimant's evidence in many respects were bare allegations, not supported by any credible evidence. In many cases his allegations were contrary not only to the evidence of the respondent's witnesses, but also to contemporaneous documents, including those produced by the claimant himself (for example, his appeal emails and email exchanges with Mr Hodgkiss and Mr Medley).

88. It is notable that during his multiple grievances and appeals the claimant never raised any complaint of race discrimination or harassment on the grounds of his race. He did not even complain about that in his appeal against the dismissal, and only raised those allegations in his tribunal claim.

89. As the hearing progressed the claimant's allegations of race discrimination, accusing almost the entire management of the respondent of racism, became more and more outlandish. They were not only unsubstantiated, but in some cases went beyond his pleaded case (for example, allegations that Mr Selley orchestrated his dismissal because of the claimant's race, or that the respondent's absence management policy was written against black employees).

90. The claimant did not give any credible explanations as to why he thought his race had any part to play in the way he was treated by the respondent, other than saying "*Why would they do that to me? I can't work it out*".

91. In short, we find the claimant's evidence unsatisfactory. However, considering that the claimant is a litigant in person, and that we are dealing with serious allegations of racial discrimination, we decided that the claimant's evidence should not be disregarded completely. Instead, the Tribunal must consider them and apply the usual principles of assessing and evaluating conflicting evidence. Where the claimant's evidence was in conflict with the respondent's evidence, the Tribunal considered the matter by referring to contemporaneous documents and the witnesses' answers on cross-examination. We also considered whether there were any areas where the respondent's evidence were unsatisfactory and adverse inferences could be drawn against the respondent. There were none.

92. In any event, the underlying facts leading to the claimant's dismissal, his dismissal and appeal were not in dispute. The nature of the dispute was whether those actions by the respondent's managers were tainted by racial discrimination, as alleged by the claimant.

Time Issue

93. The respondent submitted that only allegations 3(i), (j), (l), (m) and (n) (see the List of Issues in Annex A below) were in time and all others - out of time.

94. Having applied the legal principles set out in paragraphs 48 - 51 above, the Tribunal decided that except for allegations 3 (h), (i), (j), (l), (m) and (n), all other allegations on the List of Issues were out of time.

95. All the out of time allegations were discreet actions/omissions by the respondent. To the extent it could be said to be conduct extending over a period of time (for example, dealing with the claimant's grievance against Mr Swietchowski), the end of that period was more than three months (plus the early conciliation period) before the claimant's brought his complaint.

96. We reject the claimant's theory that there was some kind of conspiracy among the respondent's management to get rid of him because of his race with that plan starting back in 2017 with Mr Swietchowski giving the claimant the initial warning. The claimant did not present any credible evidence to sustain that allegation.

97. The claimant did not present any arguments as to why it would be just and equitable to extend the time limit to bring these allegations. The burden was on him. He has failed to discharge it.

98. Nevertheless, because the issues related to the out of time allegations were explored in some detail at the hearing, the Tribunal decided that it was able to and should make positive findings with respect to those allegations.

Direct Discrimination

Comparator

99. The claimant named Mr Humphrys as a comparator. Mr Humphrys left the respondent's employment in 2017. He was not in any way involved in the events the claimant complains about in his allegations 3(a) – 3(n). We heard no evidence to suggest that during his employment Mr Humphrey was involved in events similar to the matters related to the claimant's complaints in front of the Tribunal.

100. It appears that the claimant wanted to use Mr Humphrys as a comparator in relation to his initial warning issued by Mr Swietchowski in 2017 for the claimant's incorrectly recording start and end times of his shifts. However, that was not an allegation that was allowed to proceed as a claim but only as background. The Tribunal considered and accepted Mr Humphry's evidence as relevant background.

101. In respect to the claimant's allegations 3(a) – 3(n), Mr Humphrey is obviously a bad comparator. The Tribunal, therefore, considered using a hypothetical comparator. However, the Tribunal was able to make positive findings as to the reasons for the treatment the claimant complained about. Therefore, there was no need to use a comparator as such. However, in reaching its decision the Tribunal cross-checked its conclusions by construing a hypothetical comparator and considering how in those circumstances the respondent's relevant manager would have treated a person, who was not sharing the claimant's race (e.g. a white employee).

Burden of Proof

102. In considering each allegation the Tribunal applied the burden of proof principles (see paragraphs 64 - 67 above). In relation to each of the allegation 3(a) to 3(n) the Tribunal found that the claimant has failed to discharge the initial burden to establish facts from which the Tribunal could, in the absence of any other explanation by the respondent, conclude that the claimant was treated less favourably because of his race or that the treatment in question was in any way related to his race, and therefore the burden of proof did not shift on the respondent to show that the treatment complained of was in no sense whatsoever related to the claimant's race.

103. However, and notwithstanding that conclusion, the Tribunal was able to make positive findings as to the reasons for the treatment complained of.

a. *Gerry Sweitochwski investigating him regarding an allegation made against him on 24 August 2018;*

104. We did not hear from Mr Swietchowski. However, we heard evidence from the claimant and Mr Hodgkiss, who gave the claimant the final written warning in relation to this matter, and from Mr Miller, who dealt with the claimant's appeal against the warning. We also considered contemporaneous documents in the bundle.

105. We are satisfied that Mr Swietchowski's decision to investigate the customer's complaint against the claimant was in no way whatsoever related to the claimant's race. It was his duty as the claimant's manager.

106. The customer made a complaint that the claimant had left the job without telling the customer where he went and how long he was going to be absent. When the claimant returned some 3 hours later, the customer told the claimant that they had made a complaint about the claimant's leaving the job. The customer then made another complaint that the claimant had sworn at the customer for making the initial complaint. It was a serious matter, which required Mr Swietchowski, as the claimant's manager, to investigate it.

107. The claimant, other than accusing Mr Sweitchowski of being a racist, was not able to present any kind of evidence from which the Tribunal could conclude that the claimant's race was a motivating factor in Mr Swietchowski's decision to investigate the complaint or the way he handled it.

108. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

109. However, we are able to, and we make the positive finding that the claimant's race played no part whatsoever in Mr Swietchowski's decision to investigate the customer's complaint or the way he handled it, and that that Mr Swietchowski would have done the same in the similar circumstances in relation to a person not sharing the claimant's race.

b. *Adam Hodgkiss (Senior Operations Manager) issuing him with a final written warning on 12 November 2018*;

110. The claimant complains that Mr Hodgkiss believed the customer, who made the complaint, and not the claimant, and that there was no recording of the disciplinary hearing.

111. The issue of fairness or otherwise of the disciplinary process is not an issue for this Tribunal, except to consider whether Mr Hodgkiss' decision to prefer the customer's version of events and disbelieve the claimant, and the absence of the disciplinary proceedings record was because of or related to the claimant's race.

112. We heard from the claimant and Mr Hodgkiss, and considered the final written warning and rational, and other contemporaneous documents. We are satisfied that the claimant's race played no part whatsoever in Mr Hodgkiss' decision to issue the claimant with a final written warning.

113. It was a serious complaint. We find that Mr Hodgkiss considered the relevant materials. He explained in the rational document why he preferred the customer's version of the events. There was no credible evidence in front of us to suggest that the claimant's race played any part in that. We accept Mr Hodgkiss evidence that the claimant's race was not relevant to his considerations, and that he would have acted in the same way if he was dealing with a similar complaint against an employee not sharing the claimant's race.

114. The fact that the notes of the meetings were not available, but itself is not sufficient for us to conclude that the claimant's race was a motivating factor in Mr Hodgkiss decision to issue the final written warning.

115. Other than making a bold assertion that Mr Hodgkiss, in issuing the final written warning to the claimant, was motivated by the claimant's race, the claimant presented no evidence of any kind to substantiate that allegation. It is also striking that in his appeal against the warning and subsequently he made no such allegations, until issuing these tribunal proceedings.

116. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

117. In any event, we make the positive finding that Mr Hodgkiss' decision to issue the claimant with the final written warning was in no way whatsoever related to his race, and he would have done the same in relation to a person not sharing the claimant's race.

c. Kevin Miller (Regional Performance Manager) failing to uphold his appeal against the disciplinary warning on 10 January 2019;

118. Our finding in relation to allegation (b) above are equally applicable to this allegation. We accept Mr Miller evidence that the claimant's race played no part whatsoever in his decision to dismiss the claimant's appeal. We find that he considered the appeal open-mindedly and came to a conclusion, which was well within the range of reasonable conclusions an appeal manager could have come to in the circumstances, irrespective of the employee's race. The claimant was unable to present any cogent explanation as to why he thought his race had anything to do with Mr Miller's decision not to uphold his appeal.

119. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

120. In any event, we make the positive finding that Mr Miller's decision not to uphold the claimant's appeal was in no way whatsoever related to the claimant's race, and Mr Miller would have done the same in relation to a person not sharing the claimant's race.

d. Ian Young's failure to uphold the Claimant's grievance dated 7 May 2019;

121. We did not hear from Mr Young. However, we heard from the claimant and Mr Miller, who dealt with the claimant's appeal of Mr Young's decision. We also considered contemporaneous documents in the bundle. We find that Mr Young's decision not to uphold the claimant's grievance was not in any way related to the claimant's race. His rational for not upholding the grievance is well documented. Mr Young also properly acknowledged a point of learning for Mr Swiatchowski. We accept Mr Miller's evidence as to why he found Mr Young's decision correct.

122. We find nothing in Mr Young's rational that could possibly suggest that the claimant's race played any part in Mr Young's decision. It is also notable that the claimant made no allegations that Mr Young's decision was in any way related to his race in his appeal. The claimant did not provide any evidence from which we could conclude that the decision was because of or related to his race, other than making this allegation. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

123. In any event, we make the positive finding that Mr Young's decision not to uphold the claimant's grievance was in no way whatsoever related to the claimant's race, and Mr Young would have done the same in relation to a person not sharing the claimant's race.

e. HR's failure (Heather Palmer) to appoint a different manager to hear the Claimant's appeal against Ian Young's decision when the Claimant complained that Kevin Miller was not independent;

124. We did not hear from Ms Palmer. However, we heard the claimant's evidence on the matter. We also considered contemporaneous documents, including Ms Palmer's email of 25 July 2019, explaining her rational for not changing the appeal manager. We also accept Mr Miller evidence as to why he considered it was appropriate for him to hear the appeal, and the steps he took to ensure that he could deal with the appeal impartially.

125. The claimant failed to provide any credible evidence from which we could conclude that his race played any part in Ms Palmer's decision not to replace Mr Miller as the appeal manager. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

126. In any event, we make the positive finding that Ms Palmer's decision not to appoint a different manager was in no way whatsoever related to the claimant's

race, and she would have done the same in relation to a person not sharing the claimant's race.

f. Kevin Miller's failure to uphold the Claimant's appeal against Ian Young's decision regarding his grievance (13 August 2019);

127. As with all other allegations, the claimant did not provide any credible evidence whatsoever from which the Tribunal could conclude, in the absence of any other explanation from the respondent, that Mr Miller's decision was because of or in any way related to his race. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

128. We accept Mr Miller's evidence as to why he decided not to uphold the claimant's appeal. It was because Mr Miller considered that Mr Young's decision was correct. We find that it was a reasonable decision for him to make based on the evidence in front of him. Mr Miller's evidence are supported by clear contemporaneous evidence, as contrasted with the claimant's bare allegations of racial discrimination, and conspicuous absence of any such allegations during his employment with the respondent.

129. We make the positive finding that Mr Miller's decision not to uphold the claimant's appeal was in no way whatsoever related to the claimant's race, and he would have done the same in relation to a person not sharing the claimant's race.

g. Anthony Medley's review of the Claimant's attendance on 17 September 2019

130. We find that the reason Mr Medley conducted the claimant's attendance review was the simple fact that the respondent's attendance policy required him to do so, considering the claimant's prolonged absence. We find nothing whatsoever from which we could conclude that the claimant's race played any part in that decision or the process.

131. We accept Mr Medley's evidence as to why he decided to do the review and that the claimant's race played no part in that decision.

132. We reject the claimant's assertion that the attendance policy did not apply to him, or that it was forced on black employees because they were not going to read and understand it (the allegation he later withdrew). In any event, the policy did apply to Mr Medley as the claimant's manager, and he acted in accordance with it.

133. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102). In any event, we make the positive finding that Mr Medley's conducting the claimant's absence review was in no way whatsoever related to the claimant's race, and he would have done the same in relation to a person not sharing the claimant's race.

h. Anthony Medley contacting the Claimant an excessive number of times during his sickness absence.

134. This was because the respondent's attendance policy required Mr Medley to keep in touch with the claimant during his sick absence. We find that Mr Medley was doing that in a considered way, accommodating the claimant's request to be contacted via email and not on the phone. The contacts were once a week, which is not excessive. On some occasions the claimant initiated the contact himself by sending a "Duty of care acknowledged" email first.

135. With respect to the incident on 2 September 2019, when Mr Medley alerted the emergency services, we find that he did that out of his genuine concerns about the claimant's wellbeing and having taken advice from HR. We find that the claimant's race played no part whatsoever in that decision or in Mr Medley's contacting the claimant during his absence.

136. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102). In any event, we make the positive finding that Mr Medley's contacting the claimant during his absence was in no way whatsoever related to the claimant's race, and he would have done the same in relation to a person not sharing the claimant's race.

i. The respondent failing to transfer the Claimant to a different area, as per his request made to occupational health on 24 September 2019.

137. We find that the respondent offered the claimant reasonable options to return to work either to his old patch, or to transfer to the new available patch (North Downs) with either moving his parking to that patch's exchange or becoming a convenience parker. It was reasonable for the respondent not to transfer the claimant to Central London in the circumstances when it had excessive staff there, whom it was transferring to other locations. The claimant refused all the options offered to him.

138. The claimant complains that the respondent did not follow the Occupational Health report recommendations. However, the report does not recommend that the claimant should be transferred to a new location. It recommends that a way should be found to resolve the issues between the claimant and his managers. The respondent offered mediation, which the claimant refused on more than one occasion.

139. We find that the respondent's decision not to transfer the claimant to a different area was due to the claimant's refusal to accept the transfer terms with respect to the available alternative area (North Downs), and because the respondent did not have vacancies in Central London. We find that the claimant's race played no part whatsoever in that decision.

140. The claimant has failed to provide any credible evidence, from which we could, in the absence of other explanations explanation, conclude that the respondent's decision was because of or related to the claimant's race. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

141. In any event, we make the positive finding that the respondent's decision not to transfer the claimant to Central London and to offer the claimant the transfer to North Downs on the proposed terms was in no way whatsoever related to the claimant's race, and it would have done the same in relation to a person not sharing the claimant's race.

> *j. The respondent contacting the Claimant numerous times during his sickness absence, including a letter dated 15 October 2019*

142. We repeat our finding and conclusions in relation to the allegations (h) and (g). With respect to the letter of 15 October 2019, we find that Mr Hodgkiss' writing to the claimant inviting him to the second line absence review meeting was because the respondent's absence policy required Mr Hodgkiss to do that. We accept Mr Hodgkiss evidence that the claimant's race played no part in that decision.

143. The claimant has failed to provide any credible evidence, from which we could, absent the respondent's explanation, conclude that the respondent's contacting the claimant during his absence and Mr Hodgkiss' on 15 October 2019 inviting the claimant to the second level absence review meeting was because of or related to his race. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

144. In any event, we make the positive finding that the respondent's contacting the claimant during his absence and Mr Hodgkiss' on 15 October 2019 inviting the claimant to the second level absence review meeting were in no way whatsoever related to the claimant's race, and it/he would have done the same in relation to a person not sharing the claimant's race.

> *k. Clive Selly (CEO) for failing to intervene in the Claimant's case when the Claimant contacted him by email dated 21 October 2019*

145. The claimant alleges that Mr Selley's decision not to respond to his email of 21 October 2019 directly, and instead passing it to HR to deal with, was because of his race. In his evidence the claimant acknowledged that he never met Mr Selley, and that from his email Mr Selley would not have been able to ascertain the claimant's race. However, the claimant went on to develop a theory that upon receipt of the claimant's email, Mr Selley logged into the respondent's HR system, searched the claimant's profile, saw the claimant's photo, thus discovering that the claimant was black, and for that reason decided not to personally intervene in his case.

146. We reject that fanciful claimant's theory. There is simply no credible evidence to suggest that. Mr Selley is a CEO of a very large organisation, employing many

thousands of people. There is nothing extraordinary in the claimant's email of 21 October 2019 to suggest that the CEO must handle it personally. There is nothing extraordinary or sinister in Mr Selley's passing it to HR escalations team to deal with. A day later the claimant received a detailed response from Ms Harrop from that team.

147. In his evidence the claimant made further unsubstantiated allegations that Mr Selley, having viewed the claimant's HR file and having seen his photo, had decided to dismiss the claimant because of his race. We dismiss that allegation with no hesitation. We find the allegation is absurd.

148. The claimant has failed to provide any credible evidence, from which we could, absent the respondent's explanation, conclude that Mr Selley's not getting personally involved to deal with the claimant's complaint in his email of 21 October 2019 was because of or related to the claimant's race. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

149. In any event, we make the positive finding that Mr Selley's not getting personally involved to deal with the claimant's complaint in his email of 21 October 2019 was in no way whatsoever related to the claimant's race, and he would have done the same in relation to a person not sharing the claimant's race.

> *l. Adam Hodgkin's review of the Claimant's attendance on 11 November 2019 by telephone and his refusal to transfer the Claimant to Central London*;

150. We repeat our findings and conclusions in relation to allegation (i). We accept Mr Hodgkiss' evidence as to why the claimant could not be transferred to Central London area. We also accept Mr Hodgkiss' evidence that he offered the claimant the transfer to North Downs with two alternative parking options (transfer to the North Downs exchange or keep the current parking arrangements, becoming a convenience parker).

151. We find that there was a clear business rational for that, and it was in no way related to the claimant's race. We also find that in reviewing the claimant's attendance on 11 November 2019, Mr Hodgkiss followed the respondent's attendance policy and the decision to review the claimant's attendance or the process of doing that was in no way whatsoever related to the claimant's race.

152. The claimant has failed to provide any credible evidence, from which we could, absent the respondent's explanation, conclude that Mr Hodgkiss' review of the claimant's attendance on 11 November 2019 or his refusal to transfer the claimant to the Central London exchange was because of or related to the claimant's race. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

153. In any event, we make the positive finding that Mr Hodgkiss' review of the claimant's attendance on 11 November 2019 or his refusal to transfer the claimant to the Central London exchange was in no way whatsoever related to the claimant's race, and he would have done the same in relation to a person not sharing the claimant's race.

Conclusion on allegations 3(a) – 3(l)

154. We, therefore, conclude that the claimant's claim for direct race discrimination in relation to allegations 3(a) to 3(l) fails.

m. *Adam Hodgkin's decision to dismiss the Claimant*

155. We deal with this allegation in our findings and conclusions on the claimant's unfair dismissal claim.

c. David Kelly (director) failing to uphold the Claimant's appeal against dismissal following the appeal hearing on 16 April 2020

156. We deal with this allegation in our findings and conclusions on the claimant's unfair dismissal claim.

Harassment

157. The respondent submits that the allegations (e), (g), (h), (j), (k), (l, expect with respect to the failure to transfer to Central London) were not "unwanted conduct".

158. Given our findings and conclusions with respect to these allegations, we find that we do not need to decide whether those actions and omissions were "unwanted conduct". Our positive findings are that none of them were related in any way to the claimant's race. Therefore, the claimant's claim for harassment on the grounds of race (in relation to those allegations) falls together with his claim for direct race discrimination.

Victimisation

159. The claimant accepted that his "protected acts" in the List of Issues 10(a) and 10(b) were one and the same.

160. We find that neither the complaints of 24/25 August 2015 nor the grievance of 7 May 2019 were protected acts. We say that because neither of them said anything about the claimant's race or the claimant being discriminated on the grounds of his race. The claimant complained about being bullied and harassed but made no mention of race or any other protected characteristic.

161. We reject the claimant's assertion that the reference to "harassment and victimisation" was sufficient. These terms often used by employees, when complaining about "bad behaviour" of their managers or colleagues, in general everyday sense of the words, and not within the meaning ascribed to those terms in the Equality Act 2010.

162. If the claimant indeed wished to raise a grievance about him being discriminated or harassed on the grounds of his race, it is very surprising that he makes no mention of that in his email initiating his complaints or during his grievance and appeal meetings dealing with the complaints. He had access to his union representative and had every opportunity (and more than once) to properly formulated his race related complaints, if that was indeed what he wished to complain about.

163. In any event, given our findings and conclusions as to the reasons of the respondent's actions and omissions with regard to the claimant's allegations 3(a) – 3(n), even if the claimant's grievances were protected acts, we find that the respondent's acting or omitting to act in the way complained of was not because of the claimant's raising his grievances on 24/25 August 2015 or 7 May 2019.

164. It follows that the claimant's claim for victimisation fails and is dismissed.

Unfair Dismissal

165. The respondent says that the reason for the claimant's dismissal was capability s.98(2)(a) ERA (the claimant's long-term absence), or in the alternative – some other substantial reasons ("SOSR") (s. 98(1) ERA), namely failure to comply with the respondent's attendance requirements per *Wilson v Post Office* [2000] IRLR 834 CA.

166. The claimant claims that the reason for his dismissal was his colour.

167. Having considered all evidence in front of us we are satisfied that the sole reason for the claimant's dismissal was his prolonged absence and his refusal to return to work on the proposed terms. We find it is not material whether the "capability" or "SOSR" label is ascribed to that reason.

168. We find that it was a sufficient reason for dismissing the claimant in the circumstances. The claimant was absent from work for 271 days. He clearly indicated that he was not going to return to work to his old patch and refused the offer to be moved to a different area. In the circumstances, he left no other choice to the respondent. We have no difficulties in finding that the respondent genuinely believed that the claimant would not be returning to work on the offered terms and that was why it decided to dismiss the claimant. The claimant clearly stated that in his email of 28 January 2020.

169. We accept the respondent's evidence that the claimant's absence caused a negative impact on its business operations. We also accept that waiting any longer was not a viable option, when the claimant clearly stated that he would not be coming back on the offered terms. The claimant in his evidence accepted that his absence had a negative impact on the respondent's business.

170. The next question for the Tribunal is whether in the circumstances the respondent acted reasonably or unreasonably in dismissing the claimant for that reason. We must consider whether the procedure adopted by the respondent was within the range of reasonable responses.

171. We find that it was. The respondent followed its absence policy. We find that it was the relevant policy. We reject the claimant's argument that it did not apply to him.

172. The claimant was warned that his prolonged absence puts his employment at risk, first in October 2019 and then very clearly on 7 January 2020. He clearly understood that (see the claimant's email of 28 January 2020).

173. The respondent consulted with the claimant about his return to work and available options. It genuinely considered the possibility of moving the claimant to a different area and offered available alternatives. The claimant refused all the available options. The claimant submitted his written representations, which were duly considered by the respondent.

174. In his closing submissions the claimant argued that if the offer to move to North Downs had been made to him in writing he would have accepted it. We reject that. This assertion was not in his evidence. He did not ask for that during his appeal against the dismissal. The relevant contemporaneous documents clearly show that he was not prepared to move to North Downs on the terms offered by the respondent. Therefore, it would make no sense for the respondent to put the offer in writing, knowing that the claimant was not prepared to accept it.

175. The respondent obtained the occupation health report in September 2019 and duly considered it. It offered the claimant mediation as a way of resolving his issues with the managers (as was recommended in the report), to enable him to come back to work, which offer the claimant declined. There was no need for a further OH report. We reject the claimant's assertion that it was unfair not to refer him to OH again before dismissing him.

176. The claimant was allowed to appeal his dismissal. We find that the appeal was duly considered. The claimant was assisted by his trade union representative. Mr Kelly fully considered all relevant issues and decide not to uphold the appeal for the reasons clearly set out in his outcome letter. We find that his decision was well within the range of reasonable responses.

177. Having gone through each procedural element, we now need to step back and consider whether in the circumstances the decision to dismiss the claimant was fair or unfair.

178. We have no difficulties in concluding that it was well withing the range of reasonable responses and therefore fair.

179. We also find that the claimant's race played no part whatsoever in Mr Hodgkiss' decision to dismiss the claimant and in Mr Kelly's decision not to uphold his appeal.

180. The claimant has failed to provide any credible evidence, from which we could, absent the respondent's explanation, conclude that Mr Hodgkiss' decision to dismiss the claimant or Mr Kelly's decision not to uphold his appeal was because of or related to the claimant's race.

181. We accept Mr Kelly's evidence that he did not even know what the claimant's race was until he received the papers for this employment tribunal claim. Mr Kelly conducted the appeal over the phone. There was nothing in the appeal papers to indicate the claimant's race. In his appeal submission and during the appeal hearing the claimant did not in any way indicate that his was black or that his race had anything to do with his dismissal. Therefore, we find that the claimant has failed to discharge the initial burden of proof (see paragraph 102).

182. In any event, we make the positive finding that Mr Hodgkiss' decision to dismiss the claimant and Mr Kelly's decision not to uphold his appeal was in no way whatsoever related to the claimant's race, and they would have done the same in relation to a person not sharing the claimant's race.

183. It follows that the claimant's claim for unfair dismissal fails and is dismissed. It also follows, that the claimant's claims for direct race discrimination and harassment with respect to allegations 3(n) and 3(m) fail and are dismissed.

184. Having considered each allegation of direct race discrimination, harassment and victimisation we shall step back and look at the entire picture to consider whether taking the matter as a whole there was race discriminatory or harassment or victimisation. We have no hesitation in saying that the claimant's race played no part whatsoever in the way the respondent treated him.

185. Therefore, the claimant's claims for direct race discrimination, harassment and victimisation fail and are dismissed.

Observations

186. At the end of giving the oral judgment, the Tribunal observed that it is undoability extremely distressing and upsetting to be discriminated against because of one's

race. However, it is equally extremely distressing and upsetting to be unjustly and frivolously accused of being a racist.

187. During the course of the hearing, the claimant made a whole string of unsubstantiated allegations of racism against managers, HR and the CEO of his for former employer. He went as far as to suggest that the respondent was deliberately creating its absence management policy with racially discriminatory intent (though he later withdrew that allegation). He accused the respondent's CEO, who never met him before, of viewing his HR profile and acting in a discriminatory way after seeing his photo and thus discovering that he was black.

188. He presented no credible evidence to substantiate any of his allegations. In his closing submissions he acknowledged that the only basis for making allegations of race discrimination was him not being able to "*work it out*" why "*these things happened to [him]*".

189. There are perfectly reasonable and clear explanations as to why these things happened to the claimant, which have nothing to do with his race. He chose to ignore them, instead accusing people involved in his matter of being racists. The claimant should reflect on that and consider the impact of his hurtful and wholly unjustified allegations of racism on other people.

Employment Judge P Klimov
11 April 2022

Sent to the parties on:

11/04/2022

.....

For the Tribunals Office

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant (s) and respondent(s) in a case.

Annex A

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL CASE NO. 2203161/2020
BETWEEN:

Mr NICHOLAS GEORGE
Claimant
-V-
OPENREACH LIMITED
Respondent

LIST OF ISSUES

Jurisdiction and Time Limits

1) Were all of the Claimant's complaints of race discrimination, race related harassment and victimisation presented within the normal 3 month time limit in section 123(1)(a) of the Equality Act 2010 ("**EqA**"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?
2) If not, were the complaints presented within such other period as the tribunal thinks just and equitable pursuant to section 123(1)(b) of the Equality Act 2020?

Direct Race Discrimination (section 13. EqA 2010)

3) Has the respondent subjected the Claimant to the following treatment:

a. Gerry Sweitochwski investigating him regarding an allegation made against him on 24 August 2018;
b. Adam Hodgkiss (Senior Operations Manager) issuing him with a final written warning on 12 November 2018;
c. Kevin Miller (Regional Performance Manager) failing to uphold his appeal against the disciplinary warning on 10 January 2019;
d. Ian Young's failure to uphold the Claimant's grievance dated 7 May 2019;
e. HR's failure (Heather Palmer) to appoint a different manager to hear the Claimant's appeal against Ian Young's decision when the Claimant complained that Kevin Miller was not independent;
f. Kevin Miller's failure to uphold the Claimant's appeal against Ian Young's decision regarding his grievance (13 August 2019);
g. Anthony Medley's review of the Claimant's attendance on 17 September 2019
h. Anthony Medley contacting the Claimant an excessive number of times during his sickness absence;

i. The respondent failing to transfer the Claimant to a different area, as per his request made to occupational health on 24 September 2019;
j. The respondent contacting the Claimant numerous times during his sickness absence, including a letter dated 15 October 2019;
k. Clive Selly (CEO) for failing to intervene in the Claimant's case when the Claimant contacted him by email dated 21 October 2019;
l. Adam Hodgkin's review of the Claimant's attendance on 11 November 2019 by telephone and his refusal to transfer the Claimant to Central London;
m. Adam Hodgkin's decision to dismiss the Claimant; and
n. David Kelly (director) failing to uphold the Claimant's appeal against dismissal following the appeal hearing on 16 April 2020;

4) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators Peter Humphreys and/or hypothetical comparators.

5) If so, was this because of the Claimant's race?

Harassment related to Race (s26. EqA)

6) Did the respondent engage in conduct as set out in paragraphs 3)a to 3)n above?

7) If so, was that conduct unwanted?

8) If so, did it relate to the protected characteristic of race?

9) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation (s27. EqA)

10) Did the claimant do a protected act? The claimant relies upon the following:

a. A grievance dated 24 August 2015 in which he alleged that Gerry Sweitochwski was treating him badly because of his race;

b. A grievance dated 25 August 2015 in which he alleged that Gerry Sweitochwski was treating him badly because of his race; and

c. A grievance dated 7 May 2019 in which he alleged that Gerry Sweitochwski was treating him badly because of his race.

11) Did the respondent subject the claimant to the detriments in paragraphs 3)a to 3)n above?
12) If so, was this because the claimant did a protected act?

Unfair Dismissal (s 98 Employment Rights Act 1996)

13) What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).

14) If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

a. The respondent genuinely believed the claimant was no longer capable of performing their duties;

b. The respondent adequately consulted the claimant;

c. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

d. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant; and

e. Dismissal was within the range of reasonable responses.

Remedy

15) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation will decide how much should be awarded.