EMPLOYMENT TRIBUNALS

Claimant: Mr A Tejan-Kella

Respondent: Amazon UK Services Limited

Heard at: East London Hearing Centre

On: 2, 3, 4, 5 & 9 August 2022

Before: Employment Judge Crosfill
Members: Ms G Mclaughlin
Mr L O'Callaghan

Representation:
For the Claimant: In person
For the Respondent: Mr Michael Salter of Counsel

JUDGMENT

1. The Claimant's claims under the Equality Act 2010 fail and are dismissed

REASONS

1. We completed this case on 9 August 2022 and gave an oral judgment and reasons. The Claimant requested full written reasons for our decision on liability. These are our reasons.

2. The Respondent is an online retailer. The Claimant started working for the Respondent on 11 October 2017 at a fulfilment centre located in Tilbury. He was promoted to the position of an Area Manager from 5 August 2018. In that position he reported to John McEwen who was the Operations Manager.

3. It is the Claimant's case that once he was promoted John McEwen with the assistance of others endeavoured to drive him out of the business. He suggests that John McEwen made several discriminatory remarks and made false allegations against him.

4. Following an incident on 22 November 2018, where it was alleged that the Claimant and an employee he managed had an altercation, the Claimant was suspended. After an investigation there were disciplinary proceedings the eventual outcome of which was that the Claimant was given a final written warning and was demoted to the position of a Fulfilment Associate.

5. The Claimant approached ACAS for the purposes of early conciliation on 8 December 2018 and was issued an early conciliation certificate on 11 December 2018. On 10 January 2019 the Claimant presented his claim to the Employment Tribunal. The claims that he has made arise from seven separate factual events which the Claimant claims amounted to unlawful direct discrimination because of race contrary to section 13 of the Equality Act 2010 or unlawful harassment related to race contrary to section 26 of the same act.

Procedural History

6. The Claimant had indicated on his ET1 that he intended to bring a claim of unfair dismissal. By letter dated 6 February 2019 the Claimant was asked by the tribunal to confirm whether or not he had been dismissed. The Claimant responded in a long letter dated 8 February 2019 accept he had not been 'officially' dismissed.

7. On 29 April 2019 a preliminary hearing took place before Employment Judge Warren. The purpose of the hearing was to identify the issues and to make case management orders. The issue of whether the Claimant was claiming unfair dismissal was revisited and Employment Judge Warren recorded the Claimant as stating that he wished to advance a claim unfair dismissal relying upon a constructive dismissal. The Claimant said he had written a letter to the Respondent before he filed his claim form indicating the no longer wish to work for the Respondent. Given that the Claimant did not have two years of continuous service Employment Judge Warren indicated that the issue was academic. The Respondents position was that the Claimant had not resigned or been dismissed prior to the presentation of his claim form. It accepted that the Claimant had subsequently been dismissed and said that this was because the Claimant had no right to work in the United Kingdom at that time (or perhaps could not evidence a right to do so).

8. The Claimant's ET1 had referred only to matters which followed his suspension on 22 November 2018. At the preliminary hearing the Claimant applied to amend his ET1 to include five further allegations which gave rise to claims of direct race discrimination and harassment related to race. Employment Judge Warren gave the Claimant permission to amend his claim. In the case management order Employment Judge Warren set out the issues. In all there were eight factual issues to be determined each giving rise to claims of direct discrimination and harassment.

9. The Respondent made applications for deposit orders and the matter was listed for a further Open Preliminary hearing to take place on 26 January 2019. At that hearing Employment Judge O'Brien dismissed the Respondent's application for deposit orders and made further case management orders. Employment Judge O'Brien recorded that the Claimant clarified two of the issues 21.7 and 21.8. Employment Judge O'Brien recorded that the parties had been corresponding in relation to disclosure he recorded that the Claimant indicated that he had now received the CCTV footage requested.

10. The matter was listed for a final hearing to take place over four days between the third and sixth of March 2020.

11. The Claimant had disclosed an audio recording of the meeting that had taken place on 9 January 2019. The later part of that recording captured the Claimant apparently resigning from his employment. The Respondent commissioned an expert's report

which concluded that audio recording comprised two separate recordings which had been spliced together. The Respondent made an application to the employment tribunal for the Claimant's claim to be struck out on the basis that the proceedings had been conducted unreasonably.

12. A hearing of the Respondent's application took place before Employment Judge Burgher 21 January 2020. At that stage the Claimant had made an application to strike out the Respondent's response on the basis that the Respondent had failed to disclose CCTV evidence and had failed to comply with the order for the exchange of witness statements. Having heard the expert witness for the Respondent and from the Claimant Employment Judge Burgher concluded that the Claimant had manipulated the recordings to make it appear that the was a single meeting at the conclusion of which the Claimant had resigned. He concluded that the Claimant had been vexatious in the sense of being an abuse of process in Tribunal Proceedings. Having determined that, Employment Judge Burgher decided that the proportionate response was to strike out issue 21.8 from the list of issues which arose at least in part from the events of 9 January 2019. The Claimant and the Respondent appealed against that order both appeals were unsuccessful.

13. Employment Judge Burgher noted that the fact that a person was found the incredible respect of one aspect of their claim did not automatically mean that all other allegations are unfounded said at paragraph 33 of his judgment:

    'It is obvious that my findings on the Claimant's credibility in this regard may influence the subsequent Tribunal to conclude that the Claimant's credibility is significantly undermined but that will only be a conclusion open to that Tribunal after hearing and considering all the relevant evidence. I have not undertaken that exercise.'

14. The Claimant's application to strike out the response was also considered and rejected. Employment Judge Burgher notes that the Claimant had received CCTV evidence from the Respondent but maintained it was 'fabricated' in that it did not show the correct event. Employment Judge Burgher directed him to challenge that during the full hearing

15. The Claimant had retained a toxicology report of a former employee of the Respondent showing that employee tested positive for drug use. The Claimant had been the person who dismissed that employee. The Respondent applied for and obtained an injunction against the Claimant on 21 January 2020 in the High Court of Justice. The Claimant was ordered to pay the Respondent's costs of approximately £15,000. The Claimant made an application on 27 January 2022 to set aside and/or discharge that order. On 6 February 2020 Mrs Justice Steyn dismissed the Claimant's application and ordered him to pay a further sum of around £14,000 of costs. The Claimant sought to appeal that order to the Court of Appeal but was refused permission by Lord Justice Males. The Claimant then made an application to set aside or vary the costs order on the basis he could not afford to pay. The Respondent took steps to enforce those costs orders including seeking an oral examination. The hearing of the oral examination took place before Master Hill QC on 13 May 2021. The Respondent had been asked to provide areas of questioning in advance. Those areas of questioning included asking whether the Claimant had obtained any employment after the date of a statement that he had made in the proceedings.

16. The Claimant attended the oral examination and gave evidence. He did not volunteer that he had obtained employment shortly before that hearing. A further order for costs was made at the conclusion of the hearing by Deputy Master Hill QC. The Respondent applied to commit the Claimant for contempt and sought a postponement of the final hearing to facilitate that application being dealt with in advance of the final hearing. Whilst the Respondent was able to satisfy the High Court that they had an arguable case of contempt ultimately the Respondent applied for permission to withdraw their application.

17. The Claimant has made extensive references to the High Court proceedings in his witness statement. It is clear that he regards the Respondent's actions in pursuing its costs to be an extension of any discriminatory treatment. We have had regard to the High Court Judgments. It is clear that the Claimant has been held to have acted unlawfully, he has failed to overturn that finding and the judges of the High Court saw no reason to depart from the usual order that the Claimant pays the respondent's costs.

18. Insofar as the Claimant has suggested in these proceedings that the conduct of the Respondent in the High Court is something which should support an inference of discrimination we reject that. The Claimant retained a document unlawfully, refused to return it and then tried to set aside an order that he return it. We find nothing that would support an inference of discrimination by the Respondent.

19. At the hearing before us the parties agreed that the issues had been accurately encapsulated by Employment Judge Warren in his original case management order. The only change to that was that issue 21.8 had been struck out by Employment Judge Burgher in so far as it related to events on 9 January 2019.

20. All parties attended on the first day of the hearing. Counsel for the Respondent Mr Salter was unwell and had notified the Tribunal in advance that his hearing had been seriously affected. He asked to attend remotely via CVP using earphones in order to assist his hearing. The Tribunal agreed to that course of action.

21. Prior to the hearing there had been some correspondence as to whether Mr McEwan would be able to give evidence from the USA. Whilst the formalities had been dealt with by the tribunal the outcome had not been communicated to the parties. The USA would have had no objection but in the event Mr McEwan attended on the first day of the hearing but was flying to the USA the following morning at 5 AM. We therefore heard Mr McEwan's evidence first. We further adjusted the order of the witnesses in order to accommodate their practical needs.

22. In the course of the hearing both parties sought to introduce additional documents. Where there were disputes we resolved them and gave reasons at the time. We had regard to all of the documents that were produced. We do not understand either party to be asking for reasons for our decisions to admit documents.

23. We heard the following witnesses on behalf of the Claimant:

    23.1. the Claimant himself;

    23.2. Erica Brock, a former colleague of the Claimant who gave evidence pursuant to a witness order sent to her on the third day of the hearing. She gave

evidence via CVP and although there were a few difficulties with the quality of her audio connection she was able to give her evidence without difficulty. We are grateful to her for attending having completed a nightshift only a few hours before she gave evidence.

23.3. Dennis Lamptey, another former colleague of the Claimant, who also gave evidence via CVP because he had a family emergency need to deal with.

24. We heard the following witnesses on behalf the Respondent:

24.1. John McEwan, formerly the Operations Manager to whom the Claimant initially reported; and

24.2. Michael Magdongon, also an Operations Manager to whom the Claimant reported for a period shortly before his suspension; and

24.3. Daniel Carpenter, an area manager at the same grade as the Claimant who had been present during the latter part of the events on 22 November 2018; and

24.4. Ukwu Kalu Ukwu, more generally known as Joshua Ukwu, who was the Outbound Operations Manager at Tilbury Fulfilment Centre and the person that decision to give the Claimant a final written warning and to demote him.

25. After we heard the oral evidence the parties made their submissions. Mr Salter had prepared written submissions which he relied on expanding only briefly in oral submissions. We gave the Claimant time to read the written submissions before he addressed us. The Claimant then made oral submissions on the facts giving rise to the claim. We thank both of them for their assistance. We shall not set out a summary of the submissions but shall refer to the arguments in our discussions and conclusions below.

<u>Findings of Fact</u>

26. Before setting out our findings of fact we remind ourselves of the proper approach to fact finding.

<u>The burden and standard of proof</u>

General

27. The following propositions are set out in shorthand, as the longer quotations from the various judgments are so very well-known:

27.1. The burden of proof falls on the party seeking to establish the truth of any particular fact. It is not for the party opposing a finding to disprove a case; no burden rests on them: see <u>*Re M (Fact-Finding Hearing: Burden of Proof)*</u> [2012] EWCA Civ 1580, [2013] 2 FLR 874.

27.2. The standard of proof is the balance of probabilities: see Lord Hoffman in <u>*Re B*</u> [2008] UKHL 35, [2009] 1 AC 11, [2008] 2 FLR 141.

28. As to the fallibility of human memory, Lord Bingham, with characteristic wisdom, quoted with approval in one of his essays in *“The Business of Judging”, “The Judge as Juror: The Judicial Interpretation of Factual Issues”*, Lord Justice Browne’s apt observation:

> *‘The human capacity for honestly believing something which bears no relation to what actually happened is unlimited.’*

29. Potent and highly relevant is the description which Leggatt J set out in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor*** **[2013] EWHC 3560 (Comm) (15 November 2013)**, paras 15-21, in relation to testimony based on memory:

> *‘An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.*
>
> *While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*
>
> *Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. […]*
>
> *Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*
>
> *The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party’s lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*
>
> *Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. […]’*

30. Where a fact finder is invited to rely upon a lie as providing corroboration of guilt it is necessary to have regard to the full guidance set out in ***R v Lucas*** **[1981] QB 720**. However, where it is not suggested that a lie corroborates guilt the full direction is unnecessary. Whether the lie damages the creditworthiness of the witness is a matter of evaluation taking into account the nature of the lie, any explanation for the lie and taking notice of the guidance that the fact that a witness has lied about one thing does not mean their entire case should be disbelieved.

The burden and standard of proof under the Equality Act 2010

31. The burden of proof in respect of all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

32. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … 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.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

33. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

34. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377,** CA**.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

35. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of***

Oxford and Qureshi v Victoria University of Manchester and Another **(Note) [2001] ICR 863, EAT**.

36. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

“the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"”

37. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim.

Our findings of fact

38. The Claimant is well educated and told us that he had two master’s degrees. He was born in Sierra Leone and identifies as a black African. He started work for the Respondent in Tilbury as an hourly paid ‘Fulfilment Centre Associate’. The Claimant applied for a number of managerial roles. At the time one of his managers was Joshua Ukwu. Joshua Ukwu offered the Claimant assistance with his applications. The Claimant was successful and was appointed as an Area Manager.

39. The role of an Area Manager involved supervising anything up to 300 Fulfilment Centre Associates. As we understand it, the Claimant’s department had the job of restocking virtual shelves. A robot would bring incoming goods which would be loaded on a trolley (one type of trolley was referred to as a U-boat) which would then be manually delivered to a Fulfilment Centre Associate for what is referred to as ‘stowing’. As we understand it that involves scanning a physical product and then placing it back on a physical shelf. The effect of scanning the product was to place the product on sale on the Amazon website. By those means, the Amazon website’s virtual shelves were kept fully stocked.

40. Each Fulfilment Centre Associate was given a target to stow of in the region of 240 items per hour. It is easier and quicker to stow small items than larger items. The Fulfilment Centre associates were not meant to cherry pick the easier work over the more difficult larger items. This could on occasion cause friction between employees.

41. Like most employers the Respondent has a grievance policy. Within the bundle of documents we were supplied with there were emails showing that in early June 2018 the Claimant had raised some concerns by way of a formal grievance. It is apparent from the documents that the Claimant was complaining about harassment and bullying. In his witness statement the Claimant says at paragraph 27 that the

grievance concerned a manager Dawid who he says racially abused him saying that he was mentally retarded, that he thinks black on black people don't think straight. He says that Dawid was a level 3 manager at the time. It follows that the Claimant was aware of, and had used, the formal grievance process. Assuming the Claimant's account in his witness statement is correct it shows that he was prepared to invoke the grievance process raising allegations of discrimination against a manager.

42. Once appointed as an Area Manager the Claimant was sent on a training course. The Claimant claimed in his oral evidence that the level of training descended to policies about how people would be dismissed if they were not deemed to be performing. He suggested that he was trained to dismiss people at the behest of other managers or HR. Joshua Ukwu told us that the amount of training received by newly appointed Area Manager would vary depending on their level of education and skills. He accepted that the training course would usually cover some generic HR topics but did not accept the thrust of the Claimant's case that people were trained to dismiss at the behest of HR and others. Something the Claimant described as just being 'role-play'. The other witnesses called by the Respondent also denied that this was the case. The Claimant gave evidence that he had dismissed somebody upon the instructions of others. He did not give us any specifics. The Respondent has a disciplinary policy involving an investigation stage and a disciplinary stage with a right of appeal which broadly follows the recommendations in the ACAS Code of practice. It is unnecessary for us to make findings any wider than the case before us. However, there was not sufficient evidence before us of any widespread practice of managers dismissing at the behest of others. It may be that the Claimant has failed to distinguish between a recommendation in an investigation report and an instruction to dismiss.

43. In his amended claim the Claimant says that, at some point shortly after his promotion, John McEwen said to him 'a black manager will not survive'. The Claimant included this allegation in his witness statement and suggest that it was the very first thing that John McEwen had said to him. He gives no other context to the conversation. John McEwen dealt with this allegation in his witness statement. He puts the date of the Claimants promotion slightly later. He says that he had a great relationship with the Claimant. He recounts that the Claimant inspired his team by talking about his promotion. He says that he was able to talk to the Claimant about his background and family life and often travelled on the train with him stop and says that he was added as a Facebook friend something which the Claimant accepted. He categorically denied using the phrase attributed to him by the Claimant. He says in his witness statement that the Respondent is ethnically diverse at all levels. Joshua Ukwu held a more senior managerial position than the Claimant and is also of black African heritage. The Claimant in his witness statement says that 3 out of 30 managers were black and that there were 2 black operations managers.

44. We shall set out our conclusions as to whether John McEwen used the language attributed to him in our discussions and conclusions below.

45. The next allegation that the Claimant makes against John McEwen is that he says that John McEwen made a false allegation that the Claimant was pushing or carrying two U-boats in breach of health and safety rules. John McEwen stated that he had no recollection of ever making an allegation that the Claimant had pushed or carried two U-boats but accepted that it was a possibility as he would often remind people not to do so. The Claimant gives an account of events between paragraph 68 and 69 of his witness statement. He says that he reprimanded an Associate for pushing two

U-boats same time and reported the matter to John McEwen. He says that later on John McEwen told him that he needed to clarify what had happened. On the Claimant's account it appears that John McEwen says he had spoken to another employee who had suggested the Claimant had been pushing the two U-boats. The Claimant says that John McEwen then asked another employee, Adam Chapman to clarify and then accepted the explanation that the Claimant had done nothing wrong. No formal action was taken against the Claimant and it does not appear the matter was progress any further. The Claimant appears to suggest that John McEwen accepted his explanation and apologised for any misunderstanding.

46. We shall set out our conclusions as to whether the Claimant has established that a false allegation was made in our discussions and conclusions below.

47. The Claimant says that in November 2018 John McEwen said to him *"black people don't stay focus on their job, they go looking the girls"*. In his witness statement the Claimant briefly mentions this at paragraph 72. In his witness statement gives little context save that he suggests that this immediately preceded an allegation that he had sexually harassed Erica Brock. In an earlier case management order, when he applied to amend, he said it referred to a black colleague who had been dating an employee. John McEwen denied using any such language.

48. The Claimant alleges that John McEwen and Daniel Carpenter made false allegations against him suggesting that he had sexually harassed an employee Erica Brock.

49. Erica Brock had provided a witness statement. She had indicated that she was unwilling to give evidence unless she had reassurances from the Respondent that there would be no adverse impact on her job. When that was raised at the outset of the hearing Mr Salter indicated that his client had no objection whatsoever to Erica Brock giving evidence. The tribunal asked the Claimant to pass on that message but he indicated that Erica Brock was still unwilling to attend. He asked the tribunal to grant a witness order which we did. Erica Brock then attended by CVP.

50. In her witness statement Erica Brock stated that she had told Daniel Carpenter that she had been subjected to sexual harassment by a fellow employee. She says that that employee had pestered her to go on a date and said that he wanted a relationship with their which she had refused. He said that employee had then become furious and started harassing her in particular giving her bigger items to stow leaving her performance to drop off. She said that she reported that to Daniel Carpenter on 7 November 2018. Mr Salter did not challenge that account. He asked whether or not Erica Brock could comment upon what John McEwen had said to the Claimant and she acknowledged that she was unable to comment.

51. In his evidence Daniel Carpenter said he had no recollection of Erica Brock ever speaking to him about sexual harassment. He thought it unlikely that she would have done so because he would have expected that to have been taken seriously. What Daniel Carpenter does remember is that an employee, who he is unable to name, suggested that the Claimant was in a relationship with Erica Brock. He says that he went and told John McEwen about this because he did not know whether there was any policy about employees having relationships with managers. In his witness statement John McEwen names the individual who Erica Brock says was harassing

her as being the person who told Daniel Carpenter that the Claimant was having a relationship with Erica Brock.

52. John McEwen told us that when Daniel Carpenter told him that there had been a report of the Claimant dating Erica Brock he took steps to ascertain what the Respondent's policy was and found out that there was no prohibition on such relationships provided they did not give rise to a conflict of interest such as direct line management. He says he then spoke to the Claimant and asked if he was having a relationship with any employee and that the Claimant was the person who appeared to know who was involved. John McEwen says that the Claimant was very offended by the suggestion he was having a relationship with Erica Brock. He says that the Claimant said that he had previously dated Miss Sierra Leone and had no interest in Erica Brock. He says that the Claimant was so offended that he raised his voice.

53. The Claimant's account of the meeting is that it was put to him that he was the person that Erica Brock was complaining about. The suggestion was made that he had asked her out on dates and then had harassed her.

54. The Claimant was not challenged on his account that he had subsequently gone and spoken to Erica Brock. Erica Brock was not challenged on this part of her evidence either.

55. We revisit this conflict of evidence in our discussions and conclusions below.

56. It appears that there were at least two methods of managers communicating between themselves using text messages. One was Skype for business and the other was a system referred to as Chime. The Respondent says it was unable to retrieve the Skype for business text messages. The Claimant is recorded in a case management order as accepting the Respondents explanation for being unable to disclose those messages. Subsequently he has revisited that and suggests that Respondent has suppressed them.

57. We have Chime messages from 31 October 2018 to 22 November 2018. The early messages are between the Claimant and John McEwen with the very later ones between the Claimant and Michael Magdongon.

58. In his witness statement John McEwen refers to an incident that took place on 14 November 2018. He says that the Claimant had approached him within earshot of a step up manager saying that he wished to complain about that manager. The Chime conversation starts with John McEwen apologising to the Claimant for an overreaction but going on to say that the Claimant actions were not the way to handle the situation. He suggests that Claimant needs to be more careful with his emotions and should not let his frustration or anger show. The Claimant sent text messages saying that he was not angry but just made a complaint. John McEwen sent text messages saying that it was inappropriate to raise a complaint within earshot of the manager who was just 8 feet away. The Claimant is then recorded as saying *'I said I wanted to explain to you' 'because you treat us equally and support us' 'and I feel comfortable because you help us when something happened'*. John McEwen then just says not to worry but suggests that Claimant talk to him off the floor when such things happened.

59. Chime messages the following day show that Claimant's line manager is changing to Michael Magdongon. The Claimant sent a message saying that he will miss John

McEwen because he has a positive vibe and gives him hope. When thanked by John McEwen, the Claimant sent a message saying *'you are a good man John you are a teacher'*.

60. The chime messages then show that on the following day 16 November 2018 the Claimant had a one-to-one meeting with Michael Magdongon. He confides in John McEwen the opens by saying *'hey John as I said earlier on I feel comfortable in discussing with you because you're very open with us'*. When John McEwen asked whether everything is okay the Claimant went on to say that in the one-to-one meeting Michael Magdongon had raised the issue of him speaking harshly to another employee. In the trial bundle there was a statement from an individual called David Preece. That statement suggests that David Preece witnessed an exchange between the Claimant and another employee where David Preece says the Claimant spoke to the other employee in a confrontational manner with a raised voice. It appears that this was the matter that was raised in the one-to-one meeting. Having confided in John McEwen the Claimant sends a message saying *'you have done a lot for me and I will not want to bother you any more. From now on I will take my responsibility and act right'*. He went on to say *'I believed to explain things to you right away because I know that you handle them right away. You always make things good'*.

61. What we take from the Chime messages is that where there were instances where the Claimant had disagreements with his colleagues he approached John McEwen for reassurance and support. We find that he regarded him as a mentor who he could trust.

<u>The events of 22 November 2018</u>

62. Between approximately 2.30 and 3.00am on 22 November 2022 the Claimant went to speak to a Grade 1 Fulfilment Associate called Kevin Kondon. The context concerned the issue of whether Kevin Kondon was cherry picking goods to stow rather than accepting goods on a first come first serve basis as required. It is sufficient to say that the Claimant's intervention lead to a disagreement. A Fulfilment Associate called Michael Bracci went and spoke to the Daniel Carpenter and informed him that the claimant was involved in an altercation.

63. Daniel Carpenter tells us, and we accept that he then approached the station where the Claimant was and observed a heated argument. He says he attempted to deescalate the argument by asking the Claimant more than once to leave the station. Once the Claimant left, Daniel Carpenter took Kevin Kondon to an office. Daniel Carpenter said and we accept that Kevin Kondon was tearful.

64. The Clamant had emphasised that at times, Daniel Carpenter accounts of the event immediately following the incident as being inconsistent. He is right about that but such inconsistencies as there were related to the order of the events, not the event themselves. We are not surprised that Daniel Carpenter could not always remember what happened in what order. What was agreed was that Daniel Carpenter told John McEwen about the incident and that he took four statements from people who may have observed the events.

65. The Claimant stressed that these four statements were forged or put a different way, where the product of John McEwen, Daniel Carpenter or others telling the witnesses what to say. In the case of one witness, Kwaku Kyere Boadi, Daniel Carpenter

accepts that he wrote the statement. The statement was clearly marked to show that he had done so. He explained that by saying that Kwaku Kyere Boadi did not have sufficient written English to write a statement for himself. Daniel Carpenter says that the other witnesses Michael Bracci, Edita Braciskiene and Kevin Kondon wrote their own statements.

66. Having regard to those statement, we find that there is insufficient evidence to support the suggestion that witnesses were coerced in writing those statement. We note that one witness, Edita Braciskiene is entirely supportive of the Claimant. All of the other witness statements, surprisingly including that of Kevin Kondon himself, include evidence adverse to or critical to Kevin Kondon.

67. We note also the witnesses have each signed their statement and their handwriting is remarkably different between them. Shortly before 4.00am on the morning of 22 November 2018, Michael Magdongon made a request for CCTV from the Respondent lost prevention team. His description of events in that request relates principally to suggest that the Claimant has physically accosted Kevin Kondon. The ticket which records the request and the follow up actions were only disclosed during the proceedings. Given that it had been a complaint of the Claimant's that CCTV evidence has been supressed, we are surprised that it had not been disclosed earlier but find that it is an authentic document.

68. At around 4.00am, the Claimant was asked by Michal Magdongon to attend the office. When he attended, he met John McEwen and two members of the HR team. Notes were taken of that meeting which we accept are broadly accurate. We reach that conclusion because there are a number of points where the Claimant is recorded as putting up a robust defence to the suggestions he had acted improperly. The Claimant was asked on a number of occasions whether there had been any physical contact between him and Kevin Kondon. He accepted that there had been a point where Kevin Kondon had held on to his laptop and that he had physically retrieved it. He denied fighting but he admitted, or is recorded as having admitted, that in the answer to a question '*did you grab or push in any way?'* he is recorded he was admitting *'yes I pushed my laptop, this is the only contact'.* On 26 November 2018 the Claimant was sent a copy of the notes taken at the meeting on 22 November 2018. He was asked to indicate any disagreements. He responded saying *'the only thing that is missing from the statement is that John Said I assaulted and abuse[d] Kevin at his station P4. Because when I said I assaulted an associate I asked him [to] name the associate and explain the allegations against me which he did'.* The Claimant did not seek to correct the matters we have quoted above.

69. During the meeting on 22 November 2018 Claimant was told that the Respondent had obtained statements from individuals who had witnessed the incident. He was also asked whether there was anybody he wished the investigator to speak to. He did name one employee who was later interviewed.

70. Later in the morning of the 22 November 2018, the Claimant sent an email addressed to various senior management at the Respondent, within that email, he makes the following criticisms of John McEwen. He says that: it is with disappointment that I am writing you this letter because John McEwen has victimised and marginalised me based on his actions, for the past three (3) months he has made my life hell in amazon. I have been supressing myself for the past months thinking he would change. Because reporting my Senior Ops to HR is not a good option'. He refers to

John McEwan threating him like a *'SLAVE'*. He ends the email with a suggestion that he intends take John McEwen to court. John McEwen told us that as a consequence of that email being sent, he took no further part in the investigation. We accept his explanation. The documents showed the matter continued to be investigated by Michael Magdongon.

71. Michael Magdongon carried out further formal interviews on the evening of the 22 November 2018, running into the early hours of the morning on the 23. He interviewed the following individuals, he interviewed Michael Bracci, Kevin Kondon, Daniel Carpenter, Edyta Braciskiene, Wilson Rocha, Ionel Gais, Jacek Kowlczuk and then finally a further formal interview with Kwaku Kyere Boadi was conducted by another manager. Having obtained statements from those individuals, Michael Magdongon made a further request for CCTV evidence asking for footage of the station surrounding the station that was first identified. When the loss prevention team reviewed that footage, they indicated that it did not show any relevant matter.

72. It was a contentious matter before us, whether Kevin Kondon was also suspended. The Claimant said that he had not been, he had only been suspended two weeks later when the Claimant intimated the claim. The Respondent had given no disclosure on this point. The Claimant did not allege that Kevin Kondon was a proper comparator in his claim that the suspension was discriminatory. Kevin Kondon is a black-African male. The Claimant referred to the failure to suspend Kevin Kondon to support his allegation, that the allegation against him were fabricated and were indeed baseless.

73. The Respondent subsequently disclosed a suspension letter dated 23 November 2018 and swipe card records showing entries and exits made by Kevin Kondon in the relevant period. When Michael Magdongon gave evidence, his initial evidence was that he had no recollection of suspending Kevin Kondon and that he believed that it had been done by somebody else. The suspension letter however bore his name and he was recalled to give evidence to explain that. When he was recalled, Michael Magdongon acknowledge that it was likely that he had suspended Kevin Kondon. The Claimant says that we should find this evidence incredible. We have concluded that the documents that we have seen are authentic documents in the sense that they were often produced for their intended purposes at the time. We have concluded that Kevin Kondon was in fact suspended but on the 23 November 2018. It is correct that Michael Magdongon did not acknowledge this in his initial oral evidence and only did so when he saw the documents, we find that is not entirely unusual. Had the documents been disclosed which they ought to have been then he would be able to refresh his memory. As it was, he was being asked to recall events that took place nearly 4 years ago without the assistance of contemporaneous records.

74. The Claimant was invited to a formal investigatory meeting to take place on 29 November 2018, chaired by Michael Magdongon. The evidence that had been gathered at that stage was discussed with the Claimant. In the course of the meeting, the Claimant was told that there was no CCTV that showed the events. It is clear from the minutes that he did not accept that that was the case. He pressed for CCTV footage claiming that it would demonstrate his innocence. He was asked whether he wanted any further persons to be interviewed and he asked that Michael Magdongon speak to Jimoh Mohammed Sanni. He was interviewed later in the same day. He did not recall any altercation.

75. Having conducted that meeting with the Claimant, Michael Magdongon prepared two investigation reports, one dealing with the Claimant and the other dealing with Kevin Kondon who was also being investigated. Having read those reports, we find that they contain a very fair summary of the evidence, in particular we were impressed by the fact the Michael Magdongon stressed that any individual taking a decision about 'guilt or innocence', would have to have regard to the language used in the witness statements themselves. It is acknowledged fairly in our view that there is evidence which exonerated the Claimant as well as evidence that tended to suggest that he behaved badly. At the end of the report in respect to both employees, there was a list of an attachment which included a link to CCTV evidence. We learnt in the course of the hearing that whilst the link was functional, it could only be accessed by authorised personnel. Ultimately, Joshua Ukwu was authorised to view the CCTV shortly before the disciplinary hearing that was due to take place on the 6 November 2018. This was recorded on the ticket.

76. On 1 December 2018 the Claimant sent an e-mail to members of the Respondent's HR team. In that e-mail the Claimant complained that whilst he had been promised copies of the statements and the interviews compiled and referred to by Michael Magdongon during the meeting of 29 November 2018 he had not received them.

77. The disciplinary allegations which Michael Magdongon concluded merited the Claimant being required to attend a disciplinary hearing were set out in his report. They were then included in a letter of 5 December 2018 inviting the Claimant to a disciplinary hearing to take place the following day. That letter was sent to the Claimant by e-mail to his private e-mail address. The allegations were (a) that he had demonstrated unprofessional behaviour towards colleagues, (b) that he had used violence, intimidation or abusive behaviour or language towards any person (c) he had engaged in harassment or bullying, (d) that he had made offensive or intimidating comments, (e) that he had failed to carry out the lawful reasonable or safe instructions of a supervisor, and (f) that he had engaged in unwanted physical contact.

78. In the invitation letter, it was indicated that another manager, David Breen would conduct the hearing. Between the 5 and 6 December, a decision was taken to change the hearing manager. The Claimant has said that the reason for this was to provide a veneer of respectability for decision that had already been taken. Joshua Ukwu is of Black Nigerian heritage. Joshua Ukwu said that it was common to swap managers in these circumstances for reasons such as prior involvement with the employee or other business commitments. He says it was David Breen who asked to swap citing the fact that he previously worked with the Claimant. The Claimant further suggested that it was a conscious decision to use a Black African manager to chair his disciplinary in order to disguise the fact that the decision to dismiss him was to be taken because of race. disguising racist intent depends on whether the Tribunal could draw an inference of that effect. He has no direct evidence to support what would have had to be a widespread agenda involving a number of individuals. At this stage it is sufficient to record that We accept Joshua Ukwu's evidence that the decision to change managers was prompted by David Breen who gave his reasons as being his previous work with the Claimant.

79. When the Claimant attended the meeting on the 6 December 2018, he immediately protested that he had not received the investigation report and supporting evidence, that he did so in strong terms. When enquires where made, it transpired that these documents had been sent to the Claimant's work email address which he had no

access during his suspension. The minutes of that meeting record that the decision was swiftly taken by Joshua Ukwu that the meeting would need to be postponed. The Claimant had alleged that the failure to supply him the documents was an act of discrimination or harassment. We return to that in our discussions and conclusion below. The disciplinary meeting was rearranged to take place on 9 December 2018.

80. On 6 December 2018 a member of the HR team sent the Claimant an e-mail with 14 attachments which included the investigation report and the formal interviews conducted in the course of the investigation. It does not appear that the original hand written statements taken immediately after the incident were included.

81. The Claimant wrote further e-mails to the Respondent's HR team between 6 and 9 January 2018. In his final e-mail he prepared a critique of the statements of the witnesses who had been formally interviewed. That e-mail ends with a suggestion that the witness statements taken before his suspension had 'disappeared'.

82. On the 9 December 2018, when the Claimant attended the further meeting. During the meeting he referred to his critique of the evidence of each witness. His essential point in his document was that there were a number of witnesses which made no criticisms of him. We find that the minutes of that meeting give a reasonably accurate account of what was said. Many points made by the Claimant on his own behalf appear to have been accurately recorded. We find that the Claimant had a full opportunity to present his arguments as to why no disciplinary action was merited.

83. Joshua Ukwu told us, and we accept, that he approached the evidence in a similar way. That is borne out by the structure in his decision letter. Having discussed the evidence, a decision was taken to adjourn the meeting to enable Joshua Ukwu to make a decision. That that took some time as the Respondent was exceptionally busy over the Christmas period. In the intervening period, the Claimant contacted ACAS and made some robust criticisms of the Respondent by email.

84. On the 9 January 2019, a further meeting took place, after some further discussion, Joshua Ukwu informed the Claimant that he was to receive a final written warning and was to be demoted to the role of Fulfilment Associate, which was the level one role, he previously occupied. The evidence before us was that the Respondent had two hourly paid roles, Associates at level one and a Supervisor role which was at level 3. Beyond that were a salaried managerial roles. Demotion for the Claimant from a level 4 role to a level 1 role would have a significant financial impact upon him.

85. Joshua Ukwu confirmed his decision in a letter prepared on 14 January 2019 (but misdated as 2018). In that letter Joshua Ukwu found that the Claimant had engaged in unprofessional behaviour, that he had made intimidating comments amounting to harassment or bullying and that he had made unwanted physical contact with Kevin Kondon. In respect of that last allegation Joshua Ukwu relied upon the Claimant's own initial account that in order to retrieve his laptop he may have pushed Kevin Kondon with his body. He dismissed the allegation that the Claimant had failed to follow an instruction from a supervisor. This related to the Claimant failing to heed Daniel Carpenter's request that he move away from the confrontation. Joshua Ukwu accepted that Daniel Carpenter was not the Claimant's supervisor. The letter of 14 January 2019 included a statement made by Joshua Ukwu that there was no CCTV evidence of what had occurred between the Claimant and Kevin Kondon.

86. In his decision letter Joshua Ukwu commented upon the way in which the Claimant had conducted himself during the disciplinary process. He cited that as a reason why he had lost confidence in the Claimant carrying out the role of an Area Manager. In his oral evidence he repeated that this had been a significant factor in his decision making. We have reviewed the minutes of the two disciplinary meetings. We find that those minutes support Joshua Ukwu's evidence that he considered that the Claimant had conducted himself in those meetings in an inappropriate argumentative manner.

87. Kevin Kondom was also investigated and disciplined. The Respondent disclosed the outcome letter in the course of these proceedings. That shows that Kevin Kondom attended a disciplinary hearing on 14 December 2018 that was chaired by David Breen. David Breen upheld allegations that Kevin Kondon had used abusive language towards the Claimant. He relied on the evidence of other employees but also on Kevin Condon's own admissions. He dismissed all other allegations. The sanction imposed was a final written warning. When dismissing an allegation that Kevin Kondom had 'misused' the Claimant's laptop he said:

'You explained that you had attempted to move the laptop away from the tote located in your station to the manager's desk next door, you state this was not done with a malicious intent and that your intentions was [sic] to move it and not damage it.

I find that the supporting statements <u>and video</u> match this description of events and no clear evidence was provided that your intentions were to damage the computer. This was supported by witness statements <u>and video footage</u> of the events. Having considered the evidence carefully, I have decided to dismiss this charge.'

88. The letter to Kevin Kondom, at face value, would tend to suggest that David Breen had viewed CCTV. That is in contrast to the evidence of Michael Magdongon and Joshua Ukwu and contrary to the stance taken by the Respondent and its solicitors that no CCTV exists whish showed the incident.

89. We are satisfied that the computer record produced by the Respondent during the hearing that logs the CCTV request 'the ticket' is an contemporaneous authentic document. The first entry is a request by Michael Magdongon. The timings on the ticket were in times using a US time zone. 8 hours needed to be added to get the time in GMT. The first request for CCTV was made at 3:54 am on 22 November 2018. Michael Magdongon asks for the CCTV covering Location 4211A from 02:30 to 03:00. He says *'Associate was claiming that he was pushed by a manager. The two had an altercation where words were exchanged and there was an altercation over a laptop. The AA at the station had grabbed the associate's laptop and at this point the manager grabbed the laptop. And at this point it was suggested that the manager pushed the associate at this point. The associate is suggesting that he was pushed, the manager is saying he just put his body against the associate and no assault was made'.*

90. At 10:17pm on 22 November 2018 Michael Magdongon followed up with a further request that the Loss Prevention team look at CCTV at 4 surrounding stations to see if the Claimant had engaged with any employees. On 26 November 2018 a note was added to the ticket. That said: *'CCTV has been viewed for all stations requested we are unable to capture any activity between the AM and any other associates. Based*

on the evidence that has been provided we feel that all CCTV resource has been exhausted and therefor deem it appropriate to resolve this ticket'.

91. We need to decide whether there was in fact CCTV footage that might have assisted the Claimant and as he says has been supressed or whether as the respondent says the only CCTV did not show anything material. We note that the CCTV link was included in the material sent to Joshua Ubwe. We accept his account that he viewed that footage. His authorisation is shown on the ticket on 6 December 2018 and there is a request from HR on that day to assist with playing the footage. We accept his account that that footage showed nothing of significance.

92. It is not at all clear from David Breen's letter to Kevin Kondom what CCTV footage he saw. When discussing whether there was any pushing by Kevin Kondom David Breem's letter makes no reference to any CCTV. He relies only on witness statements when dismissing this charge. If David Breen had viewed the same video footage as Joshua Ubwe as it showed nothing then it would match Kevin Kondom's account that he did not maliciously damage the laptop.

93. We are left with what we find is clear contemporaneous evidence that shows that the Loss Prevention team had concluded that the CCTV did not capture the incident. We have the evidence of Joshua Ubwe which was that the CCTV requested initially showed nothing of assistance. For the CCTV to have been supressed a range of individuals would have had to been involved. Against that we have the wording of David Breem's letter which is not as clear as it might be and certainly does not say what he saw.

94. We have had regard to all of the evidence. We are satisfied that there was no CCTV footage that showed the incident. If we are wrong about that then we are satisfied that there was no attempt to supress the footage. All of the contemporaneous documents show that there were rapid steps taken to find the relevant CCTV. This is exactly what would have been expected.

95. At the conclusion of the hearing when the Employment Judge had announced oral reasons the Claimant commented that we had not mentioned the CCTV issue. He was right. The judge was working from in part from a draft judgment and in part notes and overlooked this part. The passages above rectify that omission and reflect the decision of the full tribunal

96. We are bound by the finding of facts made by employment Judge Burgher whose held that an audio recording of the meeting on the 9 January 2019 was modified to make it appear that the Claimant had announced his resignation at the hearing when that is not in fact the case. We have reviewed the evidence in the bundle that supported that finding and had we had to decide it for ourselves would have reached the same conclusion.

97. The Claimant appealed his dismissal, but that appeal was unsuccessful and there was no claim brought in the present proceedings that relate to that appeal.

The law we applied

Equality Act 2010 - Statutory Code of Practice

98. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011 ('the code'). Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

Direct Discrimination

99. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
(2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."

100. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

101. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.
Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.
Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

102. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in ***Amnesty International v Ahmed*** **[2009] IRLR 884** by Underhill P (as he was). He said:

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and

women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) …'

103. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

104. The reason for the unlawful treatment need not be conscious but may be subconscious. In Nagarajan Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

105. Section 39(2) of the Equality Act 2010 provides that:

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

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

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

(c) by dismissing B;

(d) by subjecting B to any other detriment.

106. A ‘detriment’ is something that a reasonable employee might consider to be a disadvantage ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] UKHL 11** an unjustified sense of grievance will not suffice.

107. Section 212 of the Equality Act 2010 provides that *‘“detriment” does not, subject to subsection (5), include conduct which amounts to harassment’.* The purpose of this definition is to prevent overlapping claims. Its effect is that where a tribunal find that an act or omission to amount to harassment for the purposes of Section 26 it cannot find that the same act or omission is unlawful contrary to sections 13 or 27 where the claim relies on establishing a that act or omission is a detriment contrary to Section 39(2)(d).

Harassment – Section 26 of the Equality Act 2010

108. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

26 Harassment

(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.

(2) …..

(3) ….

(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— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

109. The Statutory Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

110. In **Pemberton *v Inwood*** **[2018] IRLR 542** Underhill LJ explained the effect of Sub-section 26(4) as follows [para 88]:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment4 created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

111. In ***Richmond Pharmacology v Dhaliwal*** **[2009] IRLR 336**, which dealt with the legislation in place prior to the Equality Act 2010 there is a reminder of the need to take a realistic view of conduct said to be harassment. At paragraph 22 Underhill P (as he was) said:

'Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

112. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss ***Timothy James Consulting Ltd v Wilton*** **UKEAT/0082/14/DXA**. In ***Bakkali v Greater Manchester***

Buses (South) Ltd **[2018] IRLR 906, EAT** Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition. She said:

'In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race …' in the Race Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.'

113. The need for a tribunal to take a rigorous approach to the question of whether conduct related to a protected characteristic was recently emphasised in ***Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam*** **[2020] IRLR 495, EAT** where the EAT said:

'The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what *feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.'*

Discussions and conclusions

114. The Claimant's claim rests on 7 factual allegations. He says that each one was both an act of direct discrimination because of race but also an act of harassment. As we have set out above, if an act amounts to an harassment it cannot as a matter of law amount to a detriment for the purposes of a direct discrimination claim. The approach that we have taken is to firstly look at whether we are satisfied that the acts took place as the Claimant has suggested. If they did not then it is unnecessary to go further. If the acts did take place we need to ask firstly whether the acts amounted to harassment contrary to Section 26 and 40 of the Equality Act 2010 and if not whether

the acts amounted to direct discrimination contrary to Section 13 and 39 of the Equality Act 2010.

115. The issues between the parties in the case before us are those recorded in the case management order which we have referred to as paragraphs 21.1 through to 21.7 and we shall address each one of those in turn, although in reaching our decisions, we were careful not to compartmentalise the evidence and in each case, we have had regard to the entirety of the evidence.

116. Before dealing with each issues we make additional findings of fact which are relevant to more than one of our conclusions below. We start with the evidence of Dennis Lampte. Dennis Lampte refers to himself as being ‘black’. Dennis Lampte was managed by the Claimant between August 2018 and November 2018. He does not claim to have any knowledge of the events of 22 November 2018. He does not say in his evidence that he had any knowledge of how the Claimant was treated by John McEwan, Daniel Carpenter or any other manager. Dennis Lampte makes the assertion that Amazon LCY2 has been and always will be a toxic environment for black people. If there were evidence to back up that assertion then that might support the Claimant’s case.

117. Dennis Lampte sets out an account in his witness statement of his own treatment which he suggests that he was treated unfavourably because of race. He says that a female employee made a complaint against him suggesting sexual harassment. He then makes the bold assertion that as there was no evidence that did not merit investigation. Whilst Mr Lampte might have been very upset about being investigated if the complaint was untrue his suggestion that a complaint of sexual harassment merited no investigation is obviously wrong. The fact that a person had complained means that there was at least some evidence. He goes on to say that John McEwan and another manager carried out the investigation. He was dismissed but later reinstated on appeal. He says in his witness statement that he brought tribunal proceedings. Mr Salter asked him to confirm that he had withdrawn those proceedings and he agreed. He complains that when he returned to work he was asked to work in a different department from the complainant. Mr Lampte confirmed in cross examination that the outcome of the appeal was that he got a final written warning.

118. We found Dennis Lampte’s evidence to be of very little assistance. Taken at the highest his account of being investigated and subjected to disciplinary proceedings after a complaint of sexual harassment was made against him is not sufficient to support any inference of race discrimination. Dennis Lampte’s assertion that the depot was a toxic place for black people to work was an assertion devoid of any evidential support. He gave no examples which might paint a picture of the discrimination he asserts was prevalent. We find that he was and remains very upset about his own treatment. He may be justified in that but we are unable to draw any material support for the Claimant’s case from the evidence he has provided. In particular he has not given any evidence that John McEwan acted in a way that called for any explanation other than he investigated when a complaint of sexual harassment was made. That of itself cannot support any inference of discrimination.

119. The Respondent invited us to rely upon a number of matters and to conclude that the Claimant’s credibility was so seriously damaged we could not rely upon anything that he said. Amongst those matters was a suggestion that the Claimant had ben

dishonest in the course of the oral examination conducted before Master Hill QC. We would accept that, at the very least, the Claimant did not provide a full account of his income in that he did not volunteer that he had found employment. It is unnecessary for us to decide whether he acted dishonestly. We find that the context of the oral examination concerned the enforcement of a costs order that the Claimant (wrongly) believes was unjust. We accept that he honestly believes he has been treated badly by the Respondent and he does not relish satisfying a costs order in its favour. We have reminded ourselves above that the fact that a person is dishonest about one thing does not mean that we should regard them as being dishonest about everything. Whilst we consider that there is a reasonable basis for concluding that the Claimant was not as frank as he could have been in the High Court proceedings we do not place any weight on that when deciding the disputed factual allegations in the case before us.

120. Had it been necessary to do so we would have placed weight on the conclusions reached by EJ Burgher that the Claimant improperly spliced two audio recordings together for the purposes of adducing them in these proceedings. The purpose of that conduct was plainly to gain an evidential advantage in the proceedings. Where the proceedings turn on oral disputes the fact that one party has attempted to manipulate the evidence is a matter which could be taken into account in any assessment of the evidence. As we have made clear below whilst we have had regard to that conduct by the Claimant, we would have reached the same conclusions even without that additional evidence.

121. We can have regard to the general approach to diversity in the workplace. The Claimant was promoted to the position of Area Manager. That was done from a centralised application process but does not support a suggestion that there was widespread antipathy towards Black Africans. Within the local workplace it appears that there were other Black Managers including Joshua Ukwu. This gives some more direct evidence that there was not some generalised antipathy to Black Africans. These facts do not of course assist when asking whether any particular individual harboured discriminatory views.

Issue 21.1 John McEwan stating that a black manager will not survive

122. The Claimant’s case is that in August 2018, John McEwen said to the Claimant after his promotion “a black manager will not survive”. The Claimant says that this occurred, and John McEwen denies it. We have had regard to the following key matters which might support the Claimant’s contention that these words were used:

122.1. We remind ourselves of the need to look at the evidence as a whole when assessing whether a particular incident occurred as alleged. We have had regard to the fact that, on the Claimant’s case this was not an isolated incident but he says it was a pattern of conduct; and

122.2. As a matter of fact, the prediction set out in the alleged comment turned out to be true, in that the Claimant did not last long as a manager. In that sense, the remark is consistent with what the Claimant said was common practice in the Respondent organisation; and

122.3. The Claimant had made an earlier complaint about Dawid who he suggested had behaved in a racist manner. It does not appear that that complaint was ever

satisfactorily resolved although we conclude that the Claimant did not actively pursue any conclusion by a further complaint or appeal.

122.4. On the 22 November 2018, shortly after the incident that precipitated the Claimant's demotion the Claimant made a complaint suggesting that Mr McEwen had behaved unpleasantly towards him over a number of months, at that time, no specific details were given. There is no express reference to discrimination but there is a threat to take matters to court.

122.5. The Claimant did raise a connection between race and the disciplinary proceedings in an e-mail sent to the Respondent on 9 December 2018. He suggests that the Respondent was seeking to dismiss 'an innocent blackman'.

122.6. There is of course the evidence of the Claimant himself who says that John McEwan used this phrase.

123. We turn then to the evidence that might undermine the Claimant's account of this. The most important evidence that we have had regard to is as follows:

123.1. The Claimant says that John McEwan used this phrase at the time he was appointed. It is an overtly racist comment. The Claimant did not raise matters in a formal grievance. In his evidence he suggested that it was difficult to challenge a manager. We do not accept that the Claimant would have been reticent about challenging such a comment formally. We rely on our findings that the Claimant had brought a grievance when he was a level one employee against a level three supervisor, in which he alleged race discrimination. We accept that this grievance does not appear to be resolved and we do not know why and we accept that reduces the weight we can place on this point.

123.2. We have summarised above Chime messages sent by the Claimant. The key points which we take into account include the fact that the Claimant went to John McEwen when he felt that he was unfairly criticised on the 14 November 2018. Throughout those Chime messages, the Claimant praises John McEwen for his fair approach. We fully accept that it is difficult for an employee to raise allegations of race discrimination by a manger within the workplace and that they may have no confidence in that. We fully accept that an employee might in such circumstances might wish to be tactful in messages such as the Chime messages we have seen. However, the Claimant goes a little further than being merely tactful for there are a number of occasions where he actively complements John McEwen and where he seeks John McEwen out for advice. The Chime messages suggest that the Claimant regarded John McEwan as a trusted mentor.

123.3. We have had regard to the evidence of Mr McEwen himself. He gave evidence that he had a good relationship with the Claimant which is consistent with the Chime messages. He also says, and he was not contradicted on this, that he was a Facebook friend of the Claimant and that he would often travel on the train with him. We accept that this does not demonstrate anything beyond a good working relationship (as opposed to a social friendship) but it is not consistent with what would be expected if John McEwan had made overtly racist remarks.

123.4. Whilst the Claimant raised the possibility of racism reasonably early in the disciplinary proceedings and complained expressly about John McEwan the actual

allegations that he has raised in these proceedings were not mentioned at an early stage. We consider that the allegations, 21.1 and 21.3 in particular are so striking that if had they taken place, it would be surprising they were not mentioned at the earliest possible opportunity.

123.5. In respect of the suggestion that the Claimant was inhibited from complaining we have had regard to the fact that, from the moment of his suspension the Claimant wrote e-mails which robustly criticised the decisions made to suspend, investigate and to proceed with disciplinary proceedings. The Claimant did not hold back in any way. That is consistent with his behaviour before us.

123.6. We considered it relevant to have regard to the fact that the Claimant sought to rely upon a manipulated audio recording for the purposes of giving a false account of the meeting on the 9 January 2019. Having said that this was relevant we make it clear that this has been in no sense a decisive factor in our decision making. We would have come to the same conclusion had we not been bound by the finding of fact in Employment Judge Burgher.

123.7. This allegation was not included on the Claimant's ET1 but was introduced by an application to amend granted on 29 April 2019.

123.8. We were invited by Mr Salter to conclude that the evidence of the Claimant was tainted by his perception that he had been treated badly. We have no doubt that the Claimant worked hard and was proud of the fact he obtained a managerial position. Following the disciplinary proceedings which followed the events of the 22 November 2018, the subsequent demotion was a devastating blow to his pride and sense of self-worth. In these proceedings he has responded by using a great deal of hyperbole and putting allegations at the very highest, occasionally without any evidential basis whatsoever. One example is his suggestion the witness statements, taken in the early hours of the 22 November were 'falsified'. Putting it as modestly as we can we find that the Claimant has lost perspective. Reminding ourselves of the guidance in ***Gestmin SGPS SA v Credit Suisse*** we consider that the effect of the dispute and subsequent litigation has caused the Claimant to see matters only from his own perspective.

124. We have to weigh up the entirety of the evidence and do so, having done that, we have concluded that the Claimant has not shown the requisite standard that the phrase 'a Black manager will not survive' was used by John McEwen.

125. It follows that any claim of direct discrimination and or any claims of harassment under s.26 of the Equality Act that cannot succeed because the underlying allegation has not been established.

126. It follows that we do not need to deal with any question of whether the complaint was presented within the statutory time limits.

Issue 21.2 that John McEwan tried to levy false allegations against the Claimant

127. In this allegation, the Claimant said that John McEwen tried to levy false allegations against him in respect of what he describes as a health and safety incident. We have reviewed the evidence in respect to this matter, there is very little between the Claimant's account of this matter and that of Mr McEwen. Mr McEwen accepts that

where a person was pushing or pulling two U-boats, that he would generally comment. The Claimant's account is that he drew attention of John McEwen to the fact that a colleague had done so and that John McEwen took some action to speak to the employee concerned. The Claimant then says that the was then faced with a counter-allegation that he had been the person pushing the two U-boats. The Claimant had assumed that that allegation was one made by John McEwen as opposed to the person the Claimant had identified as not following the instructions only to push one U-boat. We are satisfied that John McEwen may have asked the Claimant whether or not he was the person pushing two trolleys, but it appears that he was satisfied with the answer and the matter was taken no further.

128. This allegation was not included on the Claimant's ET1 but was introduced by an application to amend granted on 29 April 2019.

129. We find that the Claimant has elevated being asked whether he was responsible for some minor wrongdoing into making a false allegation. We are not satisfied that John McEwen tried to levy a 'false' allegation. We find that John McEwan had got the impression that the Claimant might have been responsible for this minor infringement and asked him for an explanation and upon making further enquiries accepted what the Claimant had told him. At the highest there is evidence of crossed wires causing John McEwan to question the Claimant. That does not in our view amount to 'levying a false allegation'. On the basis it was put, the claim would fail.

130. We find that the Claimant has blown this incident out of any reasonable proportion. We reject the suggestion that John McEwan knowingly made a false allegation. Despite rejecting the manner in which the claim was put we shall deal with the facts as we have found them to ask whether this amounted to unlawful conduct.

131. Dealing with the allegation as a claim pursuant to Section 26 of the Equality Act 2020 we have considered whether there is sufficient evidence to conclude that John McEwan acted with the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We do not accept that there is sufficient evidence to reach that conclusion. We have had regard to the entirety of the evidence in reaching that conclusion including the later events.

132. We then ask whether the conduct we have found proved had the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We find that it did not. We have asked whether the Claimant subjectively considered that his dignity was violated or that the conduct creating an intimidating, hostile, degrading, humiliating or offensive environment for him. We find that he did not consider that to be the case at all. We have approached this matter by having regard to many of the same matters that we considered in looking at the issue above. We find that had the Claimant regarded this conduct in the manner win which he now alleges he would have raised a formal complaint, he would not have regarded John McEwan as a trusted Mentor and he would have drawn attention to the incident much earlier than he did. We do not accept that the Claimant thought any more about this incident that it merited.

133. If we are wrong about the Claimant's subjective perception we ask whether it would have been reasonable for the conduct to have the prescribed effect. We remind ourselves that the definition of harassment is not aimed at events which are trivial -

Dhaliwal. We find that whatever the Claimant may have perceived it would have been wholly unreasonable for him to have regarded the treatment as having the prescribed effect.

134. We would accept that the test for what might amount to a detriment is lower than the test in Section 26. Being asked about wrongdoing is perhaps only just sufficient to amount to a detriment. We shall assume that it is.

135. We then need to ask whether the Claimant has established facts from which we could infer race discrimination. We have focussed on the involvement of John McEwan. We have rejected the idea that there was any co-ordinated effort to discipline the Claimant. We have had regards to our findings in each of the claims brought by the Claimant. We have found nothing about the disciplinary process that called out for any explanation. We have rejected the suggestion that CCTV evidence was supressed. We have rejected the Claimant's account of overtly racist remarks. What we are left with is that the Claimant. A Black African. Was asked whether he was the person responsible for a minor health and safety infringement and where after the matter is briefly looked into no action was taken. We find that the Claimant has demonstrated nothing more than a difference in status and a difference in treatment. There is no 'something more' that would mean that the burden of showing that this conduct was not discriminatory would pass to the Respondent. The Claimant has failed to make out any prima facia case that the conduct was because of race. We should add that had it been necessary we would have made the same finding as to whether the conduct related to race for the harassment claim.

Issue 21.3 John McEwan saying in November 2022 John McEwan saying to the Claimant 'black people don't stay focus on their job they go looking for girls'.

135.1. The Claimant alleges that this phrase was used by John McEwan. John McEwan denied that he used this phrase of anything like it. This allegation was not included on the Claimant's ET1 but was introduced by an application to amend granted on 29 April 2019.

136. The Claimant's account of this in his witness statement is to say:

'On 7 November 2018, John McEwan invited me for another one on One meeting. His first statement was BLACK PEOPLE DON'T STAY FOCUSED ON THE JOB THEY GO LOOKING FOR GIRLS. I had to stop him and said that this was the second time he has mentioned race and I am very uncomfortable with that. He apologises and continues'

137. The events are closely linked to the issue we deal with below. The Claimant says that it was in the same meeting that John McEwan said that an allegation of sexual harassment had been made against the Claimant. We draw on our findings in respect of that in asking whether John McEwan used the phrase attributed to him.

138. We have approached this dispute in the same way as we have the other allegation of overt racist language at issue 21.1 above. Some factors supporting the Claimant's account are set out in our analysis above. A further factor which might assist the Claimant is the context of the conversation which, on all accounts, included discussions of sexual harassment and workplace relationships.

139. A factor which makes it less likely that the remark was made was the crass nature of it. We have listened to and observed John McEwan. We found him intelligent and thoughtful. It would be astonishing if he used such crass language in the context of a one to one meeting with a black manager. The possibility of an immediate serious complaint would have been obvious to him.

140. Of particular significance to our determination of this issue are the Chime messages sent by the Claimant on 14 November 2028. Those are sent just 7 days after the meeting. Sending messages praising John McEwan's even handedness is in stark contract to his account that days before John McEwan had made a racist remark directed at him and that he had complained and extracted an apology.

141. We have taken account of the matters set out under the hearing of issue 21.1 and the matters repeated above as well as standing back and looking at all of the evidence we heard. We are not satisfied to the relevant standard that John McEwan made the remark attributed to him by the Claimant. On that basis the claims brought under both Section 13 and Section 26 of the Equality Act 2010 must fail.

<u>Issue 21.4 Daniel Carpenter and John McEwan trying to make false allegations against the Claimant of sexual harassment.</u>

142. The Claimant deals with this allegation at paragraphs 72 to 79 of his witness statement. He says that in the same meeting of 7 November 2028 that we refer to above John McEwan told him that an allegation of sexual harassment had been made against him and that this was being investigated. This is really the only matter of dispute. John McEwan says that he had asked the Claimant whether he was in a relationship with anybody at work.

143. We draw on our findings above and in addition make the following findings about what led to John McEwan speaking to the Claimant:

143.1. We accept the evidence of Erica Brock that she was receiving unwanted attention from a male employee. We accept her account that she reported that to Daniel Carpenter. Daniel Carpenter says that he does not believe that she did report this to him but we find that he has not recalled this correctly. Having said that we do not find that he was attempting to mislead the tribunal. We find that this error of recollection is typical memory drift. Daniel Carpenter recognises that if an allegation of sexual harassment had been made he ought to have acted upon it. The fact that he did not do so has led him to conclude that no such allegation was made. In any event even if there was any dishonesty, which we find there was not, it would not be determinative of what John McEwan said to the Claimant.

143.2. The male employee who was the subject of the complaint spoke with Daniel Carpenter. Ericka Brock suggests that the conversation came about because of her complaint. We find that that is the most probable explanation. That employee alleged that Erica Block and the Claimant were in a relationship and that the Claimant was showing favouritism. We find that the context for this was that that employee was attempting to retaliate against the suggestion that he had behaved badly towards Erica Brock.

143.3. Daniel Carpenter then spoke to John McEwan. John McEwan was unsure whether Amazon had a policy about relationships between employees and made

enquiries. He then spoke to the Claimant. It is what was said in that meeting which is disputed.

143.4. Daniel Carpenter did not accept that he had suggested to John McEwan that the Claimant was sexually harassing Erica Brock. There was certainly no basis for him making that allegation and, had the matter been investigated, he would have known that the investigation would have included speaking to Erica Brock. Making a false allegation would have been a short lived affair.

143.5. John McEwan says that he only raised the issue of whether the Claimant was in a relationship with any employee. He says that the Claimant was the one who named Erica Brock. John McEwan says that the Claimant was offended at the suggestion that he was having a relationship with Erica Brock. We find that his recollection of the Claimant saying that he had previously dated Ms Sierra Leone is a detail which chimes with the Claimant's references to his family status in Sierra Leone. This gives us confidence in his recollection of events.

143.6. If a false allegation of harassment had been made by John McEwan then the Claimant would undoubtably have been angry not just at the situation but also towards John McEwan. The Claimant's Chime messages of 14 November 2028 do not suggest that he had any ill feeling towards John McEwan.

143.7. This allegation was not included on the Claimant's ET1 but was introduced by an application to amend granted on 29 April 2019.

144. Having regard to the totality of the evidence we are not satisfied that Daniel Carpenter told John McEwan that the Claimant had sexually harassed Erica Brock. He did say that he had been told by a third party that there was a relationship. We accept John McEwan's evidence and find that he did not make an allegation of sexual harassment of any description against the Claimant. He asked him if he was involved with any employee but that was all.

145. The factual premise behind the Claimant's case has not been made out on the evidence. It follows that the Claimant's claims that flow from the suggestion that he was falsely accused of sexual harassment fail.

146. Lest it be said that we have failed to deal with a lesser suggestion that being asked whether he was involved with an employee we would deal with such a claim by finding:

146.1. That the question the Claimant was asked was not with the purpose of harassing him; and

146.2. That the Claimant did not subjectively view this conduct as harassment (for the same reasons as we gave under issue 21.2 above; and

146.3. That even if the Claimant did view being asked this question as harassment he could not reasonably have regarded the conduct as having that effect. The question was for a proper managerial purpose which would have been obvious to the Claimant.

146.4. We would accept that the Claimant would have been annoyed at the suggestion he was in a relationship when that allegation was made spitefully. We would accept that this could be reasonably viewed as a detriment.

146.5. We do not find that the Claimant has proven facts from which we could, in the absence of any explanation from the Respondent, infer that the treatment was because of race. We have had regard to the entirety of our findings and the evidence. There is nothing that could properly support such an inference; and

146.6. Even if we are wrong about that we are entirely satisfied that the reasons given by Daniel Carpenter and John McEwan for the treatment were those that they gave us. They had been informed, wrongly, that the Claimant was in a relationship with Erika Brock and was favouring her. They wanted to ask him whether that was true in order to avoid any managerial conflicts of interest. We find that that was the entirety of their reasons and that their reasons had nothing whatsoever to do with race.

21.5 John McEwan influencing the disciplinary process against the Claimant; and

21.6 Being suspended for assaulting an employee

147. We shall take these two together because they concern the actions of John McEwan.

148. In relation to the first allegation the Claimant appears to believe that John McEwan influenced the process from its inception to its conclusion. He may well believe that but that is beside the point. As a tribunal we have to make findings of fact based on evidence and not mere beliefs. We may draw inferences but are only entitled to do so having made primary findings of fact that support such inferences.

149. The Claimant did become involved in an altercation with Kevin Kondon. We have accepted the evidence of Daniel Carpenter who, whilst he did not witness any assault by either protagonist did observe the Claimant and Kevin Kondon shouting and he tried more than one to ask the Claimant to move away.

150. Kevin Kondon was upset and he made an allegation that the Claimant had assaulted him. We have made findings of fact above that such an altercation in the workplace was a very rare event. Daniel Carpenter reported the matter to John McEwan. He says and we accept that he was then asked to take witness statements. That was the first involvement of John McEwan.

151. The Claimant says that the witness statements are all falsified. That is pure speculation. With the exception of Kwaku Kyere Boadi we are satisfied that each of the individuals initially asked to make a statement wrote their own statement. We are satisfied that Daniel Carpenter wrote Kwaku's statement because he could not do so himself. As recorded above he carefully recorded on the statement the fact that he had written it. We find that taking immediate statements was a sensible and understandable step in the circumstances. We find nothing about this process that calls for any explanation. We repeat our finding that Edita Brakiskiene made a statement that that was broadly supportive of the Claimant. Kevin Kondon makes a statement that although critical of the Claimant makes admissions against his own interests. There is not the slightest evidence that these statements were manipulated in any way.

152. The Claimant is invited to the office and met by John McEwan and a member of the HR team. He has suggested that the minutes of that meeting are not accurate and we would accept that they will not be verbatim. The fact that they record the Claimant defending himself gives us the confidence that they are broadly accurate.

153. At much the same time Michael Magdongon has requested CCTV in what we find are neutral terms following the complaint from Kevin Kondon.

154. In the meeting the Claimant is asked for an account of his actions. He is pressed to say whether he did anything that might constitute an assault. He accepted that there was a physical tussle over the laptop and that he pushed him in order to get the laptop. That is consistent with what Kevin Kondon said. Michael Bracci described the same incident and said that the Claimant had grabbed Kevin Kondom's shirt. Kwasu Kyere Boadi said that there was a tussle over the laptop. Edita Braciskiene was the only person at that stage who gave an account consistent with the Claimant.

155. At the conclusion of the meeting the Claimant was suspended. We find that there is nothing striking or surprising about the decision to suspend the Claimant in these circumstances. There was evidence that he had behaved in a highly unprofessional way and that he had been involved in a physical altercation. The matter was unproven at that stage but we do not find it unusual that the decision was taken to suspend the Claimant. Kevin Kondon was not suspended that night. We do not know precisely why that was but we infer it was because he had made a complaint whereas the Claimant had not. When the matter was further investigated he was suspended.

156. We have accepted that once the Claimant sent an e-mail complaining about John McEwan, John McEwan was asked to and did not have any more material involvement with the matter. The Claimant has no direct evidence that this was not the case. There is no basis for us to draw any inference that he continued to be involved.

157. We are entirely satisfied that it was Joshua Ukwu, and him alone, who made decisions during the disciplinary process about what had or had not occurred and what he should do about that. We would accept that he had and accepted advice from HR. We are confident that he was the sole decision maker as he was able to explain why he had made findings for and against the Claimant. He explained how he had weighed up the evidence and in particular he explained why he thought the sanction he imposed was appropriate.

158. Insofar as these elements of the Claimant's claim rest on a suggestion that John McEwan influenced the investigation post 22 November 2018 or the process or outcome of the disciplinary process then they fail because we do not accept that John McEwan had any material involvement whatsoever.

159. The issue for us is whether the actions of John McEwan up to the point his involvement ceased were either unlawful harassment or direct discrimination.

160. John McEwan's first involvement was to ask for statements to be taken when he learned of Kevin Kondom's complaint. His next actions were to interview the Claimant and then to suspend him. It is those actions which we need to consider, none others having been proven.

161. It is possible for us to take a number of the statutory questions we must address together. To succeed in a harassment claim the Claimant would need to show that the conduct complained of related to race. Asking for statements, interviewing and suspending the Claimant are not inherently related to race. They might relate to race if race played a part in the reasons for the treatment. In the direct discrimination claim the treatment must be because of race. In a case such as this that means that consciously or subconsciously race was part of the motivation for the treatment.

162. We shall assume in the Claimant's favour that being investigated and suspended could reasonably be regarded as potentially amounting to harassment or a detriment for the purposes of the claim of direct discrimination.

163. It is for the claimant to make out a prima-facia case that the treatment could be discrimination or harassment. At this first stage we may not have any regard to the explanation from the Respondent. However we may have regard to the surrounding circumstances. Here Kevin Kondon had made a complaint about an assault. He had been supported in that complaint by some witnesses. With or without an assault there was a suggestion that the Claimant was involved in a highly unusual, heated disagreement in the workplace. The Claimant broadly accepted before his suspension that there had been a tussle over his laptop. Kevin Kondon was also suspended although a little later than the Claimant.

164. We do not consider that the Claimant has established a prima facia case that his treatment was either related to race or because of race. Even disregarding any explanation from the Respondent there is no 'something more' than the mere fact that the Claimant is a black African and the fact that he was subjected to a disciplinary process.

165. If we are wrong about that then we would have needed to look at the explanation given by John McEwan for his treatment of the Claimant. In short he says that having received a complaint of serious misconduct he asked for statements to be take. We understand him to be saying that he wanted the evidence recorded soon after the event. We are entirely satisfied that those were his reasons and that they had nothing whatsoever to do with race (and in particular the Claimant's race) and did not relate to race in any way.

166. The reasons for carrying out an initial interview with the Claimant were that it was necessary to obtain a brief account in order to decide whether it was necessary to suspend the Claimant. We find that John McEwan explored the Claimant's account for these purposes. We are entirely satisfied that these reasons were the entirety of the reasons for interviewing the Claimant and that they had nothing whatsoever to do with race and did not relate to race in any way.

167. Finally there is the suspension. We have found above that we considered the suspension to be an unsurprising step given the nature of the complaints against the Claimant. Had it been obviously excessive we would have taken that into account in considering whether to accept John McEwan's explanation. We note from a comment by the HR representative during the meeting that suspension is considered routine. The question for us is whether we are satisfied that the decision to suspend the Claimant was nothing whatsoever to do with his race. We are. We find that John McEwan accepted the advice from HR that given the serious nature of the allegations the Claimant should be suspended pending any investigation. We find that those

were the entirety of the reasons and that they had nothing whatsoever to do with race and did not relate to race in any way.

168. **Issue 21.7 the Respondent withholding witness statements, CCTV footage, minutes of meetings and an investigation report from the Claimant**

169. This allegation concerns to the documents compromising and attached to the investigation report which was prepared by Mr Magdongon. As we have found above prior to the 6 December 2018 meeting those documents were sent to the Claimant at his work email address to which he had no access. When this was discovered the meeting was postponed and the Claimant was sent all of the statements and records of interview. He was not sent the CCTV footage but Michael Magdongon's investigation report identified the link to the CCTV footage although had the Claimant attempted to access that he would not have been able to.

170. We are satisfied that being invited to and having to attend a disciplinary meeting without any of the documents necessary to prepare for that meeting would amount to a detriment and or unwanted conduct and that that would be very distressing.

171. Dealing with the claim as a claim of harassment we do not find that the failure to send the Claimant the attachments to the investigation report was done with the purpose of violating his dignity or creating the proscribed environment. The documents were supplied to the Claimant but to an address he could not access. There is no evidence that that was done deliberately.

172. We then turn to whether the treatment had the effect described in Subsection 27(1) of the Equality Act 2010. We find that the Claimant did subjectively view the failure to send him the necessary documents prior to the disciplinary hearing as creating a hostile environment. We would go on to say that we find that he could reasonably regard this omission as having that effect.

173. We are left with the issues of whether the treatment related to race (for the purposes of the harassment claim or was because of race for the purposes of the direct discrimination claim.

174. In this instance we are prepared to assume that the burden passes to the Respondent to show that the treatment was nothing whatsoever to do with race. Giving the Claimant very little notice of the hearing and failing to provide him with the material he needed is sufficient to make out a case from which we could infer discrimination.

175. We find that we are in a position to make a finding of fact as to the reason for that treatment. We are entirely satisfied that the reasons that the Claimant was not supplied the documents at an e-mail address he could access was inadvertence. Whilst we did not hear from the HR employee who chose the e-mail address we find that there is sufficient evidence for us to have reached this conclusion. It is inconceivable that anybody working in the HR department of the Respondent would have anticipated that a disciplinary hearing would have proceeded when the Claimant had not been sent the investigation report and supporting evidence. We have regard to the fact that on the 6 December 2018, as soon as the omission was noticed, an agreement was reached for a postponement as one would have expected. There was no push back at all by Joshua Ukwu or the HR representative assisting him. Indeed it is the HR representative who states that the meeting must be postponed.

We are entirely satisfied that has nothing whatsoever to do with race nor did the treatment relate to race and on that basis, neither the claim under Section 13 or section 26 of the Equality Act 2010 succeeds.

176. In the case run before us there were additional elements of this case that we should deal with. The first is the CCTV issue. The Claimant does not accept that the CCTV footage referred to by Michael Magdongon in his investigation report and viewed by Joshua Ukwu and in these proceedings disclosed to him is the entirety of the CCTV footage. He remains convinces that there is CCTV of the actual incident and that that has been withheld from him. We have made findings of fact set out above that there was no CCTV footage that showed the incident. We are confident that the 'ticket' is a genuine record of the attempts to locate CCTV footage. It is clear from the entry of the Loss Prevention team that they did not consider that any CCTV footage was of assistance. It follows from those findings that whilst the Claimant may never accept what he has been told there is no evidence that CCTV has been withheld from him in the way that he has complained of. We accept that there was evidence that might have supported the Claimant's belief but on our assessment of the entirety of the evidence we are satisfied that no further CCTV footage exists.

177. Finally it appears that the Claimant was not provided with the hand written statements along with the other documents he was sent. He has alleged that those statements were fabricated but we have rejected that. The Claimant was sent the formal interviews of each of those individuals. In their formal interviews the four individuals who gave statements at the time broadly maintained the same position as they had taken initially. The Claimant was well aware that initial statements had been taken.

178. Having been sent the formal statements we do not consider that the Claimant has suffered any detriment by not being sent the earlier statements. We do not find that the omission comes close to amounting to conduct capable of violating the Claimant's dignity or creating the prescribed environment. However, we shall assume that we are wrong about that and ask if the Claimant has proven facts from which we could infer that the conduct bas because of or related to race. We find that the Claimant has not proven any facts from which we might infer that the treatment related to race or was because of race. There is no prima facia case that this was discrimination or harassment relating to race.

179. If we are wrong about that then we find that the reason for the treatment was that the initial statements had been overtaken by formal statements where each witness had given an account of the incident. We infer that it was thought sufficient to supply those statements. The existence of the earlier statements was revealed to the Claimant. There was no benefit in withholding the earlier statements some at least of which were harmful to the stance taken by the Claimant. We are entirely satisfied that the omission was in no sense whatsoever because of or related to race.

Issue 21.8

180. The Claimant's claim under paragraph 21.8 was struck out and an appeal against that was dismissed. As set out in the summary of the Preliminary Hearing that took place on 29 April 2019 the issue was said to be:

> '*The Respondent fabricating evidence against him, in particular two witness statements by Mr Kevin Kondon and Mr Michael Bracci, the minutes of a*

meeting on 9 January 2019 (Mr Kejan Kella says that 80% of what was discussed in that meeting was not recorded in the minutes, he says that he has a recording of the meeting that was provided to the Respondents and then they amended the minutes) and further, he says that the Respondent fabricated a spreadsheet summary of the content of witness statements'.

181. EJ Burgher found that the recording supplied by the Claimant has effectively been doctored. A different recording device had been used to make an additional recording and then specialised software used to splice the two recordings. The combined recording gave the impression that the Claimant said far more than he did at the meeting. It is not hard to see why EJ Burgher thought that the Claimant should not be allowed to pursue allegations that the Respondent forged documents (including the minutes of the meeting). The Claimant before us suggested that he acted as he did because he had no legal advice. We reject that suggestion. A person does not need legal advice to understand that they should not fabricate evidence.

182. The difficulty for us is that having struck out issue 21.8 we find that there has been a failure to really grapple with the way the Claimant put his claim. In short the Claimant's case is that the decision to demote him and give him a final written warning was an act of race discrimination and/or harassment. In our view, whilst not spelt out in the list of issues, that allegation can be extracted from issue 21.5 (which was not struck out. We do not think it would be fair to the Claimant to fail to deal with that aspect of his case. The submissions of both parties implicitly dealt with the case on this basis.

183. We have rejected any suggestion that documents were forged manipulated or manufactured. We find that there was an altercation that was highly unusual in that workplace. Kevin Kondon complained and that led to statements being taken. We have found that the Claimant's suspension was unsurprising and was not unlawful.

184. Both the Claimant and Kevin Kondon were investigated and statements taken from everybody who might have been able to assist. We find that Michael Magdongon fairly weighed up the evidence and concluded that disciplinary proceedings were justified. The Claimant disagrees. He points out, correctly, that a number of witnesses support his account that he behaved calmly and did not push or assault Kevin Kondom. That is true but there were some witnesses who disagreed. The majority of the witnesses accepted that there was an argument of some description. An investigator would not have been acting fairly by just taking the favourable parts of the evidence. We have commented that the investigation report accurately summarises the evidence for and against and leaves any decision to the disciplinary hearing.

185. We have found that Joshua Ukwu was the person who took the disciplinary decision and that he took that decision uninfluenced by any person although with guidance from HR. The decision he arrived at was his and his alone.

186. We are not hearing an unfair dismissal claim. The purpose of us assessing whether there was a reasonable basis for Joshua Ukwu's decisions is only to see whether there are matters that would support an inference of unlawful conduct. We were impressed by the evidence of Joshua Ukwu. He acknowledged that there was evidence exonerating the Claimant as well as evidence that went the other way. We have had regard to the letter Joshua Ukwu wrote to the Claimant setting out his

decision. Where he has found against the Claimant he has identified evidence that supported hi conclusions. We find that there was ample evidence that would support a conclusion that both Kevin Kondom and the Claimant shouted at each other. The Claimant was a manager. A finding of unprofessional behaviour was in our view amply supported by evidence. Joshua Ukwu was able to identify the basis on which he found that the Claimant had used offensive language. Three witnesses supported that finding. Joshua Ukwu did not uphold an allegation of failing to obey an instruction on the technical basis that Daniel Carpenter, who witnesses said made several requests for the Claimant to step away, was not in a managerial role. This was a fair finding. We would have found that the failure to step away from confrontation was a serious failure of judgment. This is not our decision to make. Finally Joshua Ukwu found that there was unwanted physical contact. There was again ample evidence to support that. Joshua Ukwu quite properly had regard to the Claimant's initial account and an admission, not retracted when the Claimant checked the minutes, that he had pushed Kevin Kondon when retrieving his laptop.

187. We find that there is nothing in the factual conclusions reached by Joshua Ukwu which were unusual, harsh or showed any indication that he was not attempting to approach the matter fairly.

188. We do find that the decision to demote the Claimant was something that requires an explanation. That decision would have a significant financial impact on the Claimant and, as Joshua Ukwu acknowledges in his witness statement, the promotion meant a great deal to the Claimant. The allegations against Kevin Kondom were of a similar level of gravity to those against the Claimant. He too was found to have behaved in an unprofessional manner. He was given a final written warning and like the Claimant was told that he could not apply for promotion in the currency of the final written warning. We consider the sanction given to the Claimant to be more severe.

189. We are satisfied that the sanction imposed amounted to a detriment and shall assume that imposing such a sanction is capable of amounting to harassment if it related to race.

190. On that basis we find that the burden passes to the Respondent to provide an explanation. The explanation we were given is firstly that Joshua Ukwu took the view that his findings amounted to serious misconduct. In his letter to the Claimant he says

'Considering the nature of the incident and the way you conducted yourself throughout this process, I have grave concerns about your ability to fulfil your role as an Area Manager'

191. The explanation is therefore not only the acts found to have occurred but also the response to them. We consider that there was a reasonable basis for this conclusion. The Claimant's case domestically, as it was before us, was that managers and HR has conspired against him, had fabricated or forged statements. His correspondence is argumentative and aggressive. Joshua Ukwu says that that was the impression he took away from the two hearings. We accept that minutes of meetings will not always capture the nuances of behaviour.

192. We find that it was reasonably open to Joshua Ukwu to reach the conclusions he did about the Claimant's response to facing disciplinary allegations. There was not then

and there is not before us a shred of recognition that matters got out of hand in the early hours of 22 November 2018.

193. We have had regard to all of the evidence. We are satisfied that the explanation that Joshua Ukwu gave us for his decisions were the only reasons. We find that those reasons had nothing whatsoever to do with the Claimant's race. We find that the Claimant's attempt to paint Joshua Ukwu as the lacky of a racist organisation are misguided and unkind. They stand in stark contract to the mentoring relationship that existed both with Joshua Ukwu and with John McEwan that existed before the Claimant became embroiled in a confrontation with Kevin Kondom.

194. For those reasons whether it is spelt out in the list of issues of not we dismiss the any aspect of the Claimant's claim that relies upon the decisions taken to demote him or give him a final written warning.

195. It follows that all of the claims either under Section 26 or section 13 of the Equality Act 2010 shall be dismissed.

An apology from the Employment Judge

196. We announced our decision and reasons at the conclusion of the hearing. As he was entitled to do the Claimant asked for full written reasons. We informed him at the time that whilst they would of course be provided the Employment Judge had a backlog of cases. The Claimant forcefully expressed his view that his case should be prioritised. To explain a little further the Employment Judge had a backlog of decisions where the parties did not know the outcome of their claims. The Claimant has contacted the tribunal on several occasions chasing these reasons. Not every message has been passed to the Employment judge. The Employment judge has worked through his backlog in chronological order. One extremely complex case took many months to complete.

197. Whilst these are the reasons for the delay the delay is not of the Claimant's making. The Employment Judge understands that he is anxious to appeal, as is his right, He therefore extends an apology to the Claimant for any additional anxiety that this delay has caused.

Employment Judge Crosfill
Dated: 9 March 2023