EMPLOYMENT TRIBUNALS

Claimant: Mr M Baah

Respondent: Ballymore Asset Management Ltd

Heard at: **East London Hearing Centre (by CVP)**

On: **4, 5, 6, 10 and 11 January 2023**

Before: **Employment Judge Jones**

Members: **Ms A Berry**
Ms S Harwood

Representation
Claimant: in person
Respondent: Mr Peter Collyer (Citation Ltd)

JUDGMENT having been given to the parties in open court on ***11 January 2023*** as follows:

The Claimant's complaints of race discrimination and harassment relevant to race succeed.

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claimant brought complaints of direct race discrimination, harassment and victimisation against the Respondent. The Claimant's complaints were mainly directed at two named managers, Ms Gomes and Mr Walker.

The Tribunal heard from the following witnesses: the Claimant on his own behalf; and from the Respondent: Ms L. Gomes, his line manager and the fitness manager for the gym and Mr T. Walker who at the time was Leisure Portfolio Manager for the Respondent, overseeing 10 sites.

Issues

There was an agreed list of issues, which is set out at pages 38 – 41 of the hearing bundle. The list is re-produced in the second half of this document where we apply the law to the facts found from the evidence.

The Tribunal made drew the following conclusions from the evidence in the hearing. These are referred to as findings of fact. We made these findings from the live evidence we had in the hearing and the documents we were asked to look at. The Tribunal has only made findings on evidence that related to the issues in the case.

Findings of fact

The Claimant was employed by the Respondent as a gym instructor/personal trainer from 19 November 2018. The Claimant was one of a number of gym instructors employed at the Royal Wharf gym which was open for use to the residents of the properties above and to members of their family.

The Tribunal will make now set out its findings on each of the Claimant's allegations, using the numbering on pages 38 – 41. In these findings the Tribunal will decide whether the allegations actually happened.

Allegation 1

In March 2020 Ms Gomes told the Claimant that he could no longer have weekends off.

The Claimant had an arrangement with his managers that he would be off the rota on weekends. The Claimant had won access to his daughter after a difficult custody court hearing. The court order was granted in October 2019. The arrangement was for the Claimant to be left off the rota on weekends came from a meeting between the managers, Sean and Jeff around the beginning of November 2019. He asked whether he could be excused from the rota on weekends so that he could spend the time with his daughter.

The Tribunal did not have evidence from those managers as they were no longer employed but copies of the rota which the claimant produced from the end of 2019 show that he was not on the rota every weekend from around the weekend of 23/24 November up to March 2020, when Ms Gomes became his manager. There was also an email from the Claimant and dated 20 February 2020, in which he explained the arrangement to Ike, the senior coach. That indicated to the Tribunal that there was an existing arrangement between the Claimant and his managers.

Ms Gomes joined the business a week before the UK went into lockdown as a response to the coronavirus 2019 pandemic.

She wanted the Claimant to be on the rota along with all the other gym instructors, working weekend shifts as well as during the week. The Claimant asked if he could be removed from the rota on the weekend or not be put on the rota because of the existing arrangement that he had with his managers prior to Ms Gomes becoming his manager and also because he needed to be available to have access to his daughter. Ms Gomes refused. She informed him that he could no longer continue to have weekends off. She felt that this would be giving him preferential treatment compared to his colleagues. She told us that the Claimant was not the only parent among the gym instructors and that do as the Claimant asked would be unfair to everyone else. Ms Gomes did not take HR advice before responding to the Claimant about this and it is unlikely that she checked with Ike

either. She was clearly not aware that she could make adjustments for employees because of particular characteristics such as disability or parental status.

Ms Gomes changed the rota and put the Claimant on it every other weekend. This meant that he would be on the rota when he had access to his daughter unless he was able to swap shifts with colleagues. She informed the Claimant that unless he was successful with a flexible working application, she would continue to put him on the rota every other weekend.

Although the Claimant continued to give the Respondent details of the weekends when he would have access to his daughter, the Respondent continued to book him to work those weekends.

Allegation 2
Dental surgery - August 2020

Dental appointments in on 7 August 2020. We find that the claimant spoke to Ms Gomes about an upcoming dental appointment sometime in July 2020. He also wrote to her on 22nd July to remind her that he had an upcoming at dental appointment and that he would need time off to attend. He reminded her on the 4th 1st of August. The appointment was on 7 august.

When Ms Gomes responded, she told the claimant that he will have to take the time off as unpaid leave or use his annual leave to attend the appointment. Miss Gomes did not cheque the Respondent's policies before telling him this. If she had, she would have notice that there is a clause in the response handbook which confirms that employees can get paid for attending medical appointments.

We find that the gym was open again at this point and that although Ms Gomes had been furloughed as it, along with all the other staff including the Claimant, the gym reopened in July so it would have been possible for her to check the Respondent's handbook or check with HR what was the position regarding attending medical appointments. She told us that she only checked her own contract and saw the provisions for sick play. Had she checked with HR she would have seen (page 55 of the bundle) a section headed *'Medical Appointments'* under which it stated the following:

> *'Employees should endeavour to arrange medical appointments in their own time or, if this is not possible, at times that will cause the minimum amount of absence from work or inconvenience to the company. However, we accept that it is not always possible to arrange medical appointments outside working hours. It is the organisations policy to permit reasonable time off work for such appointment. Provided that the employee gives their line manager reasonable notice of the date and time of an appointment, time off with pay will normally be granted although this is subject to the discretion of the employees line manager'.*

Around the same time, Simon Chandler, another gym instructor who was white, asked for a day off, also for a medical appointment. He asked miss Gomes for the day off. Its Gomes agreed that he could have the day off as a paid day off. He was not told that he would need to use his annual leave or that he it would be unpaid leave. We find that the Chandler was given that payday off with little to no fuss.

The Claimant eventually emailed HR about this and was told that he would be paid for that day as a sick day.

Allegation 3
Unsolicited comment on 31st August 2020

The tribunal finds that there was a discussion between Ms Gomes and another gym instructor refer to as Ade who was black, on the gym floor on 31st August 2020. Ade, Simon, the Claimant and Valentina were on the gym floor, cleaning. Ade had worked on his own in the gym the previous weekend. He was not pleased about this and might not have been aware that he would be working alone. He asked Ms Gomes whether the respondent had a risk assessment in place to cover situations like a lone worker in the gym. Ms Gomes did not like to be challenged and they ended up having an argument. It is likely that this was a difficult conversation, during which Ms Gomes stated that she did not need to speak to *'people like you'* in her response. The Claimant's recollection of what was said was recorded in his grievance investigation meeting as *'I don't need to speak to people like you'.* In the statement emailed to the Claimant by his colleague Valentina Baricevic, she stated that she recalled Ms Gomes saying to Ade that people like him make her job harder and that she then left the gym. Both the Claimant and Valentina recount slightly different versions of the sentence but in both recollections Ms Gomes used the phrase *'people like you'*. We find it likely that she included this phrase in her response. We prefer the Claimant and Valentina's evidence to Ms Gomes on this point.

It is likely that Ms Gomes looked at the Claimant when she made that comment, thereby including him in the comment. It is also likely that she spoke loudly in her response to Ade and that the cleaners overheard her. The cleaners were black women. Later, when Ms Gomes was not around, the cleaners came and spoke to Ade and the Claimant and enquired if they were okay, given the way that Ms Gomes had spoken to them.

In his grievance interview the Claimant told Mr Walker that Simon Chandler also heard her and asked Ms Gomes what she meant by her statement. It is likely that everyone who heard her considered that the comment was unwarranted.

Allegation 4
one to one in August 2020

We find that the Claimant and Ms Gomes had a one-to-one meeting in August 2020.

Miss Gomez asked the claimant, as a key performance indicator (KPI) that he should bring in one new personal training client to the gym, once a week. It is likely that the Respondent was seeking to increase its client base as not everyone who used to gym before the March Covid-19 lockdown had returned.

It is also likely that there were no KPIs in operation at this gym at Royal Wharf before Ms Gomes' appointment although it is also likely that the respondent had KPIs up and running at other sites. It is unlikely that the previous manager used them. We find it unlikely that the Claimant was the only person who had been asked to aim to bring in new PT clients to the gym. Even if he was the only person asked to do this, which we find is unlikely, Ms Gomes might have thought that the Claimant could do more than his colleagues to bring in new clients because of his profile as a well-known fitness coach.

The gym had recently reopened after the initial Covid-19 lockdown and it was apparent to the Respondent that a lot of members had either moved out of the area or not renewed their membership for other reasons. Not all gym users renewed their membership. Social distancing was still in operation. This KPI was set so that the Claimant and his colleagues could assist the Respondent is rebuilding its clientele.

Leads for new PT clients would also come through enquiries made on the Respondent's website, which would then be shared between the gym instructors. There were complaints from the Claimant in the grievance interview notes that those leads were not shared equally.

It is also likely that at the one-to-one meeting Ms Gomes took the claimant's personal training (PT) folder from him. The Claimant was concerned that she had asked him to

hand it over but he gave it to her. The claimant asked for a copy of the notes of the one-to-one meeting. He was not sent a copy.

Allegation 5
Claimant not being allowed to personal train in the gym in August 2020

It is likely that on the same day, the Claimant was told that he could not continue do PT (personal training) while on shift. It is likely that another gym instructor, Valentina was also told this as she confirmed in her witness statement. Valentina was white. This was likely to be a temporary adjustment because of social distancing arrangements at the gym, in the light of Covid-19. This was not permanent but was a restriction that the Respondent put on the gym instructions between June and September 2020. From October 2020, they were allowed to do PT sessions with clients when they are working their cleaning slots. In the gym, there were usually three people on shift at any one time. One would be working on reception and two will be working in the gym. When all three were present, one person could conduct PT with a client, with agreement from the others. The Respondent's idea was for them to negotiate with each other on the use of the space.

The claimant was a popular personal trainer (PT) and someone who had lots of outside interests related to fitness and personal training and who also appeared on TV and other media, again associated with PT. His email sign off is '*Celebrity Trainer'*. It is likely that meant that the Claimant was busy and may have felt the loss of the use of the gym during lockdown, more acutely than his colleagues. It is likely that the Claimant and his colleagues were anxious to get back to doing PT as soon as possible.

The Claimant's busyness may have caused him to neglect some of his cleaning duties. This was not something that his managers ever raised with him but may have been the reason one of the Claimant's colleagues referred to him as a *'not being a team player'* and another as *'conducting himself as though he was self-employed'* in their statements to Mr Walker during the grievance investigation. Simon Chandler described the Claimant as hard-working.

Usually, the Respondent allowed the gym instructors to do PT at the gym during working hours as it benefited both the gym instructors as well as the Respondent. All gym instructors were qualified personal trainers although they were not appointed as PTs. Conducting personal training (PT) was an added benefit. Whenever they did PT through the Respondent at the gym, they would earn commission of 45% of revenue, if they did PT while on shift. They would earn 75% of revenue when they did PT with clients off shift as they would need to come into the gym specifically for that purpose. Each time they completed PT they would need to complete forms to record the session and the amount of commission they had earned.

Mr Walker's live evidence was that one of the hazards of the leisure industry was that gym instructors/personal trainers would make direct personal arrangements with clients which would bypass the Respondent as their employer and would mean that the Respondent would not earn any money from the arrangement. This would be in breach of the gym instructors' contract of employment. He told the Tribunal that when the Respondent suspected that this was happening, he would usually address this by advising managers working under him to remind their instructors that they must declare any work that they do at the gym to the Respondent and remind them about what the Respondent considered to be a generous commission arrangement. Mr Walker's evidence was that if the manager of the gym spoke to the gym instructors in this way, it would cause a reduction in the incidence of this kind of fraud. We did not have any evidence in the hearing that this was ever raised personally with or about the Claimant during his employment.

We find that it was likely back from August 2020, the gym instructors, both black and white were doing PT whenever they could, whether they were officially allowed to or not. By the

time that by that time there had been and lockdown for at least three months during which the Respondent's employees, including the Claimant, would have lost money because of being on furlough. It was likely that the gym instructors were anxious to be earning and so although they were officially told that they should not do PT, it is likely that they continued to do so whenever possible.

Lastly, it was difficult to look at a gym instructor interacting with someone in the gym and work out whether they are conducting a PT session or simply being an instructor. They would be using the same machines and using the same space for both. The Claimant referred in the documents to an occasion when he was accused of conducting a PT session in the gym when he was simply showing someone in the gym how to use a machine as they were unfamiliar with it. He was adamant that he was not doing PT at the time.

Allegation 6
August 2020 – the first aid training

The claimant was booked in but did not attend the first aid training course in August 2020. he wrote too miss Gomez to inquire whether he needed to attend work first to open up the gym or go straight to the training, which was in London. He also asked for assistance in paying the congestion charge as he was planning to drive to London. It looks from the e-mail as though it was drafted the day before the training but not actually sent to Ms Gomes until the morning of the training. Ms Gomes did not reply to the Claimant but forwarded the e-mail to the office manager and Mr. Walker and her reporting manager, Ike. She had previously told the Claimant that the Respondent did not cover expenses.

There was some confusion about paying expenses at the Respondent because although Ms Gomes advised the Claimant that the Respondent did not cover expenses, in his interview during the Claimant's grievance, Simon Chandler stated that he believed that the Respondent did and had covered expenses.

It is likely that the Claimant had experienced a drop in income over the initial lockdown period between March and August 2020, which may have been the reason why he was asking for assistance in meeting his expenses in travelling to London, including the congestion charge. This is what he stated to Mr Walker in his grievance meeting. Ms Gomes had been unclear in her communication with him about whether he was to open up that morning, as he usually did, before going to the training. It was reasonable for him to ask whether he needed to go to Royal Wharf or straight to the training in central London. If the Claimant was to open the gym before going to the training he would have needed to leave home considerable earlier. The Claimant lived in Colchester at the time.

The Claimant did not attend the First Aid training in August.

In his grievance meeting with Mr Walker, which happened on 19 October 2020, the Claimant confirmed that he was keen to undertake First Aid training and that he had asked to be sent on this training on many occasions. He referred to expenses that he had incurred on the Respondent's behalf, i.e. since 2019 for things like a Spotify subscription to play music in the gym, which had not been reimbursed. He told Mr Walker that they totalled around £100.

He stated that he had already undertaken pool training before the gym was open to residents.

The Claimant was booked on First Aid training on 2 and 3 November 2019. In the lead up to the training, on 29 October, Ike confirmed to the Claimant in an email that the Respondent was prepared to pay him for the time attending the training and his expenses. He said that this was a particular arrangement for the Claimant in light of the fact that he

would be facing the congestion charge to attend the training. He repeated that it was not the Respondent's policy to pay expenses.

The Claimant attended the training venue on 2 November but had difficulties finding a parking space. He attended the course on 3 November and had to return on another occasion to attend the first day of the training.

Allegation 7
Ms Gomes' alleged comment on 29 August 2020

We find it likely that on a weekend at the end of August/beginning of September, the Claimant and other colleagues including Valentina, Ade, Simon and Krasimir were at reception. Ms Gomes was talking to them. She had received complaints about the state of the gym over the weekend of 22 and 23 August 2020.

Ms Gomes raised some concerns she had with things that were not done on the weekend and stated *'why can't you do your fucking job properly?*' The Claimant spoke up and said that none of the people that she was speaking to had worked over the weekend so she would need to speak to the weekend team about it. We find it likely that her comment was directed towards all the gym instructors that she was talking to. As the Claimant spoke out, he may have thought that her comment was directed at him but as she had been speaking to all of them, we find it likely that the comment was directed at all of the gym instructors who were present.

Allegation 8

Ms Gomes' statement to the temporary member of staff

We find that Ms Gomes spoke to a temporary member of staff called Cian and told her that a job would be coming up soon at the Royal Wharf gym. The temp was also a qualified gym instructor but she was not a manager. Cian later spoke to the Claimant and asked him if he was leaving. Simon Chandler heard the conversation between Ms Gomes and Cian and he spoke to the Claimant about it. Both Cian and Mr Chandler considered that this was a reference to the Claimant's position. Although Ms Gomes did not use his name, she said this just after talking to Cian about the Claimant. After Cian and Simon told him about this, the Claimant checked the Respondent's website and there were no vacancies advertised. The staff knew that no one at the gym was leaving. Ms Gomes was pregnant and intended to go on maternity leave, but both parties agreed that Cian was not experienced enough to be in a position to be considered for the post of maternity leave cover for the post of fitness manager.

It is therefore likely that Ms Gomes did speak to her about a vacancy coming up soon just after talking about the Claimant and left it open for her to conclude that it was the Claimant's job.

Allegation 9

Ms Gomes request for a list of previous and current clients

We find that On 31st August, following her one-to-one meeting with the Claimant, Ms Gomes sent an e-mail to all gym instructors at Royal Wharf with a request that they should all provide her with a list of current clients, including how many sessions they had left and whether their package had been renewed. This was a reasonable request. As the manager, Ms Gomes needed information on the activity of the PTs at her gym, in order to assist the Respondent with planning, marketing and business forecasting.

In his response, the Claimant provided the information requested. He confirmed that he had no clients seeking to renew their contracts post lockdown. He stated that there were people who had enquired with him about their free introductory sessions following their induction session but they had not yet signed up for it. Ms Gomes inquired further in her response e-mail to the Claimant, requesting details of current and previous clients that he had trained/was training and for information where training sessions have been completed. On 1st September, the Claimant responded and gave her detailed information with the names of the individuals concerned, showing the clients who had blocks of 12 sessions already booked and details of those who might have renewed their contracts and those who might not have.

Whereas everyone was sent the first email, it is likely that the Claimant was the only PT who was sent the second email asking for a list of previous and current clients.

Allegation 10
Ms Gomes' use of a racial insult in Portuguese

On 31 August the Claimant saw Ms Gomes at the gym with a friend who was neither a resident nor a member of staff. In his statement to Mr Walker in the Claimant's grievance investigation, Mr Chandler stated that this friend was at the gym for a long time and that it felt as though she was being shown around as a new member of staff rather than as a friend visiting casually. It is likely that during this person's visit Ms Gomes made a statement to her friend, in the Claimant's earshot, in broken Portuguese.

There was a conflict of evidence about this statement in the hearing. Ms Gomes is Portuguese. The Claimant is black British of African heritage and does not speak Portuguese. Ms Gomes stated that her friend did not speak Portuguese. The Claimant overheard her use the words *'Volt para'* and '*Africa blackie'* as part of what she said to her friend. He was concerned that she was being racist and searched on Google for what those words might mean. He believed that those words were likely to be a racial slur from the way it was said, that Ms Gomes used a different language to her friend so that he and anyone else listening would not understand and from her tone. The Claimant was angry about it but did not confront her at the time.

He was unable to find anything on Google. In her live evidence, Ms Gomes denied saying anything that could be considered as a racial slur but did say that it was likely to be *'Vai para'.* The likely meaning of the phrase was *'go back to Africa, blackie'.*

The Claimant did not include this incident in his written grievance, but it is likely that it was discussed in the grievance hearing on 19 October with Mr Walker. The Claimant was not aware that it had not been included in the minutes as he did not see the minutes until they were enclosed with the letter dated 11 November.

Ms Gomes is black and has black children and a black partner. We were not told that they were of African heritage. We do find on balance that she made the racial slur against the Claimant as stated above and that the Claimant's was deeply hurt by it.

Allegation 11

Ms Gomes approaching the Claimant at reception about a customer complaint

On 1 September, the Respondent was operating social distancing and had practices in operation specifying the number of people who could be in a room at the gym at any one time. This was as in keeping with government guidelines produced as a response to the continuing Covid-19 pandemic.

Residents and users of the gym had to book particular slots in the cardio or weights room before coming to the gym. They could do so online and a chart would be produced which would show who was booked in, what time and what slot and where there were spaces. A resident came to the gym and spoke to the Claimant on reception. The Claimant asked her what room she had booked to use. He advised her of the Covid-19 policy and told her that as she had booked a space in the cardio room she should stay there until she left the gym.

Later, a member of the team came to reception to say that there were too many people in the weights room, according to the Respondent's social distancing rules. The Claimant took the Respondent's iPad with him to the room to check who was in there. He noticed that the woman he had spoken to earlier was in the weights room. The Claimant asked her to return to the cardio room as per her booking. She gathered her belongings and moved to the other room.

It is likely that after she left the gym, the woman made a complaint to the Respondent's management that the Claimant had harassed her. There was a written complaint in the bundle which was signed off as coming from the *'owners'*, which were likely to be leaseholders who were members of the gym. The contents of that email were cut and pasted into Ms Gomes' email to the Claimant asking him to write his account.

The email from the owners had been sent to Mr Phillip Munn, Resort Director, who was the overall manager of the site. Mr Munn had called Ms Gomes into his office and passed the complaint to her to address.

When Ms Gomes spoke to the Claimant about the complaint, she did so on his arrival at work for his shift. She spoke to him about this at reception. It was not appropriate to talk to the Claimant about this in public, even if it was just to inform him that there had been a complaint and to ask him to write a statement about what had happened. The evidence was that there was a private office where this kind of conversation could have happened. That would have been more appropriate. Ms Gomes confirmed that she spoke to the Claimant about the customer complaint for between 5 – 10 minutes.

It was also Ms Gomes' evidence that she also spoke to white members of staff about conduct matters at reception. She did not think that there was anything wrong with doing so. This would also have been inappropriate.

As part of her investigation into the incident which Ms Gomes carried out after she spoke to the Claimant, Ms Gomes spoke to others who were on shift at the time of the incident. She passed all the information to Ms Minns. Mr Minns considered the information and replied to the owners. He told them the result of the investigation. He defended the Claimant and stated that the Claimant had been doing his job when he spoke to the woman in the gym. He was abiding by the Respondent's social distancing policy.

Unfortunately, the incident was posted on to the Residents Association Facebook page, which caused the Claimant some concern, especially as he was due to be on TV soon after this incident and because of all the PT work he does in social media spaces. One of the comments on Facebook referred to the harasser as the 'celebrity trainer', which was a clear reference to the Claimant.

The Claimant was convinced that Ms Gomes was responsible for the Facebook post but we did not have any evidence to support that belief. It is likely that there were other people in the room when the woman was asked to go back to the cardio room and it is likely that either they heard what happened or that she told them about it after she left the gym. She was clearly not pleased about being told to go to the other room and stick to her booking. There are many ways that this could have been posted on Facebook. There was no evidence that Ms Gomes had access to the Resident's Facebook page.

In his response to the owners about the complaint, Mr Minns referred to the Facebook post and asked for the disturbing post to be removed. He also stated that whoever was responsible should be told that such posts could have catastrophic consequences for someone's mental health and career. Mr Minns showed that he was aware of the likely impact on the Claimant and his livelihood and wanted the person operating the Resident's Facebook page to also be aware of the possible consequences of their actions, which they may not have considered before.

The Claimant called in sick on 4 September and it is likely that the incident and the Facebook post upset him and caused him stress and anxiety so that he felt unable to come to work.

Ms Gomes wrote to inform the Claimant of the outcome of the investigation and that Mr Minns had backed him in his response to the complaint. Once he received that email the Claimant felt able to return to work.

The Facebook post was eventually taken down.

Grievances

The Claimant's first grievance was raised by email on 4 September. The email was mainly about the resident's complaint, the Facebook post and its potential to damage his career, given that he was due on TV during the following month; and the stress and anxiety it had caused him.

The Claimant raised a second grievance on 15 September.

In that grievance the Claimant firstly complained about matters that concerned a previous gym manager. He then referred to most of the issues raised in this claim, apart from the racial slur that Ms Gomes made on 31 August.

Mr Walker was asked to hear the Claimant's grievance and a grievance brought by the Claimant's colleague Ade, just before the Claimant brought his.

Mr Walker emailed HR to ask whether it was okay for him to chair the Claimant's grievance hearing as he had prior involvement. HR responded to confirm that there was no reason that he should not chair the meeting and address the Claimant's grievance. With that reassurance, Mr Walker conducted the Claimant's and Ade's grievance hearings.

On 22 September the Claimant submitted a sick note because of stress. It was due to expire on 17 October 2020.

By letter dated 5 October the Claimant was invited to a grievance hearing on 19 October with Mr Walker. They knew each other as the Claimant had worked with him when he was first employed as they worked together at the opening of the gym at Royal Wharf. In the letter the Claimant was informed of his right to be accompanied by a work colleague or a trade union official. The Claimant was also informed in the letter that if his chosen companion could not attend, the hearing could be re-arranged.

The Claimant asked Simon Chandler to accompany him to his grievance hearing. It is likely that Ade also asked Simon to accompany him to his grievance meeting. Simon told the Claimant that he could not attend as Mr Walker had informed him that he could not. In Mr Walker's live evidence he could not recall saying so. The Claimant attended the meeting with a former resident. Mr Walker was unable to allow the former resident to accompany the Claimant as that person was neither a colleague nor trade union representative. He reminded the Claimant of the statement from the invitation letter that he could re-arrange the meeting so that the Claimant had some time to arrange for either

Mr Chandler or another colleague to attend. The Claimant was content to carry on with the meeting.

We find it unlikely therefore that Mr Walker told Mr Chandler that he could not attend. It is possible that Mr Chandler did not want to attend either the Claimant's or Ade's grievance meetings and used this as a way of getting out of having to do so. Even if that was not the case, we find it unlikely that Mr Walker told Mr Chandler that he could not attend the Claimant's grievance hearing.

In addition to Mr Walker and the Claimant, the grievance hearing was also attended by the office manager, Molly Smith, who took some notes. At the grievance meeting the Claimant and Mr Walker discussed the Claimant's grievance. During the meeting the Claimant stated that as an outcome he would like an apology from Ms Gomes for the way she had treated him since her appointment and to have minimal contact with her moving forward. He felt that she had created an unsafe workplace.

After his meeting with the Claimant, Mr Walker interviewed the Claimant's colleagues Simon Chandler, Lilliane Gomes, Dean Guttridge, Valentina Baricevic, Krasmir Yanchev and the senior coach, Ike Abeng. Ms Gomes and the Claimant sent Mr Walker additional documents after their interviews. Mr Walker wrote an investigation report and a decision letter was sent to the Claimant on 11 November, together with a copy of the minutes of the grievance hearing.

Mr Walker upheld the first point of the grievance which was that the Claimant had not had First Aid training despite asking for it on numerous occasions. He also upheld one aspect of the complaint about the one-to-one meeting that Ms Gomes held with the Claimant and that was that Ms Gomes had not sent the Claimant a copy of the meeting notes.

Allegation 12

Ms Gomes greeting white colleagues and not the Claimant

On 18 October, when Ms Gomes arrived at work, she said hello to everyone in the room but did not greet the Claimant. It is likely that she made it obvious that she was not speaking to the Claimant as Krasimir observed it and noted it in the email statement that he provided for the Claimant. It is likely that Krasimir got the date wrong in his witness statement, otherwise the incident he records matches the Claimant's allegation.

Krasimir described it as an awkward situation. We find it likely that by this time Ms Gomes knew of the Claimant's grievance and that it was about her. She had not been interviewed as part of the grievance investigation but it is likely that she knew about it and that the Claimant's desired outcome was to have minimal contact with her. She took that as an indication that he did not want her to speak to him, which was different.

Ms Gomes' evidence about this was inconsistent. In her witness statement she stated that she would have greeted everyone. In her live evidence she stated that she had not recollection of doing this but that if she had done, it would have been because she knew that he did not want to have contact with her.

Although the Claimant stated that Ms Gomes greeted only the white members of staff, we find it likely that there were also black members of staff present, such as Ade and that she greeted them. The only person left out of the greeting was the Claimant.

Allegation 13

Ms Gomes following the Claimant and Ade around the gym

At the end of October, the Claimant and Ade noticed that Ms Gomes was following them around the gym. She even went into the male changing rooms, when they went in there. When she was challenged about this at the time, the Claimant asked her why she was following him and micromanaging him. She told him that she can go where she pleases. In the hearing, she did not dispute this. She stated that she did so because she felt that the Claimant had been doing PT and not submitting the corresponding commission sheets. We find that she was closely observing the Claimant and Ade around the end of October 2020.

We find that Ms Gomes never spoke to the Claimant at the time during his employment about any suspicions that he was doing PT and not submitting the commission sheets. We did not have evidence that he was ever spoken to about this by any other member of management during his employment. This was not in her witness statement and was not in the Respondent's response. She only referred to her suspicions about the Claimant conducting PT sessions without declaring the commission to the Respondent in response to one of the Claimant's questions in cross-examination. It was unclear to us whether this was a real suspicion she had at the time or that she was simply retaliating to a question that the Claimant asked her.

In their one-to-one meeting, when Ms Gomes asked the Claimant for his PT folder, he asked her why she needed it as this was where he kept all his contracts, receipts, contacts and other details for clients he had worked with during the whole period of his employment. He had built a client base during that time and this was the result of his hard work. Ms Gomes told him that she needed it because there were cash in hand concerns at a previous gym she worked at. The Claimant was never spoken to about anything found in his PT folder.

Allegation 14

Ms Gomes informing the Claimant and Ade that they can no longer work the same shift

At the end of October 2020, the Respondent notified the Claimant and Ade that they could no longer work on shifts together. They had been working together on the same shift pattern for at least a year by this time. On of the parts of the Claimant's grievance that had been upheld was the allegation that he been asking for First Aid training for a while and had not been given that training. The Claimant's evidence was that Krasimir told him that he had been asked to change his shifts to accommodate the change in the Claimant's and Ade's shifts so that the Claimant and Ade were not on the rota together.

Although Ms Gomes stated that the reason for not allowing Ade and the Claimant to continue to work the same shifts was the lack of pool responder/First Aid training, we find that the Claimant had been asking for this training for a while and during that time, he had been working those shifts. He was not just pulled off a shift until the training was done. The shift pattern was reorganised so that they did not work together again. This was not a temporary change to facilitate training. If it was to facilitate training, the Respondent would have done this in a gradual manner and with notice.

We find that it was unlikely to be a coincidence that this occurred around the time that the Claimant's grievance was being considered by management and its consequences addressed. It is more likely that the splitting of Ade and the Claimant up so that they no longer worked together was related to the presentation of their individual grievances.

Findings not related to any particular allegation

On 12 November, the Claimant appealed against the outcome of his grievance. As part

of his grievance appeal, the Claimant made a Subject Access Request and a request for a full copy of the grievance minutes. He complained that he had not been given an opportunity to sign those minutes before they were sent to him on 11 November as an accurate record of the grievance hearing.

The Claimant's appeal related to the allegations of discrimination that Mr Walker had not upheld. He also appealed on the grounds that there had been insufficient investigation into the issues he raised.

Email correspondence between the managers and Ms Smith reveal that on at least one occasion she had asked the Claimant to look at and agree the minutes. The Claimant was at work at the time and therefore unable to do so. HR had advised Ms Smith that she should not send the minutes to the Claimant by email. This meant that he had not agreed the minutes before Mr Walker sent them to him on 11 November, as an accurate record of the meeting.

The appeal hearing was conducted by Rachel Hopping, Area Property Manager on 2 December 2020.

In their meeting, the Claimant indicated to Ms Hopping that he wanted to change to a part-time contact and to have minimal contact with Ms Gomes as part of the resolution of his grievance.

In her initial response to HR on 9 December, Ms Hopping confirmed that the Claimant wanted to work part-time so that he could have access to his daughter at weekends. She stated that she believed that he had grounds to be upset about how the rota worked out as on every occasion that he had access to his daughter, he had also been on the rota to work. This was so even though his managers had prior notice of those dates.

Ms Hopping also stated that the Claimant's PT folder should be returned to him.

The formal outcome of the grievance was set out in a letter dated 20 January. She upheld the grievance point that related to his PT folder being retained by Ms Gomes. Also, that he was not given the minutes of the one-to-one meeting with Ms Gomes in which they discussed his KPIs. However, she was unable to uphold the Claimant's complaint that he had been singled out.

Ms Hopping made suggestions to improve procedures across the business in relation to the conduct of KPI meetings, checking rotas, publicising job opportunities and internal recruitment. She recommended that most communication between the Claimant and Ms Gomes should be done in writing but she acknowledged that there would be times when there needs to be face to face communication and on those occasions, there should be someone present with them.

On 16 December the Claimant began the ACAS Early Conciliation process. The Certificate was also dated 16 December and the Claimant issued his ET1 claim form on 21 December 2020.

On 8 April 2021, the Claimant submitted a letter of resignation. This followed his unsuccessful application for the post of Senior Fitness coach in March, the grievance and grievance appeal and his unsuccessful attempts at getting the Respondent to agree to flexible working. He referred to all of those matters in his letter of resignation. He also complained of being subjected to unfair treatment and blatant race discrimination in the workplace and his disappointment in the Respondent's decision to reject the complaints of discrimination in his grievance. His letter of resignation also contained complaints about the times he had applied for promotion and had not been appointed. He stated that

these were the matters that led to his decision to submit his resignation.

The Respondent's HR team wrote to the Claimant to acknowledge receipt of his letter of resignation and to ask whether he wanted to discuss it and the concerns raised within it. The Claimant agreed and met with Anika Perez and Rachael Motojesi of HR on 12 April. We did not have any notes of that meeting but from the surrounding emails we find it likely that they discussed the Claimant's request to change to a flexible working contract, which had been highlighted by Ms Hopping as far back as 9 December. HR's letter to the Claimant after the meeting confirmed that he had until 16 April to let the Respondent know whether he wanted to confirm his resignation or to remain working at Royal Wharf on a 16 hours contract.

Ms Gomes began her maternity leave on 12 April 2021.

The Claimant accepted the 16 hours contract and remained employed by the Respondent until December 2022 when he was made redundant.

Law

The following is a combination of the law and the closing statements made by both parties, at the end of evidence.

The Respondent denied that any of the Claimant's allegations had taken place.

We were asked to consider complaints of direct race discrimination, harassment related to race and victimisation.

Direct Race Discrimination

The Claimant's complaint was of direct race discrimination contrary to section 13 Equality Act 2010. In this claim, the Claimant alleges that the Respondent treated him less favourably than white gym instructors in a number of instances. The Claimant is Black British.

In allegations (i) and (ii), the Claimant relied on an actual comparator, Simon Chandler, a white man also employed as a gym instructor at Royal Wharf. In relation to the other allegations, it was the Claimant's case that he was treated less favourably by the Respondent than all of the white gym instructors.

Harassment

5 The law on harassment is contained in section 27 Equality Act 2010:

"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 purposes or effect of

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

6 Section 27(4) states that in deciding whether conduct has the effect referred to in subsection (1)(b) set out above, 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.

7 The Tribunal was aware of the case of *Land Registry v Grant* [2011] EWCA Civ. 769 in which Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caused by the concept of harassment".*

8 In the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT stated that the conduct that is treated as violating a complainant's dignity is not so merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. The Tribunal is obliged to take the complainant's perspective into account in making that assessment but must also consider the relevance of the intention of the alleged harasser in determining whether the conduct could reasonably be considered to violate a complainant's dignity.

9 It is also important where the language used by the alleged harasser is relied upon, to assess the words used in the context in which the use occurred.

10 The Respondent disputed it had harassed the Claimant at all.

Victimisation

1. Section 27 of the Equality Act 2010 provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(*a*) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

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

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

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

The Claimant relied on the email of 15 September 2020 in which he raised his second grievance, as his protected act as it alleged a difference in treatment, harassment because of race and included some of the allegations mentioned at paragraphs (1) – (14) in the list of issues.

Burden of proof in discrimination cases

The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. Section 136 of the Equality Act addresses this and states that *"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. If A is able to show that it did not contravene the provision then this would not apply."*

In the case of *Laing v Manchester City Council [2006]* ICR 1519 tribunals were cautioned against taking a mechanistic approach to the proof of discrimination in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc [2007] IRLR 246)*.

In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation

that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

In assessing the facts in this case the tribunal is also aware of the comments made in the case of *Bahl v The Law Society [2003] IRLR 640* that simply showing that conduct is unreasonable and unfair would not, by itself, be enough to trigger the reversal of the burden of proof. Unreasonable conduct is not always discriminatory whereas discriminatory conduct is always unreasonable. It was also stated in the case of *Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865* that an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He only has to establish that the true reason was not discriminatory. Obviously, if unreasonable conduct occurs alongside other factors which suggest that there is or might be discrimination, then the tribunal should find that the claimant had made a prima facie case and shift the burden on to the respondent to show that its treatment of the claimant had nothing to do with the claimant's race and in so doing apply the burden of proof principle as set out above.

Applying law to facts

Credibility

In our findings above we have preferred the Claimant's evidence to that of Ms Gomes, whenever there has been a conflict in their evidence. We were aware that as the person accused of most of the acts of discrimination, Ms Gomes was likely to be feeling stressed about the case and defensive in court. However, we also found her evidence inconsistent in many places. In giving her evidence to the Tribunal she was difficult and evasive. In contrast, we found that Mr Walker and the Claimant were truthful and consistent and did their best to assist the Tribunal.

The Tribunal will now go through the list of allegations in the agreed list of issues set out at pages 38 – 41 of the hearing bundle and give our judgment in relation to each, applying the law set out above.

Direct Race Discrimination

The first set of allegations were of direct race discrimination. We will first answer the question posed at point 3 of the list of issues at page 40, which was whether these were acts of less favourable treatment.

If in our judgment, any of these allegations were acts of less favourable treatment, we will consider whether it/they occurred because of race, which answers point 4 on page 40 of the list of issues.

Was the treatment outlined in respect of each of the allegations less favourable?

Allegation 1

Being off the rota on Saturdays

It is our judgment that the Claimant made an oral application to Sean, his previous manager, after the contested access hearing giving him access to his daughter This led to a meeting with managers and an agreement that he would not be put in the rota every Saturday. This worked quite well until Ms Gomes started.

Ms Gomes refused to continue the arrangement that had been set up before she was appointed. She did not speak to HR before refusing and it is unlikely that she spoke to Sean or Ike as they would have been able to confirm or dispute the arrangement that the Claimant relied on. The Claimant provided his managers with the dates that he had access to his daughter, so that they could consider leaving him off the rota on Saturdays, to assist him. This did not happen and instead, he had to swap shifts every time he had access to his daughter, which made it uncertain that he would have the time off.

In our judgment this was less favourable treatment towards the Claimant.

We know that the Claimant was not the only parent who was also a gym instructor. We were not told anything about their situations as this was a complaint of race discrimination.

Allegation 2

Time off for a dental appointment

It is our judgment that the Claimant gave Ms Gomes lots of notice that he would need that time off for a dental procedure. He was told that he would need to take the time off as unpaid leave or use his annual leave. Simon Chandler was given medical leave by the same manager, around the same time. It is likely that he was told that he had to make up that time but the Claimant was not told this.

The Claimant was refused the leave and told that if he took it, it would be considered as annual or unpaid leave. It was only when he contacted HR later on that he was told that he would be paid sick pay. This caused the Claimant some stress.

It is our judgment that this was less favourable treatment.

Allegation 3

Unsolicited comment to Ade and the Claimant

It is our judgment that Ms Gomes said to Ade that she did not need to speak to

'people like you' and included the Claimant in that comment.

In our judgment, this was less favourable treatment as it singled them out and made them feel uncomfortable.

Allegation 4

One-to-one with Ms Gomes on 31 August

Although the Claimant believed that he was the only person given the KPI of bringing in one new client to the gym, in our judgment, it is likely that other gym instructors/personal trainers were given the same or a similar KPI. The Respondent was keen to rebuild its business after the lockdown which began in March 2020 and it is likely, that it would want everyone to assist with that.

The Claimant was sent a second email after the group email that all gym instructors got from Ms Gomes that day because of the information he gave to her in his response to the first email. There was a deeper dialogue between the Claimant and his manager about clients and what he could do to help bring them back.

It is our judgment that this was not less favourable treatment towards the Claimant. Even if it was different to his colleagues, it was not less favourable treatment.

Allegation 5

Not being allowed to PT in the gym

In our judgment, it would be difficult to work out whether someone is doing PT or just assisting a client, by looking into the gym. If the Claimant saw another instructor in the gym with a client, they could have been doing induction, PT or assisting them on a machine or with an activity. Similarly, when the Claimant was seen in the gym with someone, he could be doing anyone of those three activities.

The evidence did not support a conclusion that the Claimant was not allowed to PT in the gym at the same time as when his white colleagues were allowed to continue to do so. It was in the Respondent's interest to have the Claimant and his colleagues conducting PT as it brought business to the Respondent and income to the personal trainers.

Our judgment is that the Respondent had to stop PT from occurring between June and September for all instructors and as the national Covid-19 social distancing arrangements changed, they were allowed to conduct PT in the gym from around October.

It is our judgment that the Claimant has failed to prove that he was told that he was not allowed to conduct PT in the gym at the same time as his white colleagues were allowed to continue. This was not less favourable treatment.

Allegation 6

August 2020 – the first aid training

In our judgment this was an example of confusion in the way Ms Gomes managers the team and in the information that she had from her managers. She felt unable to agree to cover the Claimant's expenses to enable him to attend the training but did not respond to him to say so. There was no clarity for the Claimant. She also had not clarified with him whether he needed to travel to work and open up the gym first and then go on to the training.

Simon Chandler also seemed to be confused about entitlement to paid expenses, as he stated in his interview with Mr Walker.

The Respondent offered to pay the Claimant's expenses in November, to enable him to attend the training.

In conclusion, it is our judgment that this was not less favourable treatment if others also did not get their expenses paid or got them paid on occasion.

It is our judgment that this was not less favourable treatment.

Allegation 7

Ms Gomes' alleged comment on 29 August 2020

It is our judgment that Ms Gomes made this comment and that it was directed at the whole team that were at reception at the time. Ms Gomes spoke to all of them in a rude and inappropriate way. As a manager, Ms Gomes swore at some members of her team in public, in the reception area. This was not a good way to manage staff.

It is our judgment that this was less favourable treatment to the team.

Allegation 8

Ms Gomes' statement to the temporary member of staff

It is our judgment that Ms Gomes' statement to Cian that there was going to be a job at Royal Wharf soon was meant to send a message to the Claimant that his job was not secure. Whether or not she had the power to get him dismissed, she wanted him to believe that this was something she could make happen. There were no vacancies at Royal Wharf. Ms Gomes' maternity leave did not start until April 2021, some 8 months later and Cian was not in a position to apply to be her maternity leave cover.

In our judgment, both Cian and Simon Chandler thought that this was directed at the Claimant and they both made a point of speaking to him about it afterwards. It would have made the Claimant feel insecure in his job and wary of Ms Gomes.

In our judgment, this was less favourable treatment.

Allegation 9

Ms Gomes request for a list of previous and current clients

It is our judgment that Ms Gomes did ask the Claimant for his list of pervious and current clients, which he provided.

As we said above, the second email to the Claimant about this on 31 August was additional to the email she sent to all gym instructors. This was because they were having a dialogue about work.

In our judgment this was not less favourable treatment to the Claimant. He was asked for additional information and he responded, providing that information.

Allegation 10
Ms Gomes' use of a racial insult in Portuguese

It is our judgment that Ms Gomes said to her friend in Portuguese *'volt para'* or *'vai para'* and '*Africa blackie'* in the Claimant's earshot and that it was a racially insulting comment. It is also our judgment that this was directed towards the Claimant as a black man of African ethnicity.

Although the Claimant was unable to speak Portuguese, the parts of the phrase he heard reasonably led him to believe that his ethnicity was being referred to in a negative way by Ms Gomes to her friend. This was a racial slur and was deeply insulting and hurtful to the Claimant.

It is our judgment that this was less favourable treatment.

Allegation 11

Ms Gomes approaching the Claimant at reception about a customer complaint

In our judgment, it was less favourable treatment to the Claimant to be spoken to about the customer complaint in the open reception area. Ms Gomes's evidence was that there was no one in the reception area but it is unlikely that she checked before she spoke to the Claimant or that she closed all doors before doing so. Also, in our judgment, she could not be certain that a colleague or member of the public would not have walked by or come into reception while she was speaking and overheard her.

This discussion was not short as it took between 5 – 10 minutes. It would have been humiliating for the Claimant to be asked questions about this in public and at length in this way. It was perfectly within Ms Gomes' job to investigate the customer's complaint and it was right that she spoke to the Claimant first to get his side of the story before she continued her investigation. What was less favourable treatment was her decision to do so in public as he came through the door to start his shift.

It is our judgment that this was less favourable treatment.

Allegation 12

Ms Gomes greeting white colleagues and not the Claimant

It is our judgment that Ms Gomes came into the room and greeted other gym instructors but did not greet him. It is our judgment that it is likely that there were other black gym instructors in the room at the time and that she greeted them.

However, it is likely also that the Claimant had recently been informed of the Claimant's grievance and that he had asked for minimal contact with her, as part of its resolution. She told us that if she had not spoken to him it would be because he did not want to speak to her. She would only have got that from the grievance as the Claimant had not said that to her.

It is our judgment that this did not happen as alleged. Ms Gomes did greet other black gym instructors but she did not greet the Claimant.

Allegation 13

Ms Gomes following the Claimant and Ade around the gym

It is our judgment that in October 2020, Ms Gomes followed Ade and the Claimant around the gym, even into the male changing rooms.

It is also our judgment that this would have made them feel uncomfortable and that it was less favourable treatment. Even if she had suspicions about gym instructors conducting PT and not declaring it to the Respondent, she did not follow everyone around. She did not tell us why she suspected the Claimant and Ade and, if she suspected others, whether she also followed them around. She did not tell us what she hoped to see by following them around and how it would help the Respondent to stop Personal Trainers from conducting PT sessions without declaring them.

It is our judgment that this was less favourable treatment towards the Claimant.

It is this Tribunal's judgment that the Claimant has proved that he was treated less favourably in respect of allegations 1, 2, 3, 7, 8, 10, 11 and 13.

Looking at the burden proof provision at Section 136 Equality Act 2010 (set out above), it is this Tribunal's judgment that the Claimant has proved facts from which it could decide, in the absence of any other explanation, that the Respondent has discriminated against him. In those circumstances, the burden shifts to the Respondent to prove non-discriminatory, cogent reasons for the treatment. Those reasons must in no way relate to his race. If the Respondent is able to do so, then that will be the reason for the treatment and the race discrimination complaint will fail. If the Respondent is unable to show that the treatment was in no way related to race, then the Claimant would have succeeded in proving direct race discrimination.

We will now go on to consider the Respondent's reason for allegations 1, 2, 3, 7, 8, 10, 11 and 13. This is to ask the question at point 4 on page 40 – if so was it because of race?

Allegation 1

In March 2020 Ms Gomes told the Claimant that he could no longer have weekends off.

It is our judgment that this occurred because Ms Gomes did not want to make adjustments for the Claimant as a parent with caring responsibilities.

The Respondent has succeeded in proving that this related to the Claimant's responsibilities as a parent and not related to his race. The Claimant did not bring a complaint of less favourable treatment on the grounds of being a parent. That was not the case we had before us.

This did not happen because of race and this allegation fails as an act of direct race discrimination.

Allegation 2

Dental surgery - August 2020

The Respondent's explanation is that Ms Gomes did not know that the Respondent's handbook gave the Claimant the right to have paid leave for medical appointments. In our judgment that is not a credible explanation as she knew that it was possible when Simon Chandler asked for time off for a medical appointment around the same time.

In the absence of an adequate, credible explanation from the Respondent, it is this Tribunal's judgment that the Respondent refused the Claimant's request for paid time off to attend a medical appointment on 7 August 2020 on the grounds of his race.

It is correct that the Claimant did get the day authorised by HR after Ms Gomes refused him. This will be reflected in the remedy judgment, but it is our judgment that her refusal was less favourable treatment on the grounds of the Claimant's race.

Allegation 3

Unsolicited comment on 31st August 2020

It is our judgment the Respondent failed to give a credible, non-discriminatory explanation for this comment, which was directed to the Claimant and Ade, the two black gym instructors under her line management. We were not given a non-discriminatory reason for the comment as the Respondent denied that it had been made. It is our judgment that Ms Gomes did make the comment and that it was directed towards the Claimant and Ade and that it was done on the grounds of their race.

This less favourable treatment was done on the grounds of the Claimant's race.

Allegation 7

Ms Gomes' comment on 29 August 2020

It is our judgment that Ms Gomes stated to the whole team while they were at reception, 'you can't do your fucking job properly'. It was an inappropriate comment and swearing at staff should be unacceptable. It was also less favourable treatment but it was done to all of the gym instructors who were at reception at the time, which included the Claimant and Ade and white members of staff.

This was not done on the grounds of race. This complaint fails as a complaint of direct race discrimination.

Allegation 8

Ms Gomes' statement to the temporary member of staff

It is our judgment that Ms Gomes stated to Cian that there will be a job coming up soon at Royal Wharf. It is our judgment that it was said and that it was a reference to the Claimant's job.

The Respondent fails to give a credible, non-discriminatory explanation for this statement and the suggestion that somehow the Claimant was going to leave the company.

It is our judgment that Ms Gomes made this statement on the grounds of the Claimant's race.

Allegation 10

Ms Gomes' use of a racial insult in Portuguese

It is our judgment that Ms Gomes referred to the Claimant with a racial insult. She did so in his earshot, speaking in Portuguese. The reference to him was insulting. This was based on the Claimant's race and was a direct insult and less favourable treatment.

The Claimant succeeds on this allegation.

Allegation 11

Ms Gomes approaching the Claimant at reception about a customer complaint

It is our judgment that the Claimant was spoken to in the reception area about a complaint from a resident, which in the end was not upheld. Mr Minns backed the Claimant in his response to the owners because, the investigation conducted by Ms Gomes showed that he had done his job and nothing more.

In our judgment, there had been no need to speak to the Claimant about this in the reception area as soon as he got to work. There was an office that Ms Gomes could have used to have a private discussion with him about the complaint.

It is also our judgment that Ms Gomes had a habit of conducting management

meetings and management business with her staff in the reception area. This was entirely inappropriate and fails to take into account the effect that this could have on the member of staff. She stated that she did the same to Valentina and we agree that it is highly likely that she did so.

It is our judgment therefore that Ms Gomes did do this but that she did not treat the Claimant less favourably in relation to allegation 11, because of his race.

This allegation fails as an allegation of direct race discrimination.

Allegation 12

Ms Gomes greeting white colleagues and not the Claimant

It is our judgment that this was not less favourable treatment on the grounds of race as there were black gym instructors there who she greeted.

This allegation fails as an allegation of direct race discrimination.

Allegation 13

Ms Gomes greeting white colleagues and not the Claimant

It is our judgment that Ms Gomes was following around the two black gym instructors. Even if she had a suspicion that they were talking money from customers and not putting in the corresponding commission forms, that does not explain why she was only following around the two black members of staff.

As Mr Walker stated, this was an issue for the whole industry and not just the Claimant and Ade.

If Ms Gomes had real concerns that some gym instructors were cheating the Respondent out of some commission for private PT, she would have had team meetings where she told all staff to stop. We also did not hear of her following white members of staff around the gym. Whether or not Ms Gomes had real concerns about instructors not reporting their full PT income to the Respondent, this was not an appropriate and non-discriminatory way of addressing those concerns.

The Claimant succeeds. This was less favourable treatment on the grounds of race.

The Claimant has succeeded in proving direct race discrimination in relation to the following 5 allegations: - 2, 3, 8, 10 and 13.

The next claim we considered was the Claimant's complaint of harassment.

Harassment

Paragraph 5 of the list of issues asked whether the matters listed at allegations 1 – 13 above amounted to unwanted conduct?

It is our judgment that the conducted alleged in allegations 1, 2, 3, 7, 8, 10, 11, 12 and 13 were instances of unwanted conduct.

Paragraph 6 asks whether the conduct was related to race?

It is our judgment that allegations 2, 3, 8, 10, 12 and 13 were all related to the Claimant's race as a black British man of African ethnicity.

Paragraph 7 asks whether the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

It is our judgment that allegations 2, 3, 8, 10 and 13 set out above were also acts of harassment as they created an intimidating, hostile and offensive environment for the Claimant.

(Allegation 2) It was humiliating for the Claimant to be informed that he could not be paid for taking time to have dental surgery when his white colleague confirmed that he had been given a paid day off for a similar matter.

The fact that the Claimant did eventually get a paid day, once he approached HR does not mean that this did not happen or that he was not humiliated when Ms Gomes told him that he would have to take it as unpaid leave and he spoke to Mr Chandler who told him that he was being paid.

(Allegation 3) It was humiliating and offensive for the Claimant when Ms Gomes referred to Ade and the Claimant as '*people like you'* in the hearing of his colleagues. She was also overheard by the cleaners who sought out the Claimant and Ade afterwards to check in on them. That would have been humiliating for the Claimant.

(Allegation 8) It was humiliating and offensive for the Claimant to be told by Cian and Simon that Ms Gomes had indicated that he would be leaving soon and that his job might be vacant when she knew that he had no intention of leaving.

(Allegation 10) It was humiliating, offensive and degrading for the Claimant to overhear the insulting remark made by Ms Gomes in Portuguese.

(Allegation 12) It was an act of harassment when Ms Gomes chose to say hello to all the Claimant's colleagues and not to him. This was humiliating, embarrassing and hostile.

(Allegation 13) It was humiliating and violated his dignity when Ms Gomes followed the Claimant and Ade around the gym, even into the male changing rooms and did not stop when challenged.

It is our judgment that Ms Gomes' actions as described about had the effect of harassing the Claimant as described.

It is our judgment that the Respondent harassed the Claimant in these allegations and that the complaint of harassment related to race succeeds.

Victimisation

Paragraph 8 on page 41 of the list of issues states that the Claimant made a protected act by email dated 15 September 2020 when he alleged a difference in treatment and harassment because of race, including some of the acts mentioned above. The Respondent accepted that the email of 15 September was a protected act.

Allegation 12 -

It is our judgment that in choosing not to say hello to the Claimant but to greet everyone else, Ms Gomes was responding to the Claimant's grievance. She was

aware that he has raised a grievance and that she had been named in it and that he had stated that his preferred outcome was that they had minimal contact and that he did not want her to continue to be his line manager. It was for those reasons that she said hello to everyone else and not to him when she came to work. This was an act of victimisation.

Did the Respondent do the alleged acts referred to at paragraphs 9 and 10 on page 41 of the hearing bundle?

Allegation 9, page 41 – the allegation that the Claimant was not allowed to have his preferred companion at the grievance hearing

It is our judgment that on Monday 19 October, Mr Walker did not allow the Claimant's companion who he came with, the ex-resident, to attend the grievance hearing with him. The Claimant was entitled to be accompanied by a colleague or a trade union official and the former resident was none of those. It was not an act of victimisation to refuse to allow the former resident to accompany the Claimant.

It is our judgment that we had insufficient evidence from which to find that Mr Walker told Simon Chandler that he could not accompany the Claimant to the meeting. It is also likely that Mr Chandler did not want to get involved with either the Claimant's or Ade's grievances but did not want to tell them so. Even if we are wrong about that, it is our judgment that this did not happen because of the grievance.

Also, Mr Walker was happy to rearrange the hearing to allow the Claimant's chosen companion to attend. If he did not want Mr Chandler to attend he would have said so at that point rather than trying to accommodate his attendance.

Allegation 10, page 41

It is our judgment that the decision to split up the Claimant and Ade so that they no longer worked shifts together was an act of victimisation and happened in retaliation to the raising of the grievance.

The Respondent has stated that it was because the Claimant did not have First Aid training. The Respondent was well aware that the Claimant did not have First Aid training as he had been asking for that training for some time and had not been taken off the rota. This was so even after he failed to attend the training in August.

It is our judgment that the real reason the Respondent decided that the Claimant and Ade can no longer work shifts together was because they had both raised grievances and the Respondent did not want them to continue to work together.

This was an act of victimisation and the complaint succeeds.

The Claimant has succeeded in his complaints of direct race discrimination, harassment and victimisation.

The Claimant is entitled to a remedy for his successful complaints.

Should the parties come to an agreement about the remedy due to the Claimant, they should notify the Tribunal. If not, the Tribunal will list this matter for a hearing.

On 11 January, the Tribunal set this matter down for the provisional date of 21 February for a remedy hearing. EJ Jones was then allocated a 12 day hearing at the beginning of February which included 21 February. This meant that the provisional remedy hearing date had to be vacated.

The remedy hearing is presently set down for a provisional date of 31 March 2023. If this date is inconvenient, the parties must send in dates to avoid between 30 June and 31 December 2023, so that they hearing can be scheduled

In the interim, the Claimant is to sent the Respondent and the Tribunal a revised Schedule of Loss to take into account the fact that the Claimant has not been successful in all of his claims. This must be sent to the Respondent by 31 January 2023 together with any supporting documents such as the solicitor's bill referred to and the invoice and report from the psychiatrist that the Claimant referred to.

The Respondent must clarify if the Claimant was paid sick pay for the period of time that he was off sick. The Respondent must also clarify the Claimant's losses at that time – did he lose pension payments, commission, medical assistance payments?

Any witness statements must be exchanged by 31 January 2023. The Claimant's witness statement will outline his hurt feelings in relation to the successful allegations and the impact of the discriminatory treatment on him and his life.

The Claimant succeeds in his complaints of direct race discrimination, harassment and victimisation and the Tribunal will decide on the remedy due to him for his successful complaints at a hearing, the date of which will be notified to the parties as soon as it is agreed.

Employment Judge **Jones**

20 February 2023