EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr M Ithia		(1) MUFG Securities EMEA Plc (2) Michael Conway

Heard at: London Central **On**: 19-20, 23-27, 30-31 January, 1-3, 6-7 February and 31 March 2023

Before: Employment Judge H Stout
Tribunal Member S Campbell
Tribunal Member D Clay

Representations
For the claimant: In person
For the respondent: Ms T Barsam (counsel)

RESERVED LIABILITY JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Claimant's claim of unfair dismissal under Part X ERA 1996 (including automatic unfair dismissal under ss 100, 103A and 104 ERA 1996) is not well-founded and is dismissed.

(2) All claims relating to matters that occurred prior to 10 July 2020 were out of time and the Tribunal did not have jurisdiction to hear them, having regard to EA 2010, s 123, and ERA 1996, s 48(3).

(3) The Respondent has not contravened the EA 2010 by directly discriminating against the Claimant because of race, sex or age contrary to ss 13 and 39(2)(d) EA 2010. Those claims are dismissed.

(4) The Respondent has not contravened by the EA 2010 by harassing the Claimant for reasons related to race, sex or age contrary to ss 26 and 40 EA 2010. Those claims are dismissed.

(5) The Respondent has not contravened the EA 2010 by victimising the Claimant contrary to ss 27 and 39(4) EA 2010. Those claims are dismissed.
(6) The Claimant's claim that he was subjected to detriments for making protected disclosures contrary to s 47B ERA 1996 is not well-founded and is dismissed.
(7) The Claimant's claim that he was subjected to detriments for raising health and safety matters contrary to s 44 ERA 1996 is not well-founded and is dismissed.
(8) The Claimant's claim for wrongful dismissal is not well-founded and is dismissed.
(9) The Claimant's claim for unlawful deduction from wages is not well-founded and is dismissed.

REASONS

Introduction

1. Mr Ithia (the Claimant) was employed by MUFG Securities EMEA Plc (the Respondent) from 12 January 2011 until 15 July 2020. The Respondent is headquartered in London and provides securities products and services to corporate and institutional clients. It is part of the Mitsubishi UFJ Financial Group (MUFG), headquartered in Tokyo. The Claimant was initially employed as an Analyst until 1 January 2014 when he was promoted to an Associate. The Claimant's corporate title changed from Associate to Assistant Vice President (AVP) on 1 April 2018. The Respondent's position is that the Claimant was dismissed for gross misconduct (unauthorised absence). In these proceedings, the Claimant challenges the lawfulness of his dismissal, as well as other actions by the Respondent in the years prior to dismissal, and the handling of his appeal against dismissal by the second respondent, Mr Conway.

2. A table of contents for this judgment is appended to the judgment.

The type of hearing

3. This has been an in-person public hearing, but with a video link provided principally to enable the Respondent's solicitors and witnesses to observe remotely rather than having to attend the Tribunal.

4. The Tribunal room was open to the public and some members of the public joined for part of the hearing. Most of the bundles (including all those necessary for the purpose of following the proceedings) were available for

inspection by members of the public in the Tribunal room. The public was also invited to observe by video via a notice on Courtserve.net. A member of the press joined by that means for a short period. An oral request was made by a member of the press for documents to be sent electronically. It was unclear what documents were required and the member of the press was informed by the Tribunal clerk that they should make a written application explaining what they wanted and why, but no application was received during the hearing.

The issues

5. There were six preliminary hearings in this matter, as a result of which a number of claims that the Claimant had originally brought were dismissed or withdrawn or made the subject of deposit orders, some of which the Claimant paid (and so continues with), and some of which he did not and so were 'struck out' by virtue of Rule 39(4).

6. At one of those preliminary hearings, held over four days between 13-18 January 2022, it was decided by Employment Judge Adkin that the Claimant was not a disabled person within the meaning of s 6 of the Equality Act 2010 (EA 2010) by virtue of suffering headaches (eye strain, neck ache or shoulder pain) between 27 March 2019 and 15 July 2020. The Claimant was also refused permission at that stage to amend his case on disability to include other conditions including anxiety, depression, stress, and bradycardia. As a result, there are no disability discrimination claims before us.

7. During the case management process, it was also decided that the Claimant's equal pay claims (being claims for equal pay based on alleged like work/work of equal value with Employee 10, Employee 3 and (equal value only) with Employee 6 and a number of other named comparators) would be stayed pending the determination of the Claimant's other claims. We discussed with the parties the implications of this case management decision for this hearing as we were initially concerned that it presented a difficulty for the fair conduct of this hearing. This was because the Claimant was seeking in his witness statement for this hearing to raise matters relating to his equal pay claims that on the face of it we were not to determine at this hearing. However, after discussion with the parties, it was agreed that the Claimant was free to advance, as part of the evidence to be considered at this hearing, such arguments about sex discrimination in relation to pay as he wished insofar as he considered that those matters could form the basis for an inference of discrimination in relation to any of the claims that <u>are</u> listed before us for determination at this hearing. He did so, and the Respondent and its witnesses responded to the Claimant's points during the hearing. Where we have found that evidence relevant to the issues that we are tasked with determining, and found it necessary to reach conclusions in relation to that evidence in order to decide the case before us, we have done so. We recognise that some of our findings may have an impact on the equal pay claim. The extent to which that is the case will be a matter for argument between the parties in due course, but we did not consider that it would be

right for us to exclude evidence from this hearing that was relevant to the issues we have to decide simply because the Claimant still has equal pay claims to be determined that are currently stayed. Both parties were content with that course, and we were satisfied that it was an appropriate and fair way to proceed so that the interests of justice did not require us to vary the previous case management decision.

8. Following case management, the claims that fell to be determined by us at this hearing fell under the following jurisdictional headings:

    a. Direct age discrimination pursuant to s.13 of EA 2010 (LOI 4(a) and (b));
    b. Direct race discrimination pursuant to s.13 of EA 2010 (LOI 7(a) to (f) and 7 (i) to (l));
    c. Direct sex discrimination pursuant to s.13 of EA 2010 (LOI 9(a) to (f));
    d. Indirect race/sex discrimination pursuant to s 19 of the EA 2010 (LOI 7(g) and 9(g));
    e. Harassment pursuant to s.26 of EA 2010 (LOI 18(a) to (e));
    f. Victimisation pursuant to s.27 of EA 2010 (LOI 21(a) and (b));
    g. Detriment pursuant to s.44 of the Employment Rights Act 1996 (ERA 1996) (LOI 26(a) and (b) and 27 (a) to (c));
    h. Automatic unfair dismissal pursuant to s.100(1) of ERA 1996 (LOI 29(a) to (c) and 30);
    i. Detriment because of protected disclosures pursuant to s.47B of ERA 1996 (LOI 31(a) to (g) and 32);
    j. Automatic unfair dismissal pursuant to s.103A of ERA 1996 (LOI 37);
    k. Automatic unfair dismissal pursuant to s 104 ERA 1996 (LOI 38 and 39);
    l. Unfair dismissal pursuant to s.98 of ERA 1996 (LOI 40 and 41);
    m. Wrongful dismissal (LOI 42 and 43);
    n. Unauthorised deduction of wages (s 13 of ERA 1996) (LOI 46).

9. List of Issue (LOI) numbers are to the List of Issues as previously drawn up by the Tribunal and the parties (and now at pp 325-336 of the Pleadings Bundle), which we reorganised at the start of the hearing, so as to create a more manageable list as follows. During the course of the hearing, the Claimant also withdrew some of these complaints and we indicate these with ~~strike-through~~:-

    (1) Mr Niforas failure to put the Claimant up for promotion:
    ~~a. on 1 January 2015 (direct race (LOI 7a) and sex discrimination (LOI 9a); public interest disclosure (PID) detriment) (LOI 33a);~~
    b. on 1 January 2016 (direct age(4a), sex (LOI 9b) and race discrimination (LOI 7b); PID detriment) (LOI 33a);
    c. on 1 January 2017 (direct race (LOI 7c) and sex discrimination (LOI 9c); PID detriment (LOI 33a));
    d. on 1 April 2018 (direct race (LOI 7d) and sex discrimination (LOI 9d); PID detriment (LOI 33a));

e. on 1 June 2019 (direct age (LOI 4b), sex (LOI 9e) and race discrimination (LOI 7e); victimisation (LOI 22a); PID detriment (LOI 33a));
f. on 1 June 2020 (direct race (LOI 7f) and sex discrimination (LOI 9f); victimisation (LOI 22a); PID detriment (LOI 33a); comparators for direct race discrimination: Robert Dodge, Stefano Brachi and Angela Chana; comparator for direct sex discrimination - Angela Chana);

(2) Ignored requests for new equipment (direct race discrimination (LOI 7i); comparators: Employee 10, Ms Niforas, Mr Brachi, Mr Nagi, Ms Birkby, Ms Sidders and Ms Bagot):
a. new PC on 31 October 2017 and 20 January 2020;
b. screen protector on 29 November 2017, 3 April 2019 and 20 January 2020;
c. Microsoft Visio software on 18 January 2018; and
d. new headset on 3 September 2018 and 20 January 2020;

(3) Failure to offer the Claimant voluntary redundancy between 21 May 2019 and 31 August 2019 (indirect race/sex discrimination) (LOI 7g and 9g);

(4) Failure to carry out a health and safety risk assessment for over 8 months between April 2019 and 14 January 2020 (direct race discrimination (LOI 7j); health and safety detriments (LOI 26a); recommendations never completed prior to 15 July 2020) (LOI 26a)) and the Respondent informing the Claimant that he would be required to return to work on a phased basis from 23 March 2020 at a time when the Claimant was awaiting a response to his letter of 9 March 2020 and asking for adjustment to workstation and changes to duties advised by the Claimant's doctor, followed up on 19 June and 4 July 2020 (health and safety detriments (LOI 26b));

(5) Failure to award the Claimant a pay rise in the annual pay rise occurring in 2019 and 2020 (victimisation) (LOI 22c);

(6) Harassment on grounds of race/sex/age in January 2020(LOI 18):
a. On 7 January 2020, Mr Niforas verbally harassing the Claimant by speaking to him in an aggressive derogatory manner when receiving too many automated emails (SS 70) (LOI 18a);
b. ~~On 7 January 2020, Mr Niforas denying the Claimant any promotion, pay, bonus, or increased compensation (SS 70) (LOI 18b)~~;
c. On 17 January 2020, ~~Mr Boston, Mr Hammond~~ and Ms Kelliher bullying the Claimant regarding Mr Boston not receiving his data (POC 83 of 145) (LOI 18c);
d. On 23 January 2020, Mr Niforas threatening the Claimant for not signing dual hatting arrangements (SS 77)(LOI 18d);
e. ~~On 29 January 2020 Ms Owen discussing confidential matters others (SS 79) (LOI 18e)~~;

(7) Ignored advice from the Claimant's Doctor in relation to a phased return and/or workplace to make adjustment to duties and workstation in March 2020 and June 2020 (direct race discrimination (LOI 7k));

(8) Failure to provide severance package on dismissal 15 July 2020 (direct race discrimination (LOI 7l); victimisation (LOI 22e); PID detriment (LOI 33(b)); comparators for direct race discrimination: Employees 7, 8 and 9);

(9) Dismissal (unfair dismissal (LOI 40, 41); automatic unfair dismissal because of PID(LOI 37) / health and safety (LOI 29, 30) / asserting statutory rights (LOI 38-39); victimisation (LOI 22d));

(10) Wrongful dismissal (LOI 42/43);

(11) Delay in carrying out the appeal (victimisation (LOI 22f));

(12) Unlawful deduction of wages - Holiday pay (LOI 46).

10. The matters relied on as alleged protected acts/disclosures for the purposes of the victimisation, detriments and automatic unfair dismissal claims are as follows:-

(A) Protected acts relied on for the purposes of the victimisation claims under EA 2010, s 27:

a. Referring to a request for reasonable adjustments on 3 April 2019, 9 March 2020, 18 March 2020, 23 March 2020 and 19 June 2020 (LOI 21a);
b. Making a disclosure request in relation to equal pay on 26 Mar 2019, 6 Jun 2019, 24 Jul 2019, 18 Oct 2019, 29 Jan 2020, 11 Jun 2020, 4 Jul 2020, 20 Jul 2020, 24 Nov 2020 and 22 Jan 2021 (LOI 21(b).

(B) Health and safety matters relied on as reasons for detriments claimed under ERA 1996, s 44 and/or automatic unfair dismissal under s 100 (the alleged danger being the risk of harm to the Claimant's health of the Respondent's alleged failure to make reasonable adjustments (LOI 28) or – dismissal only - the risk of Covid exposure from R1 sending couriers to his house (LOI 30)):

a. alleged to have brought to R1's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety on 3 April 2019, 6 June 2019, 24 June 2019, 18 October 2019, 14 January 2020, 29 January 2020, 4 February 2020, 9 March 2020, 18 March 2020, 23 March 2020, 11 June 2020 (for 29a),19 June 2020 and 4 July 2020 (Grievance) (LOI 27a and 29a);
b. in circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not have

reasonably been expected to avert, the Claimant left (or proposed to leave) or (while the danger persisted) refused to return to his place of work on 23 March 2020 (dismissal - LOI 29b), 11 June 2020, 19 June 2020 and 4 July 2020 (Grievance) (detriment relies on all four dates - LOI 27b);

c. In circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger by bringing it to R's attention on 11 June 2020, 19 June 2020 and 4 July 2020 (Grievance) (LOI 27c, 29c);

(C) Alleged protected disclosures relied on for the purposes of the PID claims:

a. Between 2012 and 2013 reported to Employees 7 and 8, Mr Davies, Mr Fenton and Mr Ward that client money was not placed in segregated accounts but was left in the Respondent's account (see p33 of C's "particulars" dated 1 March 2021) (LOI 31a);
b. On 14 January 2020 disclosed to Ms Owen in writing that he "would report the health and safety assessment failure, which had gone on for over 8 months to the HSE and/or local authority." (LOI 31b)
c. On 11 June 2020 disclosed to Ms Owen in writing that bullying, harassment, discrimination and victimisation and a failure to make reasonable adjustments placed him in imminent danger (LOI 31c).
d. Grievance dated 6 June 2019 (LOI 31d).
e. Grievance dated 29 January 2020 (LOI 31e).
f. Grievance dated 19 June 2020 (LOI 31f).
g. Grievance dated 4 July 2020 (LOI 31g);

(D) Allegations of infringement of statutory rights relied on ERA 1996, s 104 claim:

a. The duty to make reasonable adjustments (on 3 April 2019, 9 March 2020, 18 March 2020, 23 March 2020 and 19 June 2020)(LOI 39a).
b. Pension rights (6 June 2019, 29 January 2020, 19 June 2020 and 4 July 2020) (LOI 39b).
c. Requests for disclosures in relation to equal pay made on 26 Mar 2019, 6 Jun 2019, 24 Jul 2019, 18 Oct 2019, 29 Jan 2020, 11 Jun 2020, 4 Jul 2020, 20 Jul 2020, 24 Nov 2020 and 22 Jan 2021 (LOI 39c).

11. All claims are against the (first) Respondent. Issue (11) as identified above is also a claim against Mr Conway personally as second respondent.

The Evidence and Hearing

12. We received 20 bundles of documents as follows, not all of which were we in the end referred to:-

    a. Main Hearing Bundle, Volumes 1-7, separately paginated (referred to as "VX/y" where "X" is the Volume number and "y" is the page number);
    b. Claimant's Combined Grievance Bundle, Volumes 1 and 2 (GB1/y and GB2/y respectively);
    c. Claimant's Disability Documents (CDD/y);
    d. ET Orders Bundle (OB/y);
    e. Pleadings Bundle (PB/y);
    f. Supplemental Bundle (SuppB/y);
    g. Final Claimant Bundle;
    h. Final Job Descriptions Bundle, Volumes 1 and 2;
    i. Main Preliminary Hearing Bundle;
    j. Performance and Compensation Data Bundle (PACD);
    k. PH Witness Statement Bundle;
    l. Supplementary Hearing Bundle – Final.

13. We also received 10 videos and audio recordings provided by the Claimant, one of which (the audio recording of the Claimant's telephone call with Ms Owen on 19 June 2020) was played in open Tribunal and the remainder of which we viewed privately 'in chambers'.

14. We were also provided during the hearings with some additional documentary evidence including Age Range data for some employees, and Updated Pay Data Table and a copy of Mr Niforas's email to Mr Syson of 24 January 2020, 18:23.

15. We explained to the parties at the outset that we would not read all the documents, but only those which they had referred to in their statements and submissions and to which we were referred in the course of the hearing. We did so.

16. From the Claimant, we also received a witness statement and chronology, and the chronology was with the parties' consent treated as part of his evidence. He was cross-examined by the Respondent's counsel and the Tribunal also asked questions. For the Respondent, we received witness statements from the following witnesses, each of whom was cross-examined by the Claimant and questioned by the Tribunal:-

    a. Mr Niforas (joined the Respondent in August 2007; since June 2019 Director level and Head of Master Data Management within the Information and Data Management (IDM) department; previously from November 2013 Vice President with responsibility for the Market Data team; the Claimant's line manager at all material times);
    b. Mr Syson (joined the Respondent in September 2010; between October 2019 and April 2022 Chief Data Officer for EMEA, International Head of IDM and EMEA Head of Financial Planning and

Analysis and Mr Niforas' line manager; since April 2022 Chief Financial Officer for EMEA and International Securities);

c. Ms Owen (joined the Respondent in August 2010; Head of HR Advisory and Employee Relations until October 2022; now Co-Head Chief Human Resources Officer EMEA and HR Business Partner to the Global Corporate and Investment Banking and Global Markets);
d. Mr Williams (worked for the Respondent between 19 August 2019 and 30 September 2022 as Head of Human Resources for EMEA, Managing Director level; disciplinary hearing manager for the Claimant);
e. Mr Conway (from 29 June 2020 to 3 March 2021 Employee Relations specialist, Vice President level; assigned to advise Mr Robertson on the appeal in the Claimant's case);
f. Mr Robertson (since October 2016 International Head of Change and from May 2019 also Head of Change and Transformation EMEA; appeal hearing manager for the Claimant).

17. Witness statements were also provided by the Respondent for the following witnesses, and they would have been made available by the Respondent for cross-examination, but were not made available as a result of the Claimant withdrawing his allegations against them in the course of the hearing. It was agreed that we could take their evidence 'as read':

    a. Mr Boston (joined R1 on 3 September 2007; Director level, Front office);
    b. Mr Hammond (joined R1 on 26 April 2010; Director level, Equity Derivatives Group).

18. The Respondent also submitted a witness statement for Ms Kelliher (contractor 30 November 2016 to May 2020, then permanent employee to 2 September 2022; Change department). The Respondent announced at the start of the hearing that it would not be tendering her for cross-examination because she had left the Respondent's employment and did not wish to participate and the Respondent did not wish to compel her by witness order.

19. The Respondent was represented by counsel and solicitors throughout. The Claimant represented himself. He did so with a high degree of competence. He was well prepared, navigated the complex bundles with apparent ease and conducted courteous, well-structured cross-examinations of the Respondent's witnesses. He wore a face mask throughout the hearing.

20. We explained our reasons for various case management decisions carefully as we went along.

Rule 50

21. An order under Rule 50 had previously been made by Employment Judge Adkin on 11 October 2022 in respect of the identities of individuals relied on by the Claimant as actual or evidential comparators. At the start of the

hearing, it was agreed between the parties, and we also considered, that his order had been drafted more widely than was necessary (and, the parties maintained, more widely than was intended) to protect the interests of those individuals under Article 8 of the European Convention on Human Rights, bearing in mind the need to give full weight to the principle of open justice and the Convention right to freedom of expression. In our judgment, the appropriate order, which we consider it is also appropriate to maintain in this public judgment, is that: (i) the identities of three employees who were alleged, or (in one case found by the Respondent) to have been involved in wrongdoing in 2012/2013 should not be revealed in public; and (ii) other employees should not have details of their pay or performance reviews made public. The reasons for that are as follows:-

22. As to (i): only one of the three employees who were alleged to have been involved in wrongdoing in 2012/2013 was issued with a disciplinary warning in relation to misconduct, we have little evidence about the circumstances of the other two, none of them are aware of these proceedings, and nor is there reason for them to be made aware. Their identities are irrelevant to the issues we have to decide and it would in our judgment clearly be unfair, and liable to cause unwarranted interference with their careers and Article 8 rights in future, for the allegations and matters on which the Claimant relies in these proceedings to be made public a decade after the events in question.

23. As to (ii), although we have mentioned many of the employees in question by name both at the hearing and elsewhere in this judgment, details of their pay and specific content of their performance reviews (not just the 'bare' grading) are matters about which they would in our judgment have a reasonable expectation of privacy, and, although we have not heard direct evidence from any of these employees, we consider that revealing this information publicly is likely to affect their Article 8 rights in terms of their personal and professional relationships with colleagues and, potentially, future employers. None of these employees has played any active role in these proceedings, they have all been introduced merely as comparators. So far as their pay or intimate details of their performance reviews are concerned, there is in our judgment no real public interest in knowing the names of the employees; although names are important, the judgment is comprehensible without that information. Although some of the employees are mentioned by name elsewhere in the judgment, with the exception of Employees 3, 6 and 10, we do not consider that there is any real risk in this case of any member of the public being able to work out who they are from the judgment. Other members of the Respondent's staff may be able to do so, but we consider that this may have been possible even if we had anonymised all comparators all the way through the judgment. It is still, in our judgment, appropriate to grant anonymity in relation to these details as that provides an appropriate measure of protection for the individual's Article 8 rights, whereas not anonymising provides no protection at all. For Employees 3, 6 and 10, we consider that the only effective way of protecting their Article 8 rights is to anonymise them throughout the judgment, for others we have anonymised them only in the section dealing with pay.

24. In this case, therefore, we consider that the appropriate course in this judgment is to maintain the position adopted at the hearing (extended slightly to include the details of performance reviews), anonymising the three individuals involved in wrongdoing in 2012 and 2013 and the individuals mentioned in sections of the judgment dealing with pay and performance reviews. In doing so, we have adopted the Code agreed between the parties during the hearing.

The facts

25. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities. Our findings of fact follow a broadly chronological order, but are not wholly chronological as it is convenient to draw together some of the relevant facts by theme and topic. In the course of our findings of fact, we making findings where appropriate as to the conscious thought processes of the individuals that the Claimant in these proceedings accuses of unlawful conduct. We then address in our conclusions section whether there is any inference to be drawn that in relation to any of these matters those individuals were unconsciously motivated by any of the unlawful factors on which the Claimant relies.

Overview of the Claimant's employment

26. The Claimant describes himself as a black male born and raised in the UK with African/Kenyan ethnic origin. He was born in 1974 and so was aged between 41 and 46 during the period of events with which we are concerned (2015-2020).

27. The Respondent is an investment bank with headquarters in London. It is part of the MUFG global group, which is headquartered in Japan.

28. The Claimant started working for the Respondent on 11 January 2010 as a contractor reporting to Employee 7. On 12 January 2011 the Claimant converted to permanent employment as Analyst within the Operations Department (V1/8) on a salary of £50,000pa, still reporting to Employee 7.

29. With effect from 4 November 2013 the Claimant moved to the Market Data Team in the Data Management Group, reporting to Mr Niforas (V1/196).

30. On 1 January 2014 the Claimant was promoted up one rung to Associate (V1/206) and his salary was increased to £55,000 to reflect that promotion (V1/207). The Claimant had been nominated for promotion by the Operations Department prior to the Market Data team being formed.

31. With effect from 1 July 2016 the Claimant's salary was increased to £60,000.

32. On 11 November 2016 the Claimant commenced a period of sabbatical leave (V2/186) which lasted until 4 September 2017 (V2/186).

33. On 1 April 2018 the Claimant's corporate title was changed to Assistant Vice President (AVP) (V3/127). This was not a promotion, but a change in the name of the corporate title, implemented across the Respondent.

34. The Claimant raised formal grievances with the Respondent on 6 June 2019 and 29 January 2020.

35. Mr Niforas remained the Claimant's line manager throughout the remainder of his employment. The Claimant was not nominated for promotion in any year from 2015 onwards, or awarded a pay rise, at any point after July 2016.

36. The Claimant had a period of sickness absence through stress in 2013, a period of sickness absence in March/April 2019 because of *"headaches"* but no other absences until 6 February 2020 (V4/134), when he commenced a period of absence that was initially certified as stress-related. In the circumstances we describe further below, following a disciplinary process, he was summarily dismissed by the Respondent on 15 July 2020 for, the Respondent says, unauthorised absence, which the Respondent classified as gross misconduct.

37. The Claimant appealed against his dismissal and also commenced these proceedings.

Organisational structure and culture

38. The Respondent provides securities products and services to corporate and institutional clients. It has over 2,500 employees in London. It is split into Front Office departments and Support Function departments. The Support Function departments include Information and Data Management (IDM) as well as others such as Compliance, HR, Technology and Legal. Between 2013 and 2019 the Head of IDM was Mr Gully. In June 2019 Mr Gully left and on 30 September 2019 Mr Syson replaced Mr Gully as the Head of IDM and Mr Niforas' manager. Mr Niforas at that point became Head of Master Data Management within IDM.

39. The IDM department delivers data and reports to the relevant people in the business based on agreed timelines and quality checks. The Market Data team within which the Claimant worked is one of the teams within IDM. The other teams included, for most of the period with which we are concerned, MI Development, Reference Data, Finance Reporting, Risk Reporting and Data Governance. The Market Data team was primarily responsible for the accuracy of market data. The Reference Data team was responsible for other data types including counterparty data (data relating to the clients with which MUFG transacts) and instrument data (i.e. data relating to the set-up of the products MUFG transacts).

40. The Respondent organises its employees by reference to role, team, reporting lines and corporate titles. Broadly speaking, role, team and reporting lines are functional: people have particular jobs to do, sometimes with functional job titles as part of functional teams that are organised in a traditional pyramidal hierarchical line management structure. Alongside that, in common with many organisations in the financial sector, there is a system of corporate titles. At the respondent, the corporate titles reflect (or determine) both seniority within the organisation and the nature of the work the individual does, or is expected, to do. In order of seniority, the corporate titles, and the summary description of what is expected of an individual with that title, are as follows. We take the summary description from the 2015 Performance Framework, but the descriptors were similar in all years:

    a. Officer – "*Administrative or clerical support roles";*
    b. Analyst – "*Developing professional and/or subject matter expert; senior level administrative and clerical roles"*;
    c. Associate (later called Assistant Vice President (AVP)) – "*Utilises subject matter expertise to bring change or process improvement; responsible for supervising a distinct process, project or sub-team; managing a client relationship";*
    d. Vice President (VP) – "*Responsible for managing a distinct team or project within a Department; advises on significant business and/or product decisions; managing multiple client relationships";*
    e. Director – "*Comprehensive knowledge and significant expertise and credibility in own speciality and credibility in own speciality; Actively foster relationships with other parts of the Group and firm and recognised as contributing outside own department";*
    f. Executive Director – "*Department or Section Head; leadership responsibility for a team with significant levels of accountability and responsibility";*
    g. Managing Director – "*Head of a significant Department or Desk; may have international scope; well respected internally and acts as a role model for leading teams".*

41. Functional jobs or job titles were not always linked to corporate title. Indeed, during the period with which we are concerned, an employee could in principle be promoted through the corporate titles while remaining in the same functional role (provided that they were regarded as fulfilling the criteria for promotion in this way – to which we come below). Conversely, an employee could be moved to, or (for a vacancy advertised internally) apply for, a different functional role, higher up the line management chain, without their corporate title changing – even if the new role was previously occupied by an employee of a more senior corporate title.

42. The Respondent's witnesses described this as an 'entrepreneurial' system, in which employees are encouraged and expected to drive their own career development by 'growing' their own role so as to put themselves in contention for promotion. We return in more detail to the issue of promotion below, but we observe at this point that although the system evidently did work on an

entrepreneurial model in some cases (Employee 6 may be one example), it would be naïve to regard this as an egalitarian, capitalist model. Without support from those above them in the management hierarchy, particularly direct line managers, an employee is likely to struggle to 'grow' their own role. The reality in many cases (as we have seen below) is that an employee will gain the *opportunity* for a promotion as a result of a discretionary managerial decision (taken outside of the Respondent's performance and review frameworks) as to who would be the 'best fit' for a particular role (as appears to have happened with Mr Brooks in 2016). Such an approach lacks transparency and risks perceptions of (and possible actual) inequality of opportunity. It seemed to us that a significant part of the reason why the Claimant brought this claim was his genuine and heartfelt sense of grievance that he had not been afforded those sorts of discretionary opportunities, that he felt he had as a result been 'left behind' by his peers and that he had come to believe that his race had played a part in his treatment by the Respondent. The difficulty is that the Claimant did not, despite having ample opportunity to do so in the course of the case management process, identify any of those discretionary-type decisions as the subject of his claim and so we have not heard the evidence in relation to what happened on any particular occasion and can draw no conclusions as to the factors that were at play in those decisions. We have, however, scrutinised with care the actual claims that the Claimant has brought, taking into account what we will term his 'big picture point' that he did not (as is not in dispute) get any of those discretionary opportunities that put some of his colleagues in a position where they were promoted.

The Market Data team and the Claimant's job descriptions

43. The Market Data team formed as a new team in November 2013. The original team consisted of just Mr Niforas, Employee 10, the Claimant and one other Analyst. Mr Niforas and Employee 10 were at that point two rungs above the Claimant and the other Analyst on the Respondent's corporate title ladder, being VPs. Employee 10 had been a VP since 2006 and Mr Niforas had played no part in making her a VP. Additional employees were recruited shortly afterwards. The team remained relatively small, however, consisting of five or six employees for the period with which we are concerned. Apart from Employee 10 and Mr Niforas all the other employees in the team were at all times either at the same or lower corporate level than the Claimant. The promotion to Associate in January 2014 put the Claimant one rung below Mr Niforas and Employee 10 on the corporate ladder.

44. The team structure remained like that until June 2019 when Mr Niforas, who had by that point been given line management responsibility for both the Reference Data team and the Market Data team, was promoted to Director and became Head of Master Data Management. That left Employee 10 as team leader for the Market Data team, while Mr Brooks headed up the Reference Data team. Finance Reporting was lead by Hannah Le. (We return to the circumstances in which Mr Brooks and Employee 6 obtained those

roles below.) By November 2019, the combined team was called Shared Service Data Management.

45. The Claimant's responsibilities included making payments to external clients, managing assets, pricing of securities, centralising data and working on various firm-wide improvement projects for the respondent.

46. The Respondent has job descriptions for roles. Job descriptions were high-level and, as the Claimant accepted in cross-examination, did not describe everything that a person did in the role. The Claimant and Employee 10's job descriptions in the very first year that they worked together in the Market Data team were very brief (just one page of bullet points) and identical, save for the difference in corporate title (V1/194; V1/190). Job descriptions were revised and re-signed on an annual basis. Job descriptions for all roles within the Market Data team were very similar, regardless of whether the individual was an Analyst, Associate or Vice President. The Claimant considers that the only year in which his job description was different to Employee 10' was 2016 (V2/94) when he had some additional responsibilities that she had the previous year. However, in all years their job titles were different, aligned to their different corporate titles and in most years there were differences between the Claimant's and Employee 10's job description as hers included wording denoting management or leadership responsibility, such as referring to her taking a *"leading role"* on various duties, whereas the Claimant's just said *"active role"* (V2/107), or Employee 10' (V2/196) including a requirement *"to guide projects"* (V2/196), which was not in the Claimant's (V2/199). We observe that while these are small differences, they are in our judgment significant because whether or not someone has a leadership role is (in our experience) universally regarded by employers as making a significant difference to the job. We further observe that, on the basis of the evidence we have heard, in practice what was expected of someone in any particular role depended on their corporate title, as indicated by the short descriptions of performance in each title we have quoted above, as well as the more detailed descriptors in the Respondent's promotion and performance review documents. In principle, those expectations were to be reflected in the objectives set for individuals each year in the performance review process and that does appear to have happened in Employee 10' case. For example, in the 2015 performance reviews, Employee 10 had been set the objective of 'taking a leading role in EDM' (PACD/36), whereas the Claimant's corresponding objective was 'facilitate in the implementation and switch over from Murex 2.11 to Murex 3.1 learning the relevant Market Data processes' (V1/247) and 'play an active role with the implementation of the new Market Data Management System' (V1/248). As such, the fact that the job descriptions always referred to the Claimant's and Employee 10' different corporate titles, imported a number of further differences between their jobs into their job description because, in our judgment, the job descriptions must be read as if they incorporate the expectations of the corporate title to which they refer. We therefore conclude that the Claimant's and Employee 10' job descriptions were in all years materially different to each other, and Employee 10' job description reflected her more senior role.

47. The Claimant has for many years held the belief that he was doing 'the same job' as Employee 10 and should have been promoted to VP and paid the same as her. That is his equal pay claim which is not one of the issues we are determining at this hearing. What we have to decide for the purposes of determining the issues before us is whether an inference of sex, race or age discrimination in respect of any of the issues that are before us may be drawn from the differences in treatment between the Claimant and Employee 10. We deal with this in our conclusions below. For present purposes, it suffices to record that we find as a fact that Mr Niforas believed at all relevant times that, although the whole Market Data team worked together on the same tasks, Employee 10 was fulfilling a different role or function to the Claimant as she was at a different corporate level. We accept his evidence that he did not consciously perceive there to be anything wrong or unfair about this situation that he had inherited when the Market Data team was set up, and which he maintained throughout the period with which we are concerned, i.e. the situation of the Claimant being an AVP, and Employee 10 being a VP, and there being a significant difference in their pay commensurate with that difference in seniority. As we note further below, in the light of Mr Niforas' annual assessments of both the Claimant's and Employee 10' performance, which were that they were both generally fully meeting (but not usually exceeding) expectations when assessed against objectives that reflected their different corporate titles, we further accept that Mr Niforas had reasonable grounds for his genuine belief that the Claimant and Employee 10 not only were in name at different corporate levels, but that this was appropriate and fair and reflective of their performance.

The Claimant's contract of employment

48. The Claimant's contract of employment was signed by him on 8 January 2022 and commenced on 12 January 2011 (V1/8). Some of the provisions of his contract have a bearing on the issues with which we are concerned and we set them out here.

49. As to sickness or injury, the contract provides at paragraph 11:

> **11. Sickness or injury**
> (a) You (or someone on your behalf) must inform the person to whom you are responsible of any absence from work due to sickness or injury at the earliest opportunity. Your entitlement to any payment for such absences, including the procedures to be followed in respect of such absences are set out in section 21 of the Company Procedures Manual (Human Resources section) and as set out in (b) below.
>
> (b) In the event that you have been absent through sickness for twenty eight consecutive weeks and you have exhausted your entitlement to Statutory Sick Pay, the Company may at its discretion thereafter terminate any benefits to which you are at the time entitled under your contract of employment including, but not limited to, the benefits set out in clause 9 of this Agreement.
>
> (c) The Company may in its absolute discretion require you at any time, whether or not you are absent from work, to attend such medical examination as it may in

> its sole discretion require by a registered Medical Practitioner nominated by the Company and you shall, subject to the provisions of Access to Medical Reports Act 1988 authorise the Medical Practitioner to disclose and discuss with the Company the result of any medical examination.

50. The Claimant argues in these proceedings that as a matter of contract he only needed to notify his employer at the start of sickness absence and that he did not need to do anything further. He says he has not received section 21 of the Company Procedures Manual. However, we find that the effect of the above clause of his contract is not to limit his obligations on being sick to an initial notification to his line manager, or to compliance with section 21 of the Company Procedures Manual. The contract is just the starting point for his obligations to his employer in the event of sickness. The contract also refers (at clause 12) to the Respondent's Company Procedures Manual, which is expressed to be non-contractual and capable of amendment from time to time. In fact, the Respondent's policies and procedures are now set out in a Handbook, which is published on the Respondent's intranet, and which we are satisfied was available to the Claimant at all times during his employment. In accordance with normal employment practice, and the commonly implied term that an employee will follow reasonable management instructions (a term which we find of necessity or as a matter of obvious common intention formed part of the Claimant's contract), the Claimant was required to adhere to the Respondent's policies in respect of sickness absence as set out in the Handbook (see further below).

51. As to place of work, the contract provides:-

> **14. Place of Performance**
> (a) Your normal place of work shall be the Company's offices at Ropemaker Place, 25 Ropemaker Street, London, EC2Y 9AJ, although you shall also work at such other location as may be required by the Company (temporarily or permanently), for which reasonable notice will be given.

52. The Claimant at one point sought to argue, reading out only the first part of that clause, that its effect was that he could not be required to work from home, as happened during the Covid-19 lockdown and the period prior to his dismissal on 15 July 2020. However, on the Tribunal pointing out that he was only reading part of the clause, he did not pursue this argument further, but he did seek both during his oral evidence and in closing submissions to argue (faintly) that it was unreasonable for him to be required to work from home, saying (in closing submissions): *"if you are a plumber and go out to work, you don't go home and start fiddling with the taps, if you go to work you don't naturally go home and work, I categorically said I would go to the office"*.

53. As a matter of fact at the Respondent, prior to the Covid-19 pandemic employees worked almost exclusively from the office, with only very occasional home-working which, if it was anything more than ad hoc, would have to be specifically authorised by a home-working agreement. During the first lockdown in 2020, however, as we set out further below, the Respondent required all of its employees to work from home if they could reasonably do so, and most of its 2,500+ workforce did work from home for several months.

The Respondent's policies

54. The Respondent has an Employee Handbook (V6/127) which is updated from time to time and, as we have noted, was published on its intranet and available to the Claimant at all times while he was at work. When he was absent from work from 5 February 2020 onwards, it would not have been available to him, but only because he had failed to arrange remote access when asked to do so (in circumstances we describe below). During the disciplinary process, the Respondent intended to send him a copy of its Employee Handbook, but in fact by error sent him a copy of the MUFG Bank Employee Handbook. Neither party has identified any material difference between these two documents (or between the document we have dated April 2020 and any earlier version there might have been), so we refer to the Respondent's Employee Handbook (April 2020) for the Respondent's policies and procedures.

55. The sickness absence procedure is at V6/180. So far as relevant, it provides that sickness absence of more than seven days is considered to be longer term sickness absence and a doctor's certificate is required for such absence. It states: *"HR will liaise with the line manager to ensure that they are aware of the reasons for absence and the period covered by the certificate.* ***If absence continues beyond the period shown in that certificate, further doctor's certificates must be submitted****"* (emphasis added). The policy provides that all sickness absence must be recorded on Workday even if the employee is in receipt of a doctor's certificate, and it must be authorised by the line manager. During any period of absence, *"The employee must keep the line manager informed of their progress and likely return date"*. A formal review meeting may be held if absence is stress-related. Employees may be required to attend occupational health appointments (OH), or a report may be sought from an employee's GP or specialist. Refusal to consent to this will mean the Respondent, *"will make a decision regarding next steps based on the information available"*. The policy warns that failure to follow the policy and procedures may result in disciplinary procedures.

56. The disciplinary procedure (V6/185ff) requires employees to act in accordance with the company's policies and procedures at all times. Misconduct *"includes, but is not limited to … unauthorised absence, failure to observe MUFG's policies and procedures, unreasonable refusal to follow a manager's instruction"*. Gross misconduct dismissals may result in summary dismissal. Gross misconduct includes: *"unauthorised or unexplained absence"* and *"a serious breach of any of the Company's policies, procedures or guidelines"* (V6/188). The policy provides for an investigation to be carried out in misconduct cases, either by HR or another suitable independent manager. An employee may be asked to attend an investigatory meeting or the Respondent can proceed directly to a formal disciplinary meeting. The policy provides for the Disciplining Manager to decide whether or not to invite an employee to a disciplinary meeting. The policy provides that an employee will *"be given a reasonable opportunity (usually 48 hours' notice) to consider their response"* to any disciplinary allegation and that reasonable notice of a

disciplinary meeting will be given *"usually at least one working day, but no more than five working days"* in advance. The employee is expected to take all reasonable steps to attend the meeting. A meeting may be held in an employee's absence *"if insufficient attempts have been made to attend"*. If an employee or companion is unable to attend, *"the meeting will be re-arranged, within five working days of the original date"*. There is a right of appeal, which must be submitted in writing within five working days. The policy permits the Respondent to depart from the terms of the policy, including missing out steps in the process, *"where it is considered appropriate to do so"* and *"time limits may be varied by MUFG dependent on the circumstances of the case"*.

57. The grievance procedure (V6/193ff) urges employees to raise grievances informally first with line manager or HR. Formal grievances should be labelled as such. The procedure allows for an investigation, grievance decision and appeal. *"Where an employee raises a grievance during a disciplinary or other internal process, the other process may be temporarily suspended in order to deal with the grievance if MUFG considers it would be appropriate to do so on the facts of the case. This will be determined on a case-by-case basis. Where the grievance and disciplinary or other matters are related it may be appropriate to deal with both issues concurrently."*

The Claimant's performance reviews and participation in the review process

58. The Respondent has a performance review system, through which annual objectives are set for employees by their line managers, and their performance reviewed twice a year at mid year and end of year, and graded. The procedure is that at mid year and year end the employee goes first, inputting comments and giving themselves an appraisal rating against each objective. Line managers then comment and grade employees' performance against individual objectives and the system then automatically calculates an overall grade, although this can be overridden manually. Before grades are notified to employees, they are subject to a moderation process where managers, and HR (in this case, Ms Owen), challenge each other's gradings where appropriate with a view to ensuring fairness and guarding against overall 'grade inflation' or 'deflation'. Performance review ratings are taken into account by the Respondent when considering employees for pay rises, bonuses and promotions.

59. All of the Claimant's performance reviews were done by Mr Niforas, who was his line manager at all material times. Prior to the Claimant commencing these proceedings, Mr Niforas believed that he got on well with the Claimant. The Claimant also accepted in cross-examination that for the most part he had a friendly relationship with Mr Niforas, although he felt that Mr Niforas sometimes spoke to him *"in a derogatory fashion"* and that their relationship had changed when he (the Claimant) *"started having issues with the terms and conditions stuff"*, and that after June 2019 Mr Niforas had cancelled their normally monthly 1-2-1 meetings.

60. The Claimant's 2014 Review (V1/197) included some "significantly exceeds expectations" ratings, but overall was "fully meets expectations". The Claimant sometimes graded himself higher than Mr Niforas graded him. We observe that the same thing happened for Employee 10. The Claimant's performance review referred to use of Visio as a product that he was using at that time. Mr Niforas commented that the Claimant had been *"involved heavily in preparing our market data user stories for the EDM project and I expect him this year to be actively involved in the implementation phase"*. The comments on the review show that Mr Niforas was prepared to be positive about the Claimant.

61. In his 2015 Review (V1/247), the Claimant was again graded by Mr Niforas overall as "fully meets expectations", but with a number of "significantly exceeds expectations", including in relation to his work on EDM, and on "Challenge Ourselves to Grow Behaviour" where it was noted he had become a member of the MUFG Values committee). Again, Mr Niforas did not always rate the Claimant as highly as he rated himself, and we again observe the same thing happened for Employee 10 in this year and other years. The Claimant noted that he had again trained new joiners on existing processes, including Mr Brooks and Mr Brachi. There had been a high turnover of team members, and the Claimant's comments indicate that he had done well to cover that turnover and *"cause zero losses to the firm"*. Mr Niforas' comments are again positive, for example, writing that the Claimant *"has been a very valuable member of the team"*. Looking to the future, Mr Niforas advises that the Claimant's *"continuing effort should be to enhance further his understanding of the business, the products we trade and pricing and risk systems we use"*.

62. 2016 (V2/109) was the year in which the data teams achieved a very significant cost saving which was welcomed by the business (GB2/28). The Claimant regarded this as a saving achieved through work that he had been doing, but Mr Niforas explained that the other data team was responsible for the vast majority of the savings. We accept that both the Claimant and Mr Niforas were expressing their genuinely held views on this subject, but observe that Mr Niforas as the more senior individual was better-placed to know what had happened, so we accept his evidence as to the facts. The mid-year comments for the Claimant were good, but there was no rating or end of year comments from either the Claimant or Mr Niforas. This, we find, is because the Claimant was on sabbatical by the time of the end of year review in January 2017 (PACD/57). The EDM project had 'rolled out' during the first part of the year and the CEO had described it as a *"critical strategic initiative"* in comments that the Claimant included at mid year.

63. In April of that year, the EDM team (of which the Claimant was part) won the Team Work Values Award for the business. The Claimant pointed out that where Employee 10 mentions winning this award in her mid year comments, Mr Niforas commented on it (PACD/56), but that he did not for the Claimant at (V2/120). We find there is no significance to this. Having considered all of the Claimant's and Employee 10's reviews, it is clear that Mr Niforas comments equally on both, but not necessarily on the same sections. Thus

in this particular review, while Mr Niforas did not comment on the Claimant's entry about the Values Award, he did comment favourably on the Claimant's participation in the work of the values committee, and put a long comment against Financial Goals (V2/117), when he put no comment on the same section of Employee 10' (PACD/53). Overall, we cannot discern from the documents any significant difference in Mr Niforas' approach to the Claimant's and Employee 10' performance reviews.

64. The Claimant returned from his sabbatical in September 2017, and he completed his part of the performance review for 2017 at the end of the year, but Mr Niforas did not do his bit (V2/215-231). Mr Niforas could not remember why this was, but believed it was because the Claimant had been on sabbatical for most of the year and he thought he would probably have checked with HR and been told there was no requirement to complete it. There was no evidence that the Claimant had chased Mr Niforas to complete the review, or otherwise complained to anyone about it. We note that the following year, in January 2019, Mr Niforas in an email to Mr Gully (V3/368) noted the reason for not having completed the Claimant's 2017 performance review as *"N/A sabbatical"*. In the circumstances, we accept that Mr Niforas' (conscious) reason for not completing the Claimant's performance review for year end 2017 was because he was not asked or required to do so because the Claimant was on sabbatical. Employee 10' was completed and signed off by Mr Niforas on 11 December 2017. In his own comments on this review, the Claimant mentioned that he was working on training a team in New York and provided them with insight into the functions performed in London. He had completed some training for the company, including Dual Hat Confidential Information Controls. The Claimant relies on this as evidence that he was engaging with 'Dual hatting' (to which we return later) and was not against doing that work. The Claimant had also been involved in a Personal Statement Workshop for some college students.

65. The Claimant seeks to draw a comparison with Mr Brooks' performance review for 2015, which was completed in January 2016 by Mr Niforas (PACD/44) and related to a period of 10 weeks from 19 October 2015 to 31 December 2015. However, Ms Owen explained (and we accept) that it was a requirement of the Respondent's policy for performance reviews to be completed during probationary periods. Mr Niforas also completed Mr Brooks' performance review in 2016 even though he moved team mid-year (PACD/61), but Mr Niforas explained (and we accept) that this was because he was required to complete Mr Brooks' review that year.

66. The Claimant also draws comparison with Employee 6's review in 2018. She had been out of the office on maternity leave at mid year and so her mid year review had not been completed (PACD/292ff). She had returned (according to comments on the review), a *"short period"* before year end, however, and both her and Mr Niforas completed her appraisal. Mr Niforas rated her as *"significantly exceeds expectations"*, noting *"[Employee 6] has been very keen to increase her role and responsibilities and the opportunity to manage the P&L reporting function is a result of her performance … [Employee 6] is proactive and confident in communicating with more senior stakeholders …"*.

We infer from these comments, as well as her own comments on the form and other evidence we have about Employee 6's proactive approach to progressing her own career (in particular, her approaches to Ms Owen for assistance and as a promotion referee), that Employee 6 would not have remained silent if Mr Niforas had not completed her review that year.

67. For the 2018 year both the Claimant and Mr Niforas completed his performance review and the Claimant was graded "fully meets expectations" (V3/32) (with a "significantly exceeds expectations" for "participation in training and firm initiatives"). Again, Mr Niforas did not comment on all aspects of the Claimant's performance, but did comment on most of them and in positive language.

68. For the year 2019, the Claimant refused to participate in the performance review process. In his grievance of 6 June 2019 that he sent to Ms Owen he explained this decision as follows:

> As it is not a legal requirement to complete an appraisal I decline to engage in your performance management system / approach as I believe it is a possible waste of time and may be used unfairly against me and as a tool to manage me out of the company, as opposed to highlighting the said work and rewarding individuals with fair compensation instead of zero pay rises.
>
> Please refrain from sending any information in relation to the appraisal or performance management approach or chasers or have anyone harass or intimidate me into completing it.

69. Thereafter, as we set out further below, despite being informed by Ms Owen that participation in the performance review process was mandatory, and despite being encouraged by Mr Syson, the Claimant refused to participate. There is no evidence that any other employee refused to participate in the performance review process. Mr Syson explained in oral evidence that he had considered whether the Claimant should be subject to disciplinary proceedings for refusing to participate, but consciously decided against that because he was aware the Claimant had raised a grievance (although he was not aware of the content of that grievance) and wished to avoid any perception that the Respondent was retaliating against him for doing so. We accept that this was indeed Mr Syson's thought process at the time as we were impressed with his creative and thoughtful approach to the Claimant's refusal to participate in the performance management process, which led him (as detailed further below) to have a long conversation with the Claimant with a view to discussing performance issues and career aspirations on an informal basis. We observe, however, that the Respondent could reasonably (and, in our experience, most employers would) have disciplined the Claimant for refusing to participate in the performance management process as the requirement to do so was a reasonable management requirement.

<u>Promotion decisions 2015-2020</u>

70. The Respondent has an annual promotion process. The written policy on it changes each year, but the general principles remained much the same each year. Individuals had to be nominated for promotion by their line manager or someone else in their management chain. The person nominating an individual had to prepare a business case justifying the nomination, and the individual also required referees. From 2017 onwards, decisions in relation to promotion to VP level and above were made by committee. Ms Owen as HR Business Partner for Finance would offer her views on candidates, but she was not ultimately responsible for decisions. Factors relevant to promotion in all years were: tenure in role (which was from 2014 normally required to be three years in role), performance as assessed through the performance review framework (which from 2018 normally needed to exceed expectations, and from 2019 normally needed to have exceeded expectations for two years), platform (i.e. the individual's place in the business, whether they had been undertaking managerial responsibility, or responsibility for a key stakeholder relationship or a particularly important project), and behaviour (i.e. matters such as professionalism, teamwork, willingness to embrace changes, etc). Each year there was a framework of criteria for each corporate level against which applications for promotion were judged. The Claimant viewed the changes in these criteria from year to year, the effect of which was to make it more difficult to obtain promotion, as 'moving the goalposts', but the fact is the goalposts were moved for everybody. There could always be exceptions, where a particular criterion would be accepted as 'trumping' the others and justifying promotion in a particular case, such as where an individual had already been moved into a more senior functional role, which might sometimes (but not always, as the cases of Mr Brooks and Employee 6 show) be regarded as sufficient to justify promotion even if performance had only been graded as "meeting expectations", or the individual had not had the normal length of tenure in role.

71. The Claimant's position in oral evidence was that he should have started at the Respondent as an AVP as that is what he was previously at Credit Suisse, and that he had sufficient management experience to have been on the same grade as Employee 10 from at least 2014. However, he has not brought any claim in respect of the Respondent's original decision to engage him at Analyst level, and his claim in these proceedings regarding promotion decisions is directed at Mr Niforas' decision-making each year. Mr Niforas played no part in the Claimant's original appointment and we have already found that Mr Niforas genuinely (and reasonably) did not consider that the Claimant being an AVP was unfair or wrong.

72. As we have already noted, the Respondent has an 'entrepreneurial' model for career development and the promotion guidance in each year (see, for example, V5/103) generally contained wording along the lines that it was up to employees to drive their own career development, through (among other things) high performance and initiating *"career aspirations discussions"* with their manager. The performance review form each year contains space for employees or line managers to input development objectives. Promotion was never identified as an objective for the Claimant, whereas we note that other

employees did sometimes set promotion as an objective for themselves in their performance reviews: see, for example, Employee 5 in his 2018 review (PACD/222: *"looking for grade promotion, year 1 of 5 year plan"*), Employee 14 in his 2018 review (PACD/266: *"Build my profile and deepen stakeholder relationships in order to get promotion to AVP"*) and Employee 2 in his 2019 review (PACD/364: *"I'll keep pushing myself to move through career progression steps and reach the promotion not achieved last year"*). We have also heard evidence of other employees taking proactive steps to obtain promotion. For example, at V4/115 we see a message from Mr Niforas to Mr Khan in April 2019 saying that he is *"pushing for promotion"* and asking him to act as referee. Likewise, we heard from Ms Owen how Employee 6 had put herself forward as a promotion candidate, and proactively asked Ms Owen for assistance and to act as referee. The Claimant did not take any such steps. He accepted that the only discussions he had with Mr Niforas about promotion were in January 2015, when we accept (in the light of his January 2016 email: V2/128) that he did raise promotion when discussing his goals for the year as part of his performance review and January 2016 when he complained again that he had not been promoted. On his own evidence, the next time that the Claimant raised promotion with anyone was 12 November 2019 in a conversation with Mr Syson which we return to further below.

73. Mr Syson held a 'lunch and learn' training session open to all staff where he went through what was needed to be promoted. He thought the Claimant had attended this. The Claimant could not recall attending this, but we have no reason to believe it did not happen or that the Claimant could not have attended it if he wanted to.

74. As it was, the Claimant was promoted to Associate in January 2014, having been nominated for promotion by Employee 7, his former line manager in the Operations Department. Thereafter, with Mr Niforas as his line manager, he was not promoted, and nor was anyone else in the Market Data team, until Mr Niforas himself was promoted in 2019.

75. We know from the Claimant's January 2016 email (V2/128) that in January 2015 he raised the possibility of promotion with Mr Niforas and Mr Niforas told him, correctly according to the Respondent's policy for that year, that he had to be performing in his role for three years before he could be promoted. In his January 2016 email, the Claimant wrote that he knew of cases where people had been promoted in less than three years (though he did not say who). It is clear from this email that the Claimant was already unhappy about not being promoted at this point, but in our judgment his expectations at this stage were unrealistic. None of the Respondent's main criteria for promotion were met: he had not been three years in role, his role had not changed significantly, and he had not been graded as exceeding expectations. We observe that even at this early stage the Claimant was taking the view that simply because someone else had been promoted (whatever the reasons or their circumstances), he ought to have been promoted too. He has not put before us evidence of anyone whose circumstances were even close to his own who was promoted.

76. The Claimant's argument in relation to promotion is that he had worked extensively on the EDM project between 2014 and 2016. He contends that this could have provided the basis for a promotion and that it was referred to in promotion applications for other employees. This is true, but in the promotion nomination forms that we have seen there are always many other reasons advanced as to why the individual merits promotion. We have not been shown any nomination form in which work on EDM provided the sole argument for promotion. In any event, the Claimant accepted that there were many people involved in that project and that he was not fulfilling a leadership role on it. He argued that Mr Khan had been recommended for promotion because of his role in EDM, but Mr Khan was the lead member of the Change Management team and was put forward for promotion by the head of the Change Management team, not Mr Niforas. The Claimant also considered that the work he had done on EDM had contributed to very significant cost savings for the Respondent, but Mr Niforas explained (and we accept as he was in a better position to know than the Claimant) that most of the cost savings had been generated by the work done by a different workstream in which the Claimant did not participate. The Claimant also argued that his role had grown significantly because when he joined the Market Data team it was new and so inevitably his role had to grow. However, that is not the sort of growth that the Respondent regards as significant. The sort of factors that are treated as growth in role for individuals who are promoted include things such as gaining line management responsibility, leading a team or taking on responsibility for a significant new area of work. The Claimant did not do these things. He referred to a project he had done rolling out LMS Training – Enterprise Data Compliance, which Mr Niforas had referred to in his own promotion nomination form (V3/286), but Mr Niforas' view of that was that the Claimant's role had been essentially administrative, in contrast to his own role which had involved actually designing the training. We accept Mr Niforas' view about the nature of the work that the Claimant was doing as being a view that he genuinely held on reasonable grounds.

77. Mr Niforas denies treating the Claimant unlawfully by not putting him forward for promotion from 2015 onwards. He says that the reasons he was not promoted were because he only 'met' rather than 'exceeded' expectations on performance reviews and there was no business case for promoting the Claimant either because it was a small team that was already 'top heavy' with two VPs, and did not need an additional VP and the Claimant had not in any event demonstrated the skills required for a more senior role. We accept that these reasons were Mr Niforas' genuine, conscious, reasons for not putting the Claimant up for promotion and that, in the light of the evidence we have heard, these reasons provide in principle a reasonable basis for not promoting the Claimant.

78. From 2018, the Claimant's refusal to accept changes to his terms and conditions, refusal to be dual-hatted (as to both of which see further below), and his refusal from 2019 to participate in the performance management process presented further obstacles to promotion. The Respondent's witnesses were tolerant and respectful of the Claimant's choices regarding

these matters, and they did not in these proceedings present these matters as being insurmountable obstacles to promotion, focusing instead on the practical effects of his decisions making it difficult for him to fulfil the promotion criteria (i.e. that refusal to dual-hat meant that he was not undertaking the work opportunities that colleagues were, and that refusal to engage in performance management meant that he could not be graded and so could not readily be assessed as meeting the Respondent's criteria for promotion). However, we infer that in reality the mere fact of the Claimant's refusals on these matters made it very difficult for him to be promoted. Most organisations can only function effectively if its employees are willing to accept reasonable changes to working arrangements, terms and conditions and follow reasonable management instructions and processes such as performance management. We note in this respect that one of the behavioural requirements for promotion to VP (V5/104) was, *"Delivers change effectively and role models acceptance of new initiatives to others"*. Promoting the Claimant once he had distinguished himself by refusing changes which others accepted, and refused to participate in performance management, would have been very difficult as it would have appeared to be rewarding refusals to co-operate with the Respondent's processes. Most employers would have considered that promotion in those circumstances would set a precedent for other employees that would have been unworkable for the organisation.

79. We add that although Mr Niforas denied in evidence that the Claimant having taken a sabbatical had any impact on his promotion prospects, we also find that hard to accept. The reality is that the Claimant's sabbatical between November 2016 and September 2017 was a period in which he did no work, yet during which colleagues will have continued to develop. That must have had some impact on his career progression, even if it did not formally make much difference because there was little change within the team during that period.

80. Finally, we note that at least in 2019 (V4/124-126) there is some evidence of Ms Owen steering promotion decisions in favour of female candidates, conscious of females being under-represented at the higher levels in the Respondent. The same argument could have applied to people of the Claimant's race, which Ms Owen accepted were also under-represented at the higher levels. However, it does not follow from the fact that we see her steering decisions in favour of female candidates and not candidates of the Claimant's race or sex that the Claimant has been less favourably treated. What the evidence shows is Ms Owen steering decisions from within the range of people who have actually been nominated for, and are 'in the frame' for promotion. On the evidence we have heard, the Claimant was not even 'in the frame' and the reasons why the Claimant was not 'in the frame' we address in this section, the next and in our Conclusions.

<u>Promotion decisions for other individuals</u>

81. A number of individuals are referred to by the Claimant as actual or evidential comparators, and we have also heard evidence about some other individuals, so we record here some basic information about those who have particularly featured in the evidence, insofar as that basic information is relevant to our decision-making. We emphasise that race/ethnic descriptors are for the most part those advanced by the Claimant, and may well not be correct or the descriptor that the individual would choose for themselves.

82. We add that some of these individuals were individuals who were the subject of a deposit order by Employment Judge Adkin on the basis that the Claimant stood little reasonable prospect of establishing that their circumstances were materially similar to his so as to be able to rely on them as actual comparators, and in respect of whom the Claimant failed to pay the deposit. At this hearing, it was accepted by the Respondent (rightly in our judgment) that it did not follow that the Claimant was necessarily precluded from relying on them as evidential comparators, but the Respondent did argue that it was not fair to permit the Claimant to do so because he had at a case management hearing in July 2021 (Orders Bundle, V/37, [24]-[25]) indicated the individuals he would be relying on as evidential comparators rather than actual comparators and had not included within this (or subsequently indicated anywhere, prior to his witness statement) that he wished still to rely as evidential comparators on people who he could not rely on as actual comparators as a result of not paying the deposits ordered. In the end, we have not excluded evidence in relation to those individuals, but have taken the evidence into account, such as it is. What we do not do, in the circumstances, is to draw any adverse inference against the Respondent as a result of its failure to produce evidence in relation to these individuals because we consider it would not be fair to do so given the procedural history we have just recited.

83. The potentially relevant evidence about other individuals that we have received is as follows:-

    a. Mr Brachi is a white male who the Claimant perceived to be younger than him who joined in 2015 as an Analyst in the Market Data team and was promoted to AVP in 2020 on Mr Niforas' recommendation, Mr Niforas' rationale being that he had exceeded expectations in 2019 and was performing in line with what was expected at the AVP level. As already noted above, Mr Brachi specifically raised his aspiration for promotion with Mr Niforas in his performance review, having apparently been disappointed not to receive promotion the previous year. All of these features are significant differences between Mr Brachi's circumstances and those of the Claimant;

    b. Mr Brooks is a white male who the Claimant perceived to be younger than him. He joined the Market Data team in 2015 and then was selected by Mr Gully (without objection from Mr Niforas) to move to lead the Reference Data team in late 2016 and was then promoted to VP in 2018 (nominated by Mr Gully and Mr Krusinskaite) to reflect those new management responsibilities. Mr Brooks' circumstances

were therefore significantly different to those of the Claimant. We should add that the Claimant sought to make much at this hearing of the selection of Mr Brooks for the move to lead the Reference Data team, which then provided him with the opportunity for promotion, but the Claimant did not make a claim about this decision and as a result the Respondent understandably did not deal with the decision in its written evidence. We accept Mr Niforas' oral evidence that he did not have much to do with this decision, but simply went along with Mr Gully's suggestion. As we have not heard from Mr Gully (and there was no reason why we should have, given that none of the Claimant's claims are directed at him and the Claimant in fact failed to pay the deposit order in respect of relying on Mr Brooks as an actual comparator), we can make no further findings about the reasons why Mr Brooks was selected for that move. There is no evidence before us to suggest that race played a part;

c. Mr Dodge is a white male who joined in 2018 and was aged approximately 42-47 in the period with which we were concerned and who the Claimant perceived to be older than him. He was an AVP in the Reference Data team and was promoted to VP in 2020 on the nomination of Mr Niforas. The stated business rationale, which we accept represented Mr Niforas' genuine belief, was that Mr Dodge had an indicative exceeding expectations rating for 2020, had unofficial managerial responsibilities for two Analysts and one contractor, was proactively leading the Instrument and Organisational Data team within Reference Data and was a key point of contact for senior stakeholders. His circumstances were therefore materially different to the Claimant's;

d. Mr Fenton is a white male who has worked for the Respondent since at least 2011, was promoted in 2016 to VP and in 2019 to Director. Mr Niforas played no part in his promotion and Mr Fenton's circumstances can therefore tell us nothing about why Mr Niforas treated the Claimant as he did;

e. Mr Karatrasoglou is a white male who the Claimant perceived to be younger than him who joined in 2016 as an Analyst in the Finance Reporting team and was promoted to AVP in 2019 after two years where he was rated as "significantly exceeding expectations". Mr Niforas was one of those who put him forward for promotion. As already noted, Mr Karatrasoglou also specifically raised his aspiration for promotion as part of his performance review. All these factors mean that Mr Karatrasoglou's circumstances were quite different to those of the Claimant, and the Claimant did not pay the deposit order in respect of Mr Karatrasoglou;

f. Mr Nagi is a Middle Eastern male who joined in January 2017 as an AVP in the Market Data team with the Claimant and was not promoted. We observe that he is one of two individuals (the other being Mr Wade) whose circumstances were most similar to those of

the Claimant and he was treated in the same way as regards promotion, notwithstanding being of a different race;

g. Mr Nelkenbaum is a white male who the Claimant perceived to be younger than him who was promoted in 2016 to AVP and in 2019 to VP. Mr Niforas played no part in his promotion and the Claimant did not pay the deposit order in relation to him. He is also not therefore of any assistance even as an evidential comparator;

h. Mr Niforas is a white male who was promoted in 2013 to VP and in June 2019 to Director. He obviously did not nominate himself for promotion and his circumstances are completely different to those of the Claimant. He is of no assistance even as an evidential comparator;

i. Mr Syson is a white male who was promoted in January 2011, January 2014 and June 2019. He is much more senior than the Claimant and Mr Niforas played no part in his promotions. He is of no assistance as an evidential comparator;

j. Mr Wade is a white male who joined in January 2017 as an AVP in the Reference Data team. He was not promoted, even though, as noted above, he had aspirations to be promoted and had specifically raised that as part of his performance review with his manager. His circumstances are fairly close to those of the Claimant and he was treated in the same way, notwithstanding the difference in race and his putting himself forward for promotion in a way the Claimant did not;

k. Employee 10 is a white female who was aged approximately 46-51 in the 2015-2020 period with which we are concerned and who the Claimant perceived to be older than him. She was a VP from 2006 and not promoted during the period with which we are concerned. So far as promotion is concerned, her circumstances are relatively similar to the Claimant's as she was working in the same team and her performance reviews were similar to the Claimant's, but even though she had been at VP level for much longer than the Claimant had been an AVP, and even though she was white and female, she was still not promoted;

l. Employee 3 is an Asian female who was aged approximately 38-43 in the period with which we are concerned and who the Claimant perceived to be younger than him. She was an AVP in the Reference Data team. She had a period of long-term sick leave in or around 2018. She was promoted from AVP to VP in 2020 on Mr Niforas' nomination, his rationale being that she was proactively leading the Counterparty team within Reference Data, had unofficial line management responsibilities for two AVPs in that team and was performing above her level, with an indicative rating for 2020 of

exceeding expectations. Her circumstances were therefore significantly different to those of the Claimant;

m. Employee 6 is an Asian female who the Claimant perceived to be younger than him. She joined in 2016 as AVP. She was nominated for promotion in 2018 by Mr Gully and Mr Krusinskaite, with Mr Syson and Ms Owen as referees, but was unsuccessful. In 2019, when she had taken the lead role in the Finance Reporting team, she was nominated by either Mr Gully or Mr Kyle with Mr Syson and Mr Vickery as referees (Supp/99; V4/171), and promoted to VP. Her circumstances were therefore significantly different to the Claimant's. However, the Claimant has raised a number of other points regarding Employee 6 that we need to deal with. The nominations for promotion had been made by 12 March 2019 (V4/124). Following an enquiry by a Committee member in April 2019 about the whereabouts of 360 feedback for Employee 6, Ms Owen explained that there was none (V4/180). The Claimant took this to indicate some sort of favouritism by Ms Owen for Employee 6 (along with their emails of mutual congratulation they sent each other at V4/139), but it does not show that. The previous year, Employee 6 had asked Ms Owen to referee her but she was unsuccessful despite the reference from Ms Owen. That is the clearest possible evidence that Ms Owen was not 'breaking the rules' for Employee 6. The 360 feedback email does not show Ms Owen seeking to influence the Committee at all, merely providing factual information, while Ms Owen's and Employee 6's emails of mutual congratulation show Ms Owen acknowledging the amount of work that Employee 6 had to put in to get promoted and thus the efforts to which she had gone to push her own career forward. None of this assists the Claimant's case as he did nothing similar to promote his own career. The Claimant further argues (based on emails at V4/196-202) that Mr Niforas was involved in promoting Employee 6, but the Claimant has no personal knowledge of what happened and the emails are in our judgment consistent with Mr Niforas' evidence, which we accept, that he had no involvement in her promotion but was sent her promotion forms to help him complete her performance appraisal for that year as he was her reporting manager on an interim basis at that point;

n. Ms Soh is an Asian female who was perceived by the Claimant to be younger than him and who was promoted in 2011, 2013 and 2016, by which time she was at Managing Director level. Mr Niforas had no involvement in her promotion and she is therefore of no assistance even as an evidential comparator;

o. Mr Tillings, Ms Birkby and Ms Rowley were other individuals mentioned in the Claimant's statement, but in respect of whom Mr Niforas played no part, and who were comparators in respect of which deposit orders were not paid and about which we in the end heard nothing at the hearing.

The Claimant's pay

84. Pay at the Respondent is determined according to firm-wide compensation guidelines which are set each year as part of a compensation review process. Mr Niforas was not responsible for determining pay for his team, but his performance assessments and recommendations for promotion would be taken into account in setting pay. Mr Gully up until the 2019 pay award (and Mr Syson from the 2020 pay award) determined the increases, and Mr Niforas communicated the numbers determined to his team. There were no set salary scales, but as a general rule pay increases with seniority, albeit that levels of pay within a particular corporate title could vary depending on the area in which the individual worked, pay with a previous employer, market data about equivalent roles with other organisations, and annual bonuses would in particular vary according to performance both of the organisation as a whole and the individual. As with promotion decisions, Ms Owen played a part in pay decisions, offering advice with a view to ensuring fairness and consistency, but she was not the final decision-maker.

85. In these proceedings, the Claimant alleges that the failure to award him salary increases in 2019 and 2020 was unlawful victimisation/subjection to detriments for having made protected disclosures. However, he also invites us to consider the whole period of his employment and to take into account that he did not after 2016 receive any salary increases and was throughout paid less than Employee 10, Employee 3 and Employee 6. These are the comparators (who along with some others about which we have received no material evidence as part of this hearing) he claims equal pay (i.e. he alleges there has been sex discrimination, but not other forms of discrimination, in relation to pay). The Claimant's claims in respect of equal pay will be considered at a subsequent hearing. However, as noted above, no evidence was excluded from the present hearing: it was up to the Claimant to advance any arguments about pay that he wished to advance in order to persuade us to draw an inference of discrimination in relation to the issues that *are* before us.

86. We have as a result in particular considered the position of Employee 10 and have concluded that she was at all times regarded by Mr Niforas as doing a different and more senior job to that of the Claimant (see above paragraphs 46-47).

87. So far as Employee 3 and Employee 6 are concerned, they were as AVPs paid more than the Claimant, but they were not in the same team as the Claimant or doing the same role and Employee 6's salary was in line with Employee 1's in 2018 and Employee 3 was paid in line with Employee 1 in 2019. This tends to suggest that sex was not a material factor, but Employee 1's circumstances may not have been typical. The level of the Claimant's pay was always higher than a number of other male AVPs (who we note in passing did not share his protected characteristic of race), including Employee 4, Employee 5, Employee 2 and (in 2019, but not in 2020)

Employee 14. The fact that the Claimant's pay was so much higher than most other AVPs for whom we have evidence suggests in general terms that he was not being less favourably treated in relation to pay than other employees (regardless of protected characteristics or Protected Acts done).

88. However, we acknowledge that, on analysis, on the evidence before us, all the male AVPs apart from Employee 1 were paid less than Employee 3 and Employee 6. This potentially raises a case that requires an explanation from the Respondent which we have not received because: (i) this hearing is not dealing with the Claimant's equal pay claim; and (ii) the Claimant himself did not draw the evidence together in this way during the hearing and put the point to one of the Respondent's witnesses to answer. Having spotted this point in the course of our deliberations, we have considered carefully whether we need to recall the parties and witnesses to deal with it, but we have decided that we do not. The claims of direct sex discrimination before us are not concerned with pay but with other decisions by other managers about other matters. The Claimant himself draws the strongest connection between his pay and his treatment by Mr Niforas in relation to promotion.

89. We have considered carefully what the position would be if the Respondent was unable to explain the differences in pay between the AVPs and it was concluded when the equal pay claims are determined that sex was a factor in the setting of pay. We have asked ourselves whether that would lead us to conclude that sex was a factor in relation to any of the sex discrimination claims that are before us. However, we do not consider it would. In particular, as regards Mr Niforas' decisions not to put the Claimant forward for promotion, we do not consider that a finding that sex was a factor in decisions made predominantly by other more senior managers in relation to pay, would lead us to conclude that sex was a factor in Mr Niforas' decision-making regarding promotion. The framework for decision-making regarding promotion is separate. We have heard extensive evidence about it, and about the Claimant's performance and the work he was doing over the years. If, having considered that evidence, we conclude that sex is not a factor, we cannot see what difference it would make that sex had influenced other managers' decisions in relation to pay. This is also because it is clear to us that the relationship between promotion and pay at the Respondent is a one-way relationship, i.e. promotion will almost always result in an increase in pay, whereas an increase in pay is never a reason for promotion. We have not therefore invited the parties' further submissions or evidence on this issue. We are content that they have had a fair opportunity to put before us the evidence and arguments on which they rely in relation to the issues it was agreed would be determined at this hearing. We are satisfied we can reach a fair conclusion on those issues on the basis of the evidence before us. The potential issue that we have identified as requiring an explanation from the Respondent will be dealt with as part of the Claimant's equal pay claim in due course.

90. So far as the Claimant's salary is concerned, when he commenced permanent employment in 2011 it was £50,000pa. In February 2012 he was awarded a £6,000 bonus. In February 2013 he was awarded a bonus of

£10,000. On promotion to Associate in January 2014 his salary was increased to £55,000 and he was awarded a bonus of £10,000. In 2015 the Claimant's salary remained the same and he was awarded an £8,000 bonus. In August 2016 the Claimant received a mid-year off-cycle salary increase to £60,000, backdated to 1 July 2016 (along with a few other employees: V2/149), and signed a confidentiality agreement in relation to it. The Claimant suggests that he was awarded a salary increase because he had asked about taking a sabbatical. It is unclear to us why he considers it would be significant if that was the reason he was awarded a pay increase, but (for the avoidance of doubt) we do not accept that the Claimant has demonstrated that his request for a sabbatical had any impact on the decision to award a pay increase. The documentary evidence shows that the Claimant only began to make preliminary enquiries about a sabbatical on 1 August 2016 (V2/161), while decisions about pay for numerous people had been made and discussions were ongoing about how to communicate the decisions by 3 August 2016 (V2/152). It therefore seems to be highly unlikely that the Claimant asking for a sabbatical had any impact on the decision to award him a payrise and, in the absence of any other evidence, we do not accept the Claimant's assertion in that regard.

91. After that salary increase, the Claimant's salary remained at £60,000 until he was dismissed. In 2017, his bonus of £10,000 was held back until he returned from sabbatical on 1 September 2017. In February 2018 the Claimant received a pro-rated bonus of £3,500, but was informed the annual bonus remained £10,000 (V3/84A). In May 2018 the Claimant's so-called "stub" (part-year) bonus was confirmed as £2500 (V3/30 and 164).

92. The 2018 compensation review is at V4/213 and sets out the principles on which decisions were made about salaries and bonuses in 2019. The business performance had been poor in 2018 (V4/215) and the business prioritised those who had been promoted for salary increases. It was highly exceptional for an individual who had not been promoted to have a salary increase in that year. Criteria were set (V4/227). Employee 5 as AVP received a small salary increase but was still being paid substantially less than the Claimant. Employee 6 received a substantial salary increase, but this was to accompany her promotion. Employee 1, who had been engaged on a starting salary as AVP that was higher than the Claimant's, received a further increase. They were all in the Reference Data team. They were not managed by Mr Niforas during 2018 and Mr Niforas had not influenced pay decisions for them. He became their manager in March 2019, and so was the communicating manager for those employees in May 2019 (V4/223A).

93. The Claimant considered that the reason Employee 1 was favoured was because of his friendship with Mr Moore, the former head of the Reference Data team until 2016 when he moved to Change Management. There is no evidence to support this suggestion and we do not accept it; we also observe that it does not assist the Claimant's case in any event because it tends to point away from the decision being influenced by unlawful factors and towards it being influenced by merely improper factors. The Claimant has not

adduced any evidence that would suggest that pay decisions in relation to Employee 1 were influenced by race.

94. The Claimant also came up with a theory during the hearing, to the effect that it could be the Respondent decided to award him a payrise in this year, but then took it away when he requested pay data from Ms Owen in March 2019. Again, there is no evidence to support that theory either and we do not accept it. We add that given that the Respondent (particularly Mr Syson and Ms Owen) later went out of their way to avoid the perception of retaliating against the Claimant for raising a grievance, it is highly unlikely that the Respondent would have done anything so obvious as proposing the Claimant for a pay rise and then deciding not to award him a pay rise because he had asked about pay data.

95. The outcome of the 2018 compensation review was communicated on 23 May 2019. The Claimant was informed by Mr Niforas that he would not receive a salary increase and that his bonus would be £5.5k (down from £10k). The Claimant evidently expressed unhappiness about this to Mr Niforas, who passed the message on to Mr Gully who in turn in an email to Ms Owen mentioned a few employees including the Claimant who had concerns about their pay, noting that the Claimant was *"unhappy – likely to have follow up questions"* V4/237. Mr Gully's email notes, *"Securities – most understood the performance backdrop and were able to reconcile with the Y-o-Y reductions"*, which indicates that most employees understood that 2018 had been a 'bad year' and that pay decisions reflected that. This same email chain records that someone was processed as a leaver and bonus was removed, which we note in passing has some bearing on the Claimant's arguments about what should have happened with his bonus when he was dismissed. Ms Owen was thus aware of the Claimant's unhappiness and at this stage had not responded to his requests for pay data first made on 26 March 2019. We asked Ms Owen in oral evidence why she had not taken action to help the Claimant at this point. She explained, and we accept, that she saw no particular reason to intervene in relation to the Claimant's pay. We asked her whether there was anything unusual about an employee not getting a payrise for three years (as happened with the Claimant after 2016), but she said there was nothing unusual and that the Respondent has a large number of employees who have not received a salary increase over a number of years. The priority for salary increases is always those who have been promoted, and people whose salaries are out of line with the market. Her understanding was that the Claimant's role had not changed, was not out of line with the market and there was no warrant or justification for a salary increase in those circumstances, given the available funding in the years after 2016.

96. The financial year 2019/2020 was a better year. On 22 January 2020 Mr Niforas had a discussion with Mr Syson about pay and performance for team members regarding the pay awards that would be communicated in May 2020. The Claimant was not off sick at that time. Mr Niforas was not aware of the Claimant's grievances at this point until later in the summer. Mr Syson was aware the Claimant had raised a grievance, but was not aware of the

specific content of it or his information requests. The Claimant was provisionally allocated a bonus of £7,000 (V5/76A and 76C). This was determined based on the increase in overall performance but rounding his previous year's bonus of £6,400 up to the nearest thousand. It was lower than the 19% increase experienced on average in the team. Mr Syson explained that the rationale for rounding up rather than applying a proportionate increase was driven by the desire to reflect the upside of firm-wide performance but to also reflect the performance concerns about the Claimant arising from his unwillingness at that time to engage in the performance review process. The decision had been made by Mr Syson, in consultation with Mr Niforas and Ms Owen. Ms Owen did know about the content of the Claimant's grievance and his information requests at this point. The Claimant did not ultimately receive this bonus as, consistent with the regulatory obligation imposed by the FCA to consider conduct issues when determining variable compensation, a decision was taken to withhold while he was on unauthorised absence and then to withhold it altogether when he was dismissed for gross misconduct. We return to that aspect of the decision-making later.

97. Although bonuses in general increased substantially in 2020, there was still a very small budget from which to award salary increases (approximately 1.7% of total salary costs within IDM). This was allocated with priority to those people who had been promoted or those with a pay-gap to peers. As a result, of the 62 people in Mr Syson's department, only 24 received a salary increase, and nine of those were because the individual had been promoted. The Claimant was therefore in the majority who did not receive a salary increase. Mr Syson could not see a justification for awarding the Claimant a pay increase at this point. His salary was higher than all but one of the other AVPs in his team (Employee 5, Employee 13, Employee 2 and Employee 4), who received only small increases (Employee 2's reflecting a promotion). Although he was still working hard, he was refusing to participate in the performance management process and appeared to Mr Syson to be 'doing his job and nothing more'. Only one AVP received more than him by the time salaries were increased in June 2020, and that was Employee 14. Employee 14 had been paid substantially less than the Claimant when first promoted to AVP in 2019. He received a substantial increase in 2020, taking his salary past that of the Claimant. In oral evidence, Mr Syson explained that Employee 14 had secured an employment offer elsewhere, and the Respondent countered it in order to retain him as he was a high performing employee whose skills were valued.

98. We accept Mr Syson's written and oral evidence as to the factors that he consciously took into account when determining pay and bonuses for employees. We found him to be a reliable witness who is an astute and careful manager (we have in mind his evidence about how he arranges 1:1s with everyone in his team at different frequencies depending on how far away from him they are in the hierarchy, his creative and flexible approach to the Claimant's refusal to participate in the performance management process, and his careful conscious decision-making about how to avoid giving the Claimant the impression that the Respondent was retaliating against him for

raising grievances). We further find that Mr Syson's explanations for pay decisions made sense and were on the face of it reasonable.

Client money breaches 2012/2013

99. In 2012/2013, before the Claimant moved to the Market Data team, the Claimant reported breaches of client money procedures and his then line manager Employee 7 escalated the issue, identifying the Claimant as the one who had raised the issue (V1/39-41 and 48-49). Employee 7 (who is white) faced disciplinary proceedings in relation to this, but left under a mutually agreed severance package instead in December 2012 (V1/56-60, 102). Employee 8 (who is Asian) was also subject to disciplinary proceedings and was actually disciplined and issued with a written warning (V1/87).

100. On 29 November 2012 (V1/95) Employee 8 appealed against his disciplinary hearing and parts of his appeal were upheld (V1/129), but the warning remained in place and areas for performance improvement were recommended. Despite this, the Respondent decided to pay his bonus the following year on 26 February 2013 (V1/136), noting that this was an exception to normal policy.

101. Employee 8 went off sick. On 8 April 2013, Employee 8 was contacted by email because his fit note had expired on 3 April and he replied that his doctor had advised a phased return once his fit note had expired and that he had told the Respondent of that previously. The Claimant contends thereafter that Employee 8's phased return recommendations from his GP were followed by Respondent, but there is no evidence to support this assertion. What limited evidence we have shows that Employee 8's sickness absence was dealt with by a Ms Porter. Employee 8 kept in contact with the Respondent when requested, provided sick notes (occasionally retrospectively) to cover his whole period of absence, was in contact by email and letter, specifically enquired about PHI and was in response informed that this would normally be considered after 10 weeks' absence. An OH appointment was rescheduled for him, but he was in contact about it and evidently co-operating.

102. Employee 8 raised a grievance on 22 April 2013 (V1/168) alleging that he had been discriminated against in relation to the disciplinary. The grievance was set out in a straightforward single-page letter (i.e. it was nothing like the Claimant's own grievance). It was acknowledged immediately by Ms Owen and a hearing date was set. Ms Owen said she did not manage that process, but it is apparent that she did (V1/170-172); we infer she meant that she was not the grievance hearer but merely HR support. She said that the grievance meeting did not take place. Emails at V1/171-172 show that Employee 8 had instructed solicitors who negotiated a postponement of the grievance hearing and a mutually agreed severance package for him. We have been provided with a draft of the settlement agreement dated 9 May 2013 (V1/174) which suggests (V1/184) that Employee 8 probably withdrew the grievance in return for a severance package.

103. The Claimant suggests that the reason for the difference in treatment between Employee 8 and Employee 7 in relation to the disciplinary was because of race, but there is no evidence to support this assertion. The Claimant's argument is based solely on the fact that they are of different races to him, but that is not sufficient. On the basis of the evidence before us, it looks as if the reasons for the difference in treatment of Employee 8 and Employee 7 probably reflected their different roles in the incidents and the stage at which Employee 7 engaged solicitors to negotiate a severance package for him. However, the Claimant has not adduced sufficient evidence about this matter to enable us to draw any conclusions as to the reasons for the difference in treatment, and even if he had done, as the disciplinaries were handled by people who have not played any part in the matters about which the Claimant brings claims in these proceedings, it could not have assisted us much, if at all. All we can say, is that there is no evidence that race played a part.

104. The Claimant further contends that Employee 8 was more favourably treated than he was in relation to his own disciplinary in 2020 and this is indicative of race discrimination because his race is different to that of Employee 8's. The Claimant says that Employee 8 was provided with more notice of his disciplinary hearing than the Claimant was and his appeal was heard within a shorter time. Employee 8 was referred to OH and an appointment was rearranged to suit Employee 8. Employee 8 was paid a discretionary bonus despite being under disciplinary sanction/ off sick / out of the office. However, we find that the Claimant's circumstances were so different to that of Employee 8 that there is no proper comparison to be made. The Claimant does not appear to us to have been less favourably treated. In particular, as we detail later in this judgment, unlike Employee 8, the Claimant did <u>not</u> keep in touch with the Respondent when absent from the office; unlike Employee 8 the Claimant never did produce sick certificates covering the whole period of his absence (even belatedly); unlike Employee 8, the Claimant did not co-operate with the OH referral; unlike Employee 8, rather than being given a 'mere' disciplinary warning, the Claimant was dismissed for gross misconduct, so it is not surprising he was not paid a bonus.

105. We further find that none of the Respondent's witnesses knew about the Claimant's involvement in raising these client money breaches and so any disclosures that he made about these matters cannot have influenced the way that he was subsequently treated by the people about which he now brings claims. Only Ms Owen had any involvement at all in these matters in 2012/2013 and her part was limited to providing HR support in relation to Employee 8's grievance. There is nothing to suggest on the evidence before us that she knew about the Claimant's part in reporting the breaches.

<u>2016 complaint</u>

106. On 14 January 2016 (V2/127), following a meeting between the Claimant and Mr Niforas the previous day, the Claimant emailed Mr Niforas saying that he

was disappointed about the meeting last night and wanted to write to make him aware of the matters set out, and that he had booked a meeting room to discuss if he wished to. The Claimant complained about his stance on the lieu days he was due (requiring him to take holiday rather than lieu days) and saying that being made to change his holiday to allow others to take leave, and not approving his holiday when others are approved, is *"making me feel like a second class citizen".* He complained that Mr Niforas had refused to promote him on the basis that there was a three year rule for promotion, but he said that he 'knew of cases to the contrary'. He complained about getting zero pay rise and reduced bonus for all his effort. He expressed that he felt Mr Niforas adopted an aggressive manner when talking with him. At the end of his email, he stated that he was only raising this with Mr Niforas as his manager at this stage, but could take it to HR or Mr Gully if Mr Niforas so advised. The Claimant did not in this email suggest that that the reason he was not being promoted was because of his race or because he had raised complaints about client money breaches.

107. In his witness statement, Mr Niforas stated that he could not remember seeing this email, but on being questioned about it, he accepted he had received it and he agreed with the Claimant that they had met the following day (15 January 2016). The Claimant regarded the matter as 'closed' by the subsequent meeting and did not make a further complaint to Mr Niforas or HR or anyone else about these sorts of issues until he raised his first grievance in 2019.

<u>2016 sabbatical</u>

108. In August 2016 the Claimant requested to take a nine-month sabbatical. He made notes at the time about the progress of his request (V2/160-162) in a letter of complaint to Mr King which we accept reflects what happened. In summary, on initial approach to Ms Owen, she told him that the Respondent had no policy on sabbaticals and in the past only senior managers had taken sabbaticals. She indicated it was at the discretion of the individual manager. Mr Niforas initially was supportive of the Claimant (V2/161), but then after consultation with Mr Gully told him the request had not been approved because the Respondent did not want to set a precedent and sabbaticals were normally only offered for emergencies. By letter of 26 September 2016 to Mr King the Claimant complained (V2/159), arguing among other things that he had worked hard, that the Respondent *should* have a sabbatical policy and that the Respondent frequently accommodated absences of that sort of length for women taking maternity leave so it should not be a problem. The Claimant concluded his letter to Mr King by saying that he had *"a very healthy relationship"* with all involved (i.e. Ms Owen, Mr Niforas and Mr Gully) (V2/162). He did not at any point tell the Respondent why he wished to take a sabbatical, although he was asked to give a reason (V2/163-164) because the Respondent wanted to know in order to understand whether he needed support and to ensure consistency with the handling of requests from other employees. He explained that he was 'a private person' and did not wish to disclose what he chose to do with his time away from the office. Ultimately, despite his refusal to give reasons, his request was approved and the

Claimant commenced a sabbatical on 11 November 2016 that lasted until 1 September 2017 (V2/186). The Claimant still at this hearing did not wish to explain why he took the sabbatical, and his position was respected by the Respondent and the Tribunal. We do, though, note that in one of his 29 January 2020 grievance documents (V5/65) he suggests that he took the leave because of his disappointment with not being promoted or considered for promotion in 2016 as he writes that this failure led him to *"question [his] existence and having to take a prolonged period of unpaid leave"*.

Dual hatting

109. In June 2017 the Respondent joined with MUFG Bank Ltd under the title "OneMUFG" and employees of the Respondent were asked to carry out functions on behalf of either entity on a 'dual-hatted' basis. On 30 January 2018 the Claimant was asked to sign forms confirming that he would (in summary) work to a Dual Hat version of his job description, comply with MUFG Bank Ltd's policies and procedures and notify any potential conflicts of interest arising between the Respondent and the Bank (V3/61). The Claimant was willing to do the MUFG Bank work in principle, but refused to sign the forms. He was the only employee who was asked to sign who refused to do so. This meant that he was not allowed to undertake the work for the Bank. This situation was evidently manageable as the Respondent allowed it to continue, but it did mean that Bank work could only be done by other team members, which we accept would have led to a perception of unfairness as between team members and would have made allocation and sharing of work more difficult.

110. The Claimant points out, correctly, that he asked various questions of HR in January and February 2018 about signing the forms, and that his last email on the topic went unanswered (GB/49-50). We observe that the Claimant's concerns about the dual-hat arrangement were not in our judgment reasonable concerns. For example, in his February 2018 email he stated that his being asked to work for the Bank in addition to the Respondent for no extra pay was *"a form of slavery"*, when the obvious reality is that working for the Bank was just an additional task that the Respondent was reasonably asking him to undertake within his existing working time. It was the kind of reasonable management instruction that many employers would have imposed without asking their employees to sign anything, but our understanding is that it was concern about proper procedures for handling of client information that led the Respondent to require employees to sign documentation.

111. At the end of August 2018 Ms Owen picked up the issue with the Claimant and had a meeting with him following which she reported to Mr Gully (V3/180) that the Claimant was comfortable doing work for the Bank and using the Bank systems but did not want to sign anything that he believed related to his employment terms and conditions. She indicated to Mr Gully that she was going to look at the Claimant's requests and see what, if anything, could be agreed but she considered it unlikely that there could be *"any flex"* as all other

employees had signed the original documentation and she could not see any reason to differentiate. Neither Mr Gully or Ms Owen ever got back to the Claimant about this.

112. The next time anyone spoke to the Claimant about dual-hatting was on 24 January 2020 when the Claimant complains that Mr Niforas 'bullied' him about it. We deal with this below.

2018/19 changes to terms and conditions

113. On 7 September 2018 the Respondent launched a consultation regarding alignment of terms and conditions (V3/194).

114. On 30 January 2019 the Claimant and other employees were informed of the outcome of consultation and changes to their terms and conditions (V4/34). It is not necessary to the determination of the Claimant's claims in these proceedings for us to consider whether the changes were reasonable or not, but we record here that we have seen no evidence to suggest that the changes were unreasonable. There was a long period of consultation on the terms with employee representatives (the Claimant had sought election as an employee representative unsuccessfully) and although some of the changes may have been unfavourable to some employees (in particular, perhaps, as to pension and holiday entitlement), the points that the Claimant makes in his subsequent grievance about the changes appear on their face to be largely unmeritorious. For example, he complains at length about the change to working hours to 35 hours per week, subject to a requirement to work additional hours as necessary, which he describes as *"slavery",* but we observe that his original 2011 contract was actually *less favourable*, providing for normal working hours of 40, together with additional hours as required (V1/11).

115. On 26 February 2019 the Claimant wrote to Ms Owen to confirm that he did not agree any changes to terms and was continuing to work under his original contract. He referred to Ms Owen having failed to answer questions he had raised previously (V4/116). Ms Owen by reply indicated that she was not clear on the questions he was raising and that another member of HR had already met with him to discuss. She informed him that the changes were in place and that he could raise a grievance if he wished to. If he did, she said she would send him the grievance procedure.

116. By email of 26 March 2019 the Claimant confirmed that he wished to raise a grievance in respect of the changes to his terms and requested a large amount of information to allow him to do so (V4/129). The request was 15 bullet points and was a very wide request for information. There was no reference to a complaint about equal pay or anything that could be interpreted as such, but he did ask what compensation was being offered for the changes and for information about the salary bands for an analyst in his role, and a vice president in his role and *"the salary and bonuses provided to team members since I joined to present day"*. He did not say why he wanted this

information. He did not ask for a copy of the grievance procedure and Ms Owen forgot about her promise to provide it and did not provide it. The Claimant has complained in these proceedings about Ms Owen's failure to provide the grievance procedure, but we do not consider that there is any significance to attach to that. There is no dispute that the grievance procedure was at all times available to the Claimant on the Respondent's intranet, so he could either have accessed it or, if he felt he needed it, he could have reminded Ms Owen about it. He did not do so and we find he was not disadvantaged in any way by Ms Owen not sending the procedure; nor is there any significance to be attributed to her failure to send it.

117. Ms Owen acknowledged the Claimant's email on 29 March and said she would *"be in touch on Monday to advise on next steps"* (V4/221). She did not however get back to him on the Monday (which would have been 1 April), and then on 3 April she received the letter from him together with a GP's note signing him off until 18 April 2019 and requesting a workstation assessment (which we deal with below), and we infer that this is why she did not provide the promised response at this point regarding the information requests. The Claimant also did not chase Ms Owen for a response until 22 May 2019 when he asked to be provided with the information in seven days (V4/221). Ms Owen again did not respond. We observe that the Claimant's email coincided with the period during which employee compensation decisions were announced (V4/223A). We also heard evidence from Ms Owen, which in general terms we accept, that her role means that she has responsibility for very large numbers of employees both in London and globally and that her failures on occasion to respond to the Claimant in a timely manner were in part simply a result of her being busy. The Claimant then submitted a formal grievance to Ms Owen on 6 June 2019 which we deal with below.

<u>Equipment requests and workstation assessment</u>

118. The Claimant complains that he made a number of requests for new office equipment which were ignored or not approved by Mr Niforas. All requests were made using the Respondent's online system. When an employee enters a request into the system an automated email is sent to the employee's line manager requesting that they approve the request. An automated reminder is also sent. If a request is not approved within 20 days, it is automatically marked as rejected.

119. On 31 October 2017 the Claimant requested a new desktop install (V2/274). Mr Niforas failed to approve it within 20 days and it was automatically rejected on 28 November 2017 (V3/9, V2/274). Mr Niforas cannot remember why he did not approve this request. He gets a large number of automated emails. He does not recall the Claimant chasing him about the request, and the Claimant does not suggest he sought to speak to Mr Niforas about the request. Having had this request automatically rejected, the Claimant did not ask for a new desktop install again until August 2018.

120. On 28 November 2017 the Claimant emailed CAF- Facilities Helpdesk about how to get screen protectors fitted to the monitors on his PC (V3/8). He did not copy in Mr Niforas. The Claimant's witness statement (p 93) suggests that he submitted this request through the online system on 29 November 2017, but we have not been provided with the documentary evidence of this and Mr Niforas's evidence was that the self-service portal does not have an option for requesting screen protectors. In the circumstances, we do not accept that the Claimant has proved that he even made this request to Mr Niforas in November 2017.

121. On 18 January 2018 the Claimant made a request through the online system for computer software called Microsoft Visio which he had had on his computer prior to going on sabbatical but which was not on the computer he was given when he returned from sabbatical (V3/55). Mr Niforas emailed the Claimant to ask him what he was requesting. The Claimant replied: *"It's the Microsoft application used to make the drawings, it would be easier to add them to the documents/specs"*. Mr Niforas cannot remember what happened after this, but he believes (and we accept this now to be his genuine belief) that he formed the view that the Claimant did not need this programme as none of his colleagues had it any more either. In the end, the request was rejected automatically as Mr Niforas had not responded within 20 days (V3/78). Neither the Claimant or Mr Niforas suggest that they had a conversation about this request.

122. On 23 August 2018 the Claimant submitted a request through the system for a new desktop install, which was notified to Mr Niforas (V3/179). We have no further evidence about what happened with this and the Claimant did not even refer to it in his witness statement (p 93). In the circumstances, we find that he has not proved there was any failure in relation to this request.

123. On 3 September 2018 the Claimant submitted a request through the system for a new telephone headset (V3/182, 190, 192, 193, 267). The system sent Mr Niforas a number of automated reminders, to which he failed to respond, and as a result the request was automatically rejected. The Claimant does not suggest that he chased Mr Niforas in any way in relation to this request, either by email or by speaking to him.

124. In the light of advice from his optician with a view to preventing headaches the Claimant was experiencing (V4/133, 176 and V7/319), on 3 April 2019 the Claimant wrote to Ms Owen requesting privacy, anti-glare and blue light screens and attaching a sick note from his GP signing him off from 27 March 2019 until 18 April 2019 (V4/177-178).

125. By letter of 18 April 2019 Ms Owen wrote to the Claimant confirming that, *"as requested"* three anti-glare screens had been provided and would be at his workstation when he returned, and that a workstation assessment would happen on return (V4/194). We accept that Ms Owen genuinely believed that the requested screens had been provided as, so far as she was concerned, she had made the correct request (V4/190) and had no reason to believe it would not be carried out. However, the Claimant maintains (and we also

accept) that when he returned to work the screen protectors were not present. The Claimant did query this and screens were then provided and he trusted they were the right ones, although he was subsequently informed by the person who carried out his workstation assessment in January 2020 that they were not the right screens. We observe that if the Claimant did not realise they were not the correct screens, it was also reasonable for the Respondent's witnesses not to be aware of the problem.

126. In her letter of 18 April 2019 Ms Owen had told the Claimant that when he returned to the office he should let her know so that a workstation assessment could be arranged. This he did and on 2 May 2019 Ms Owen duly arranged a workstation assessment (V4/203) to take place on 13 May 2019. It is clear from the email trails that the workstation assessment was properly booked by the Respondent (V5/15), but in the event it did not happen for reasons unknown. The Claimant did not tell anyone that it had not happened until he mentioned it in one line on page 26 of his 36-page grievance that he submitted to Ms Owen on 6 June 2019 (V4/265) as part of a list of unanswered requests for *"information"*. Ms Owen did, however, notice this once she had read the grievance, and by email of 24 June 2019 (V4/314) Ms Owen stated that she would reschedule the workstation assessment as a matter of priority, but she cannot now recall what she did about this. She has no documentary evidence that she took action and we find that she took no action. We infer that this is because she forgot.

127. The Claimant did not raise the matter again until he mentioned it in an email to Ms Owen of 18 October 2019 (V4/346) as part of correspondence about the grievance (which we deal with below). The email itself is not one that is easy to read and the reference to the workstation assessment is brief and towards the end of the email. Ms Owen was away and travelling a lot during this period and missed this bit of his email when she read it. We accept that she genuinely missed this part of the email as it would be easy to overlook.

128. On 14 January 2020 the Claimant sent a very short email to Ms Owen on the sole topic of the workstation assessment (V4/346). This time, Ms Owen took action speedily. By email of 15 January 2020 Ms Owen apologised that the workstation assessment had not taken place and confirmed that it had been prioritised (V5/9). It took place on 20 January 2020 (V5/40, V5/119), carried out by providers called Roodlane. This time, Ms Owen followed up immediately to make sure that it had happened (V5/40). Thereafter, it was for the Health & Safety team to make any required recommendations or adjustments.

129. On 27 January 2020 Roodlane provided their report regarding assessment of the Claimant's workstation (V5/47, 55-59) to Mr Zemaitis in the Respondent's facilities team. The recommendations included recommendations for two anti-glare and blue light filters for his screens, and a headset. The Claimant explains in his witness statement at p 23 (and we accept) that Mr Zemaitis came to his desk on 4 February 2020 to say that he had just received the report and asking to discuss the screens required. The Claimant asked that he be sent the report and emailed him to remind him the

same day. On 5 February 2020 the Claimant spoke with Mr Zemaitis at c 8.10am to ask him to send the report, but he failed to do so. The Claimant then left work and did not return to the office until 19 June 2020 when he came in to deliver a letter in connection with the disciplinary hearing that was originally scheduled for that day (see further below). On that day he went to his desk and saw that the screens he had requested were still not there, but the reason for this (as set out below) was because the office was still 'closed' for the Covid-19 pandemic at that point and arrangements had been made for screens to be provided when the office re-opened and the Claimant returned to work.

130. Mr Zemaitis in fact sent the report to the Claimant by email of 7 February 2020 (V5/116). However, by that time the Claimant was off sick and as he did not have remote access to his emails (because he had not requested remote access) he was unaware that Mr Zemaitis had sent him the report.

131. Between 7 and 13 February 2020 emails indicate that Mr Zemaitis attempted to order anti-glare and anti-blue light filters for Claimant (V5/154-156). However, someone called Ms Mace advised that they did not have blue-light screens, only anti-glare filters and privacy screens, so that was what was ordered. The Claimant's position, which we assume to be correct, is that the anti-glare screen and privacy screen were one and the same thing. What it appears could not be obtained were the anti-blue light filters, and there is no evidence before us that Mr Zemaitis ordered a headset.

132. In the meantime, and before he went on sick leave, on 20 January 2020 the Claimant had submitted a request through the system for a new desktop install (V5/33-36). There is no evidence that the system at this point notified Mr Niforas of this request or otherwise required his approval. Although the documentation relating to requests made through the system is not entirely consistent or easy to understand (even when one understands that "Serena" refers to anyone accessing the system not under a particular login), we cannot on the record of this request see on the Change History that it was at any point marked as requiring line manager approval (contrast, by way of example, those for Ms Bagot at V2/52 and V2/57, Mr Niforas' own requests at V2/157 and V2/265, and Mr Nagi's request at V2/234). The Notification History (V5/34) also contains no record of an email having been sent to Mr Niforas or even a "Team Assignment" (contrast that for Ms Bagot at V5/136 and that for Mr Brachi at V3/9C). The Claimant's evidence is that he spoke to Mr Niforas about this request on 23 January, and we can see that he chased him in his subsequent email of 24 January 2020 (where he said that Mr Niforas had agreed to approve the request). Mr Niforas did not reply to that email because he understood that Ms Owen was dealing with it. Mr Niforas' evidence, both in his witness statement and orally was that this request was not approved because the Respondent was no longer issuing new desktops. However, from the documentary trail, it is apparent that this is something he learned only later in March when Mr Cullen contacted him about the request (see below). The precise sequence of events in relation to this request was not explored by the parties orally. Doing the best we can on the evidence we have, we find that although Mr Niforas was made aware of the existence of

this request by the Claimant on 23/24 January 2020, the Claimant has not shown (on the balance of the probabilities) that Mr Niforas was notified by the system of the request at this point and we infer that this is why he did not approve it at this point.

133. For some reason (again not explored in evidence, but possibly connected with the fact that this request does not seem to have started its course through the system in the same way as others we have seen), this request did not lapse automatically after 20 days, but was picked up Mr Cullen in facilities on 8 April 2020, who emailed the Claimant asking if the new desktop install was still required. He explained the Respondent was not issuing new PCs any more, but could issue something called a *"wyse terminal"*. Having got an out of office (or equivalent notification) for the Claimant (who was not in the office and not receiving emails), Mr Cullen then emailed Mr Niforas about the request. On the evidence before us, this is the first time that Mr Niforas was actually notified of the formal request being in the system. Mr Niforas agreed that Mr Cullen could cancel that request and raise a new request for the Claimant for a wyse terminal, which Mr Niforas then approved (V5/33-36), noting *"Once we are back in the office your PC will be replaced with a Wyse terminal"* (V5/329). The Claimant argues that this shows that Mr Niforas was willing to answer a request from a white person, but not from him. We disagree. What it shows is that Mr Niforas answered promptly a non-automated email about an equipment request, and arranged for equipment to be authorised for the Claimant, even though he is black, and even though he had not been at work for two months. Such action provides no basis for an inference of discrimination – quite the opposite, it shows that Mr Niforas is much more responsive to personal emails than automated emails and that, when approached in this way, he did action requests for the Claimant promptly.

134. The Claimant argues that he was less favourably treated in relation to equipment requests than the following people, about which the evidence presented to us is as follows:

    a. Ms Bagot requested a new desktop install on 14 July 2015 and for whom equipment (PC/screens) was provided and not ignored (V2/50-53); likewise on 3 January 2019 (V3/314-316). Mr Niforas had no involvement in this;
    b. Ms Sidders' request on the same date was actioned (V2/54-58). Mr Niforas had no involvement in this;
    c. On 21 September 2016 Mr Niforas requested a new desktop install and it was approved by his manager (V2/157);
    d. On 3 January 2017, just before his official start date, Mr Nagi requested a new desktop install and Mr Niforas approved it, but Mr Cullen then rejected it as *"not required"* (V2/233); Mr Nagi on 20 July 2017 had his request for a new headset approved by Mr Niforas (V2/269-71);
    e. On 15 May 2017 Mr Niforas requested a new headset and it was approved by his manager (V2/256-66);

f. On 2 April 2019 Employee 10 requested a new desktop install (virtual terminal) and was granted it on approval by Mr Niforas (V4/173-175);
g. In November/December 2017, Mr Niforas approved Mr Brachi's request (V3/7A-C and 9A-C) for a new large flat screen after being chased by Mr Brachi (V3/9B). A previous request by Mr Brachi on 3 November 2017 was rejected automatically because Mr Niforas did not respond within the 20 days.

135. Mr Niforas in his witness statement explains that he receives a high volume of automated emails on top of hundreds of non-automated emails per day, and that it was hard for him to respond to the Claimant's complaints about equipment as most were historic in nature. He denied that the Claimant's race had played any part in his decision-making and stated that, as with Mr Brachi, if he missed someone's request they would normally make it again. We also note that we are aware from the Claimant's own case about what happened in January 2020 that Mr Niforas was a person who got frustrated by automated emails. He responded to Mr Cullen about the Claimant's request when directly chased. We find as a fact that Mr Niforas' working practices were such that he was more likely than not to ignore automated emails unless chased.

2019 voluntary redundancies

136. On 30 May 2019 a voluntary redundancy programme was launched for Managing Directors and Directors in which they were given the option to accept voluntary redundancy by 5 July 2019 (V4/226-277 or 310). The reason for choosing Managing Directors and Directors was because the company had an excess of people at that level and wanted to recruit and retain more junior people (V4/266). 16 people (14 men and 2 women) accepted voluntary redundancy and there were then also some compulsory redundancies. The Respondent accepts that it has more male employees than female employees at Managing Director/Director level, and that black employees are also under-represented at that level. The Claimant, however, told us in evidence that he did not want to take redundancy as he did not want to leave the business and he accepted that this meant he was not disadvantaged by the Respondent's actions in relation to voluntary redundancy.

2019 grievance

137. On 6 June 2019 the Claimant submitted by hand to Ms Owen a 36-page grievance. This was concerned principally with the changes to employee terms and conditions that the Claimant had refused to sign, and the dual-hatting arrangements that the Claimant had also refused to sign. The Claimant characterised the Respondent asking him to sign those new terms and conditions as bullying and harassment contrary to the Equality Act 2010 and the Harassment Act 1977, but did not suggest that race or sex was the reason for the treatment. He complained that the new terms and conditions were more favourable to younger employees, and that his statutory rights to

wages, holiday and pensions were being breached. He made clear that he was aware of his right to take a claim to the Employment Tribunal, and the three month time limit for doing so (V4/245). He complained about the selection of employee representatives for the consultation and alleged that the Respondent had *"taken issue"* with him for nominating himself as a representative (not a claim he has repeated in these proceedings).

138. He stated his belief that, *"anywhere one employee is entitled to receive more than another employee regardless of corporate title is discrimination"* and asked *"to be given the same notice period as the person with the longest notice period to ensure no discrimination occurs"* and *"the same rate of pay as a Director"* for Weekend/Bank Holiday pay, thus *"removing the discrimination"*. He stated his belief that the Respondent would retaliate against him for raising issues. He asserted that the Respondent's changed terms and conditions were not legally binding and that nor was the Respondent's performance management process which he would henceforth refuse to participate in as already set out above. There was a brief complaint about lack of promotion, pay rise and reduced bonus payment and failure to respond to his requests for information. He made further requests for information, including for information about pay and compensation broken down to reflect age, sex, race, ethnic, origin, role, length of service (broken down for the current year and going back year-on-year for the last 10 years). We observe that most of his requests for information (including in particular the requests for information about pay) appear to have nothing to do with the grievances that he has raised (other than the passing reference to him not having had a pay rise). As part of the requests for information (V4/265), he mentioned that his workstation assessment had still not been carried out. He stated that the actions of the Respondent *"have and continue to make me ill"* and asked that the Respondent should *"[nurse] me back to good health and [stop] practices which lead or will lead to poor health"*.

139. The grievance named the company and six individuals who are not the subject of allegations in these proceedings as being responsible for the matters about which the Claimant was complaining.

140. The Claimant included by way of appendices to the grievance 369 pages of documents that we now have in GB1.

141. The Claimant suggested in his covering letter that he was concerned that investigation into his grievance should be impartial and that if this was not done to his satisfaction it may be better to have an external independent third party review the grievance and look at the whole consultation process and act as mediator (V4/240).

142. The Claimant's grievance was marked *"for your eyes only"* and in block capitals made clear that Ms Owen was not authorised to distribute, copy, duplicate or share the grievance without seeking and gaining written approval from him. Ms Owen accordingly did not disclose the grievance to anyone other than the Respondent's lawyers and data protection officer for the purposes of taking legal advice. The Claimant has sought to suggest that Ms

Owen may have shared his grievance more widely, but there is no evidence to support this and given how clear the Claimant was that the grievance was not to be shared by Ms Owen, we would have found it very surprising if she had shared it more widely as it would be obvious to most people that doing so would be likely to be unlawful (whether as a breach of confidence or a breach of data protection legislation).

143. Ms Owen acknowledged the grievance the same day and indicated she would identify an independent person to hear it (V4/238). She explained in evidence that this was because of the size and complexity of the Claimant's grievance, which she did not think could easily be dealt with by someone internal, and also because she considered that the Claimant would be reassured by having a third party (as he had suggested). She also gave him information about how to make a subject access request.

144. By email of 24 June 2019 (V4/313), Ms Owen set out further details of the proposed grievance process and attached her attempt to summarise the grievance. She said she had identified an HR consultancy (Byrne Dean) as a suitable option and they had suggested Rachael Forsberg could act as investigator. She asked the Claimant to give consent to share his grievance with Ms Forsberg and whoever was in due course identified as the "Grievance Hearer". She again outlined the process for making a subject access request. She explained how Ms Forsberg would proceed.

145. The Claimant did not reply to this email until 24 July 2019. The Claimant confirmed that he did not authorise Ms Owen to share his grievance. He said he would not do so until he had been provided with the information he had requested. He also asked for more information as to the identity of the person to hear the grievance, and asked for Byrne Dean's preliminary views on the grievance (V4/323). He objected to Ms Owen's attempts at summarising the grievance and asked if ACAS could be used to mediate or CIPD. He said he had made a SAR request.

146. By email of 5 August 2019, Ms Owen provided further information on the grievance (V4/328) process to the Claimant and stated that they were still identifying an appropriate person to hear his grievance. She explained that Byrne Deane did not have preliminary views on his grievance. She asked for various details from the Claimant. She asked the Claimant to confirm that they could progress the grievance. The Claimant did not reply.

147. On 2 October 2019 the Claimant was provided with a response to his SAR and he was also previously sent information relating to the Respondent's gender pay gap.

148. By 4 October 2019 Ms Owen had still not had a response from the Claimant. She chased him, and advised him that the Respondent had decided it was not necessary to appoint someone external as the actual decision-maker, but that they did consider it appropriate for Byrne Dean to conduct the fact-finding investigation (V4/333). She confirmed that there had been no other employee

grievances regarding the changes to terms and conditions. She asked him again to confirm that his grievance could be progressed.

149. The Claimant emailed Ms Owen on 18 October 2019 to complain regarding the provision of data requested by him. He pointed out that she had not forwarded him the password for the data she had provided on 2 October 2019, despite saying in her covering email that she would do so. He confirms that the health and safety assessment had not been carried out and stated: *"To give you an idea my head is thumping, but I do not believe I can take any sick leave as I fear further reprisals from the company"* (V4/348). The Claimant again did not give consent to his grievance being progressed by way of disclosure to the Byrne Dean investigator. The Claimant's position, as explained to us orally, was that he could not consent to his grievance being given to Byrne Dean until he knew who would hear his grievance. We observe that he did not at any point communicate that to the Respondent. He simply wrote at length and did not consent to his grievance being progressed.

150. Ms Owen did not respond to the Claimant's email of 18 October 2019 for nearly two months, during which time he did not chase for a response. By email of 20 December 2019 Ms Owen apologised to the Claimant for the long delay, explaining that she had been out of the office for "several weeks" of annual leave (in fact only 11 days from 7 October and 18 October) and also travelling to Tokyo and New York for business purposes (each trip lasting one week). She explains in her statement how busy she was during this period, and we accept that it was a busy time for her, albeit that it does not wholly excuse a failure to reply for two whole months. She enclosed the personal data he had requested (V4/420), but explained that he was not entitled to data about other staff. She did not refer in this letter to his grievance. Nor did she do anything about the Claimant's health concerns or workstation assessment. As already noted above, we accept that she genuinely overlooked this part of his email at the time. However, we observe that a referral to OH could have been considered at any point after the Claimant raised a grievance stating that the Respondent was making him ill. We did not, however, explore in evidence with Ms Owen why this was not done.

151. Regarding what happened with the Claimant's grievance up to this point, we find that the reason why it was not progressed was because the Claimant refused to consent to it being progressed and instead insisted on first being provided with a lot of information, most of which was on its face irrelevant to the grievance he had raised. However, we observe that there were other options open to Ms Owen that might have 'cut the Gordian Knot' created by the Claimant in this respect. Although we accept that she could not reasonably have disclosed the grievance to a third party without his consent, she could simply have arranged a meeting for the Claimant to attend with the appointed investigator. Ms Owen herself arrived at that conclusion after the Claimant submitted further information about his grievances on 29 January 2020 (see her email of 7 February 2020: V5/129). We consider she could reasonably have done this earlier, and she would then have fulfilled the Respondent's obligation under the ACAS Code of Practice of inviting the Claimant to a meeting to discuss his grievance. It would then have been up

to the Claimant whether or not he attended that meeting. Given the Claimant's references in the grievance and subsequent emails to 'being made ill' by the Respondent, she should also have offered him the Employee Assistance Programme and other support and reassurance (as she did in her email of 7 February 2020) at a much earlier stage. She might also have referred him to OH. These options did not occur to Ms Owen until later, but we do not consider that any adverse inference is to be drawn as a result. What Ms Owen did do, in terms of writing to the Claimant and trying to answer his questions and provide reassurance involved a lot of effort on her part. Although there were delays in her replying to the Claimant when she was busy, those delays were broadly matched by the Claimant's own delays in correspondence, and are more readily understood given that the Claimant did not chase her for responses. We further observe that the options that we have identified that Ms Owen may have tried earlier may well have resulted in no different outcome as the Claimant's approach to the disciplinary process and referral to OH towards the end of his employment suggest that he would have been unlikely to co-operate with these options. As is clear from the Claimant's own letters of 29 January 2020 and 5 February 2020, he was also determined to provide further information about his grievance, and to have all matters dealt with together. This, probably, is why he did not consent to her progressing the grievance earlier, so it is unlikely that even if Ms Owen had taken the steps she took in her email of 7 February 2020 sooner (or referred him to OH) that this would have made much difference.

Performance management 2019

152. On 11 June 2019 the Claimant emailed Mr Niforas to confirm that he would not participate in the performance management process (V4/283). Ms Owen in response made clear that it was not an option to opt out, and it was a mandatory requirement for all employees. Her email explained that performance management is important to *"opportunities to promote personal development and growth"*.

153. By email of 16 July 2019 the Claimant was again asked by Ms Owen to complete his performance objectives (V4/326), but did not do so, telling Mr Gully who asked him about it that he had told Ms Owen he did not wish to be 'harassed' on the matter. Mr Gully noted in an email to Ms Owen (V4/326) that, *"Failure to follow firm policy / procedure seems to me to be getting into disciplinary territory but I am aware that there is a broader context here"*.

154. Mr Syson was new in post at this point. He was aware from Ms Owen that the Claimant had raised a grievance (but not aware of its contents), and that the Claimant was refusing to participate in the performance management process, but was otherwise still working well in his 'day job'. On 15 October 2019 he contacted the Claimant noting that his mid-year review was outstanding and asking to catch up to discuss (V4/345).

155. The Claimant replied on 16 October 2019 confirming that he would not participate in the performance review process, had made this clear previously

to Ms Owen and Mr Niforas and would accordingly *"politely decline"* his request to meet (V4/344). In oral evidence, the Claimant suggested this was not what he meant, all he meant was that the deadline had not yet passed and he would not do it yet, and he went on when questioned about performance management to maintain that he was not refusing to take part. However, it is very clear once one has the full chronology in mind, and the Claimant's rationale for not participating in the performance management process as stated in his grievance, that he was refusing to take part in the performance management process because he had become suspicious of it and believed that the Respondent could not legally require him to participate.

156. In response, Mr Syson explained that he was not wanting to meet to carry out the performance review, but in order to understand the Claimant's rationale for not wishing to participate (Mr Syson not having seen the explanation provided in the Claimant's grievance). Taking a creative management approach, Mr Syson wrote that the Claimant's position presented challenges in terms of deciding on performance and reward, but accepted that if the Claimant was 'fully against it' he would respect that and 'work things out by myself'.

157. Mr Syson recognised that disciplinary proceedings could have been commenced against the Claimant for failing to participate in the performance management process, but consciously (with colleagues) decided not to commence disciplinary proceedings against the Claimant for this to avoid a perception of retaliation for having raised a grievance. The Claimant was at this point, and throughout, up until the point when he went off sick in February 2020, working diligently and to his usual standard with apparent commitment to the Respondent in terms of his day-to-day work.

158. On 12 November 2019 (V4/356) Mr Syson then invited the Claimant to an informal feedback session on matters such as would have been covered in the performance management process, *"the idea being to help you get the most out of your career"*. The Claimant attended this meeting. The Claimant's case is that at this meeting he *"discussed discrimination"* and Mr Syson *"did nothing to address the matter amicably"*. The Claimant complained that he had not been promoted to VP like Employee 10 although he believed he had been doing the same role. At this hearing, the Claimant's position was that he asked Mr Syson 'what he would do for him' and that Mr Syson agreed to look into promotion opportunities for him. Mr Syson for his part described the meeting as a difficult one. He found the Claimant's communication style *"odd"* and considered it was apparent that frustrations had been building up for some time. He thought it would take some work to bridge the gap between the Claimant's expectations and reality. He said that he would like to set up regular meetings with the Claimant (something he does with all those who report to him, quarterly for those at the Claimant's level, monthly for the next rank and weekly for his direct reports). Mr Syson says that the Claimant refused to schedule any further meetings, but he put one in his own diary anyway for February 2020 to make sure he got back in touch with the Claimant. In the end that further meeting did not happen because by that time the Claimant was off sick. We find that the differences between the Claimant's

and Mr Syson's recollection of this meeting were relatively minor and that such differences as there were resulted from the Claimant's misunderstanding of the situation. The Claimant has, we accept, been convinced since 2014 that he is doing the same job as Employee 10 and that he is deserving of promotion and increased pay for all the reasons he has advanced in these proceedings. He genuinely believed that Mr Syson had agreed at this meeting to look into his situation and come back to him regarding promotion opportunities. However, we find that is not what Mr Syson said: we find that Mr Syson genuinely did not consider that the Claimant had been wronged as regards not being promoted to VP like Employee 10 or not being promoted (essentially for the reasons advanced by the Respondent in these proceedings) and that his intention was to try to meet with the Claimant with a view over time to helping him to understand why he was in the position he was in, and providing guidance about what might be needed to progress within the Respondent. He did not in our judgment mislead the Claimant at this meeting; the Claimant simply came away believing that Ms Syson had said what he wanted him to say. Mr Syson himself formed the view at the time that the point he was trying to make had not *"landed"* with the Claimant. We observe that even in the course of this hearing when questioning Mr Syson about the meeting, the Claimant misunderstood Mr Syson's answers and suggested that Mr Syson had agreed that he was going to see what he could find for the Claimant by way of promotion opportunities even when that had not been Mr Syson's answer. As Claimant and witness were at cross-purposes, the judge had to intervene to explain to the Claimant the difference between what Mr Syson had said and what the Claimant seemed to think he had said.

Alleged harassment January 2020

159. The Claimant's position was that after June 2019 Mr Niforas had kept cancelling their normal monthly meetings. Mr Niforas appeared confused by this point when challenged by the Claimant in cross-examination. It was evident he was taken by surprise by the point, which had not featured in the List of Issues or in the Claimant's witness statement. He replied that he thought they had had 1:1 meetings, frequently and that they had frequent interactions on a daily basis as they worked closely together. As the Claimant did complain about the lack of monthly 1:1 meetings in his email of 24 January 2020, we accept that he is right that the scheduled 1:1 meetings did not happen during this period, but we do not consider that any particular significance should be attached to that, given that the Claimant did not dispute that they had continued working closely together during this period and Mr Niforas had not had proper notice that the Claimant was going to complain about a lack of meetings and thus not had a chance to check his diary so as to be able to explain why they had not happened.

160. On 7 January 2020, the Claimant accuses Mr Niforas of verbally harassing him by speaking to him in an aggressive derogatory manner when receiving too many automated emails. Mr Niforas cannot recall this incident, denies he would have spoken to the Claimant in a derogatory manner, but accepts he

finds automated emails frustrating. The Claimant did not in his witness statement (or any other document) provide any detail of what happened in this incident. In answer to the Tribunal's question at the hearing, the Claimant described what happened as being that on the emails coming into inboxes, Mr Niforas had jumped up and come across to him asking why he was getting 'all these emails'. The Claimant asked him please not to speak to him like that. The Claimant said that Mr Niforas does not speak to other people like that. The Claimant explained why the emails were coming and Mr Niforas spoke to him *"aggressively"* to get him to get Employee 10 to fix it. The Claimant after the conversation emailed Employee 10 stating that Mr Niforas had 'asked him to mention' the issue *"with the view of getting it resolved by the EDM team"* (GB2/208). It was suggested to the Claimant in cross-examination that the way he writes this email is casual and calm and does not suggest that Mr Niforas has just been aggressive to him. The Claimant said that this was because he was not going to 'take it out' on Employee 10.

161. Regarding this incident, we find that Mr Niforas did not act inappropriately or aggressively. We accept he would have been frustrated about the automated emails arriving in his inbox and that this frustration may have come across in the way he spoke to the Claimant, but we consider that the Claimant has over-stated his case regarding this incident. If it had been as serious as he now suggests, he would not have written in such casual terms to Employee 10 with no intimation of urgency at all, and he would have complained about this incident in his later email of 24 January in which he makes other allegations of harassment against Mr Niforas.

162. In the List of Issues, the Claimant alleged that on 7 January 2020 Mr Niforas denied him any promotion, pay, bonus, or increased compensation. This was not dealt with in the Claimant's witness statement and Mr Niforas cannot remember this conversation either. It is not mentioned in the Claimant's subsequent email of 24 January. It was put to the Claimant that there was no conversation with Mr Niforas in January about promotion, pay, bonus and the Claimant agreed. The Claimant accepts this alleged conversation did not happen and we so find.

163. The Claimant brought claims in the List of Issues that on 17 January 2020, Mr Boston, Mr Hammond and Ms Kelliher bullied him regarding Mr Boston not receiving data he had requested. After the Respondent had informed the Tribunal that it would not be calling Ms Kelliher (who has left the Respondent), only Mr Boston and Mr Hammond, the Claimant stated that he was not making claims against Mr Boston and Mr Hammond so they need not attend to give oral evidence either. The Claimant's complaint about what happened on 17 January 2020 as set out in his witness statement (p 118) is that he was on the phone for over an hour in an uncomfortable position because he did not have a headset and that he suffered (unspecified) *"racial harassment"* during this call (p 118 of witness statement). Invited by the Tribunal to explain what he says the harassment was, he said that Ms Kelliher spoke to him in a derogatory manner, but this was limited to tone. He accepted that she had never spoken to him like that at any other point, and that it may have been

because she was just irritated/cross about what had happened on this occasion.

164. On 21 January 2020 the Claimant emailed Mr Niforas about behaviour by Mr Boston, Mr Hammond and Ms Kelliher (GB2/188, DD/131). The Claimant in his email complained about Mr Boston's conduct as being 'unprofessional', Mr Hammond making what he considered to be unreasonable demands, and Ms Kelliher had 'continued to attempt to force through late active list changes without a fully tested and working alternative solution'. He says nothing here about Ms Kelliher having spoken to him inappropriately. He makes a general complaint, without particulars, about *"people who scream and shout and bully their way to getting what they want"*.

165. Regarding the allegation against Ms Kelliher, although she was not tendered for cross-examination, we note her denial of the allegation in her witness statement, and we find that the Claimant has on his own evidence not made out the factual basis of any case against her. We find that at best he has again misinterpreted another employee's frustration about a work situation as something personal to him. We are not satisfied, in the light of the Claimant's vague and changing account of what happened, and his own acceptance that she may just have been frustrated about work, that Ms Kelliher acted inappropriately. He has in any event adduced no evidence at all from which we could conclude that Ms Kelliher's treatment of him was influenced by his race.

166. On 23 January 2020, the Claimant alleges that at a 1:1 meeting Mr Niforas 'threatened him' for not signing dual hatting arrangements. Mr Niforas said he had to raise it as the Claimant was the only one in a team of 22 who had not signed and it was not fair on the rest of the team. The Claimant sent an email about the meeting in the evening of the next day (V5/43-45). In his email, the Claimant complained about the dual-hatting being a breach of his rights. The Claimant in his email states that Mr Niforas said he would *"prefer if [the Claimant] was dual hatted"* and that he needed to *"consider [his] team"* and that he was *"just making [the Claimant] aware and had to mention it"*. The Claimant denied that the reference in his email to Mr Niforas having said that the need to 'consider his team' was a reference to Mr Niforas saying it was unfair on the team that the Claimant was not dual-hatted. The Claimant said he viewed it as a threat about him leaving the team, but we find that this line in the Claimant's email does reflect what Mr Niforas said he said about it not being fair on the rest of the team that the Claimant was dual-hatted. We further find that it was reasonable for Mr Niforas to raise this with the Claimant in the (very moderate) terms that the Claimant describes in this email given that, as we have already set out above, we find that asking the Claimant to become dual-hatted (and sign the relevant paperwork) was a reasonable management request. Given the Claimant's long-standing resistance to it, and his strength of feeling about it, we consider that he over-reacted to Mr Niforas raising it with him and perceived it as a threat. We find that there was nothing unreasonable about Mr Niforas' conduct on this occasion.

167. In the email of 24 January 2020, the Claimant also complained about Mr Niforas not having yet approved his new PC install request made on 20 January 2020 despite having said he would do so. He complained about Employee 10 doing his work or passing him half completed work and expecting him to pick it up, and that Mr Niforas had been spending much more time with other employees. He made a complaint that Employee 10 had spoken to another black employee in an aggressive derogatory manner saying, *"Save the f***** file"*.

168. Mr Niforas did not reply to the Claimant's email, although he strongly disagreed with its contents. He forwarded the complaint to Mr Syson half an hour after receiving it with a covering *"fyi"*. He did not attempt in his email to Mr Syson to defend himself or provide any context. He did not recall speaking to the Claimant about the email subsequently, but maintained that he had not previously been aware that the Claimant had a problem with him and he had felt they always got on well. He did not reply to the Claimant personally because Mr Syson did not advise him to, but told him that he would pass it on to Ms Owen to deal with. Mr Niforas also did nothing about the complaint about Employee 10, although he said that if the alleged language had been used by her, it was *"not acceptable"*. Ms Owen decided to deal with this email as part of the Claimant's grievance. We have considered carefully whether this was appropriate, particularly in relation to the allegation that the Claimant made regarding Employee 10. We observe that this is a complaint the Claimant is raising on behalf of another employee and there is no evidence that the other employee actually regarded the behaviour as untoward or complained about it himself. There is nothing on the face of the allegation (save for the colour of the employee concerned) to suggest a racial element. In the circumstances, we find that it was reasonable for Ms Owen to add this email to the Claimant's grievance to be dealt with as part of that.

169. On 24 January 2020 the Claimant himself forwarded to Ms Owen the email he had sent to Mr Niforas (V5/43), but deleted from it the complaint about Employee 10. In his covering email he wrote that he was advising her that he was still being harassed. Ms Owen says in her witness statement that she decided to include this with the other grievances that the Claimant had raised, but we do not accept that as she did not refer to it in her email of 7 February 2020 as being one of the Claimant's communications that would be considered as part of the grievance. Some of the issues that the Claimant raised in the 24 January email were, however, repeated in his 5 February email which <u>was</u> to form part of the grievance investigation.

170. The Claimant's allegation that on 29 January 2020 Ms Owen discussed confidential matters with others was withdrawn at the hearing.

<u>January 2020 grievances</u>

171. On 29 January 2020 the Claimant handed Ms Owen two further grievances each with lengthy appendices. His covering letters for each were in the same form as what he referred to as his *"original grievance"* of June 2019 (i.e. with

the same requirement that it not be disclosed to anyone) and the grievance summaries described the further grievances as not being separate grievances but *"further information"* in relation to his original grievance. The first (V5/60) was concerned with the Respondent's failure to promote him and broadly follows the claim he has made in these proceedings, i.e. the Claimant argues that he has always been doing 'the same job' as Employee 10 and complains that *"no one has ever been promoted from IDM-Market Data (until the manager himself was promoted in June 2019) … whilst younger persons continually join the company and are promoted within 2 years"* (V5/62). He did not refer to there being any other potentially unlawful reasons for failure to promote (such as race or sex or having made protected disclosures). The second (V5/70) complained about the failures by the Respondent to provide him with the equipment he had requested over the years, including failures to provide requested *"reasonable adjustments"*, again broadly in line with the claim he has made in these proceedings. He also complained about Ms Owen's failure to provide him with all the information he had requested. He again suggested that the grievance could be investigated by someone external, and asked that he be given at least 14 days off work to prepare for any hearing, and that he be given at least 5 days in which to present his case.

172. By email of 3 February 2020 Ms Owen acknowledged the further grievances (V5/110). She stated that the grievance policy *"requires a level of engagement and prompt responses to enable us to investigate without unreasonable delay"*. She said that she would be in touch shortly to confirm the next steps.

173. On 4 February 2020 Mr Sword and Mr Hameed of the Compliance Division emailed the Claimant regarding apparent IT breaches by him as two emails with confidential data, and also the Respondent's organisation charts, had been sent by him to his personal email address (V5/144, V5/148). The emails reminded the Claimant that use of personal email accounts required advance approval and that otherwise when working from home, employees are supposed to use remote access. The Claimant was asked to explain his reason for sending the material and confirming approval had been obtained. The Claimant said in oral evidence that he did not read the email from Mr Sword (V5/111) because as it was from a Bank employee and he is not dual-hatted all he could see was a preview panel where he could see the attachments. However, in his letter to Ms Owen of 5 February 2020 (V5/112) (in which he made clear that he had not sent her two further grievances, but further information in relation to his original grievance and that he wanted all matters dealt with together) he complained that he was still being harassed, and identified the emails from Mr Sword and Mr Hameed as acts of victimisation (V5/112). It is apparent from what he writes in that letter that the material he emailed to his personal email address in breach of the Respondent's IT policies was material that he had appended to the grievances he sent to Ms Owen. He wrote: *"Given I have raised a Strictly Private and Confidential and For Your Eyes Only Grievance with yourself on 6th Jun 2019 and provided further information on 29th Jan 2020 … I find it strange I am being quizzed on information which was only submitted to yourself less than a week ago"*. We observe that his use of the words *"being*

quizzed" strongly suggests that the Claimant had read the content of the emails and not just looked at the attachments. Ms Owen also gave evidence, which we accept, that the Claimant not being dual-hatted did not prevent him reading Mr Sword's email because there was nothing done to the email system to prevent the Claimant reading emails from Bank employees, and in any event Mr Sword was dual-hatted and, as it states on his email, he was authorised to represent the Respondent as well as the Bank so there was no problem. As such, we find that the Claimant was not frank when asked about this email in oral evidence.

174. On 7 February 2020 Ms Owen sent a lengthy email to the Claimant (V5/129) which he did not receive as he was by that time out of the office. It is clear from this email that Ms Owen has finally properly read the Claimant's communications over the previous six months. She picks up on his references to feeling unwell and that he cannot take sickness absence and assures him that he can. She refers him to the Employee Assistance Programme and asks him whether, pending investigation of the grievance by Byrne Dean, she can provide any other assistance. She had decided that it was necessary to move forward and appoint Byrne Dean even though he had not agreed to that and informed him that the next stage would be an invitation to a meeting.

175. As the Claimant had not replied to Mr Sword's or Mr Hameed's emails about IT breaches, Mr Sword followed up regarding the IT breaches on 11 February 2020 (V5/142), but the Claimant did not get this email as he was out of the office by then. Mr Sword's email makes clear that the Respondent takes IT breaches *"very seriously"*. Mr Niforas responded to inform Mr Sword that the Claimant was out of the office and to confirm that he had not authorised the Claimant to send emails to his personal email address. Mr Syson was informed about IT breaches as well as the fact that the Claimant had raised a further grievance (V5/141). Again, he considered whether disciplinary proceedings should be commenced, but decided against it so as to avoid giving the Claimant cause to think the Respondent was retaliating against him for raising grievances.

2020 absence / Covid-19 pandemic

176. From 6 February 2020 the Claimant was on sick leave. Although we infer from his witness statement (p 23) that he commenced sick leave in part because the screens recommended in the workstation assessment had not been supplied at this point and Mr Zemaitis had delayed in sending him the Roodlane report, the Claimant did not tell Mr Niforas or anyone else any of this. He simply texted Mr Niforas on the morning of 6 February (V5/114) that he was unwell and unable to work and would let him know when he was able to return. Mr Niforas replied that he hoped the Claimant would feel better soon. The next day Mr Niforas texted (V5/115) the Claimant to say he would be out of the office that day so he should contact Employee 10 who he had asked to provide cover. It is apparent from this text message that Mr Niforas

thought it was possible that the Claimant would return to work that day, i.e. that he was unaware that the Claimant might be seriously ill.

177. On 12 February 2020 the Claimant still had not returned to work. Mr Niforas texted him to ask how he was, whether he could provide any help and when he thought he would be well enough to return so he could arrange cover (V5/149).

178. On 13 February 2020 the Claimant wrote a letter to Ms Owen (V5/150) and provided a doctor's note to HR signing him off sick with *"stress, panic attacks and headaches"* until 8 March 2020. In the letter, he said he was planning to return to work on 9 March 2020 (V5/152). He also texted Mr Niforas (V5/153). In the letter he asked for his privacy to be respected and information about his absence not to be passed on. He said *"all being well"* he was planning to return on 9 March.

179. By email of 18 February 2020 Mr Sword informed Ms Owen that 52 emails were sent to the Claimant's personal email account between 25 January 2019 and 29 January 2020.

180. On 19 February 2020 Ms Owen sent a text message to the Claimant to offer support and acknowledge receipt of his sick note (V5/160). The Claimant did not respond to that message (V5/161). Ms Owen kept Mr Syson and Mr Niforas informed, noting that the Claimant was signed off until 9 March 2020 (V5/161).

181. On 28 February 2020 Ms Owen sent a letter to the Claimant at his home address to offer support (including the Employee Assistance Programme and, on his return to work, Occupational Health) and asked for him to confirm receipt to her phone or email as she was worried about him (V5/176). The Claimant did not respond to that immediately, although from his perspective his letter of 9 March 2020 (that the Respondent did not receive) was intended to be his response (V5/201).

182. On 9 March 2020 the Claimant obtained a further doctor's note signing him off sick with "stress at work" until 17 March 2020 (V5/202). The fit note ticked the box "you are not fit for work" rather than the box "you may be fit for work taking account of the following advice", but did state in the comments: *"Work place to make adjustment to duties and workstation"*. The Claimant also wrote a letter dated 9 March 2020 (V5/201) which thanked Ms Owen for her letter of 9 March 2020 and stated that *"all being well"* he intended to return to work on 18 March 2020. He asked that before he return, Ms Owen should *"complete the following and confirm in writing to [his] address"*. The four things requested were: a new PC; privacy, anti-glare and anti-blue light screens fitted to all monitors; all health and safety recommendations to be completed; and *"I will not be bullied, victimised, harassed, discriminated or suffer any other detriment"*.

183. On 10 March the Claimant texted Filippos Niforas to confirm he had been signed off until 17 March 2020 and would send the doctor's note to HR.

V5/153, V6/92. Mr Niforas emailed Ms Owen to tell her that the Claimant had texted and was *"signed off work until March 17th and he will be sending the doctors note to HR"* (V5/204).

184. The Respondent's position is that it did not receive either the Claimant's letter or medical certificate of 9 March 2020 at the time. The Respondent accepts the letter of 9 March 2020 was sent with the Claimant's letter of 19 June 2020. The medical certificate the Respondent says that it first saw as part of disclosure in these proceedings. The letter has a slightly incorrect postcode on it, but is otherwise addressed correctly. The error in the postcode was one the Claimant repeated in a number of communications and does not of itself explain why the letter would go astray. We accept the Respondent's evidence that it did not receive the Claimant's letter or medical certificate at this point, as this is clear from the content of Ms Owen's letter of 24 March 2020. We consider that Ms Owen's message of 18 March has given the Claimant the wrong impression because it contains a typing error. We note, as Ms Owen observed in oral evidence, that the sentence reads rather oddly because it suggests both that he sent in his doctor's certificate and, contradictorily, that she has not heard from him. We infer that the most likely explanation is that Ms Owen meant to write something like *"he said he would send me his GP certificate advising he was signed off until 17 March but I haven't heard from him"*. As such, we conclude that the Respondent did not receive from the Claimant his letter detailing his requested adjustments until 19 June 2020.

185. By this time, concerns were rising nationally about the Covid-19 pandemic. By email of 12 March 2020 Mr Syson notified employees of split remote and office working arrangements in response to the pandemic (V5/213, 215) and a remote working rota was started on 16 March 2020 (V5/222). The Claimant was allocated to the Platinum team that was due to be in the office from 16-27 March 2020. The Claimant would not have received these emails at the time as he did not have remote access to his emails.

186. On 17 March 2020 Mr Niforas contacted the Claimant by text at 10.42 to ask after his health and inform him that it was possible to work from home if he could (V5/233, V6/93).

187. This arrangement for optional home-working was very quickly overtaken by an email of 17 March 2020, 14.03 to all UK employees requesting that they all work from home if they were able do so from 18 March 2020 (V5/234). Again, the Claimant did not see this email at the time. Following this communication, the vast majority of the Respondent's c 2,500 London employees began working from home. Only those who could not do their work from home or who made special requests to work from the office because of personal circumstances attended the offices.

188. On 18 March 2020 Ms Owen and Mr Niforas messaged each other about the Claimant. We have dealt with this exchange above insofar as it concerned the Claimant's 9 March GP certificate. Ms Owen's message continued, *"Can you please drop him a text to advise we have invoked remote working"* and

"if he is planning to return to work we should advise him that he should do this from home – thanks".

189. We should interpose at this point that the Claimant submitted in closing that Mr Niforas had not given honest evidence about his communications with Ms Owen about the Claimant's absence and that he *"confirmed three times that he had not advised Ms Owen of my absence, and then he changed his position"*. The Claimant's submission does not accord with our notes of evidence. We found Mr Niforas to be a straightforward and honest witness, albeit one whose memory of events was not very good, but in such cases he simply said he did not remember. For the avoidance of doubt, it is perfectly clear from the documentary evidence that Mr Niforas from the outset kept Ms Owen informed of communications he received from the Claimant in connection with his absence.

190. On 18 March 2020 the Claimant obtained another certificate from his GP signing him off sick with "stress at work" until 22 March 2020. The GP wrote on the note: *"Back to work on Monday 23rd of March 2020 for phased return to work – for 2 (two) months"* (V5/241). There is no dispute that the Claimant did not submit this sick note until 19 June. As is apparent from his later text message of 23 March 2020, he deliberately withheld it.

191. On 18 March 2020, the Claimant texted Mr Niforas to say he had been signed off until 22 March 2020 and was planning to return on 23 March 2020 (V5/244, V6/94). The Claimant wrote: *"Upon my return I will come in and work from the office."*

192. On 19 March 2020 Mr Niforas replied to the Claimant: *"That is good to hear that you are coming back. As mentioned due to the Covid-19 developments we are asked to work from home. Therefore there is no need to come in the office. Let me know if your remote access works"* (V6/94, V5/244). The Claimant did not reply to Mr Niforas' message about working from home or remote access. He did not explain that his remote access was not set up, and had not been set up since 2016. Nor did he tell the Respondent that he could not work at home for medical reasons. When cross-examined about this by the Respondent (and then asked further questions by the Tribunal) the Claimant said that his doctor did not want him working at home in isolation because part of the problem was that he was being harassed and discriminated against and *"they definitely did not want me sitting in isolation"* and that it was the advice of the doctor that he should come to work. We note that the Claimant first suggested that it was his doctor's advice that he should work from the office in his letter of 4 July 2020 (V7/73). However, we do not accept that the Claimant received any such advice from his doctor. We so find for the following reasons:

    a. There is nothing to suggest that the Claimant discussed with his doctor about working from home or working from the office – if this was discussed and was an important point it would have featured either on the Claimant's GP records (V7/327-328) or the sick certificate signed that day, but it does not – despite the Claimant

having told the GP that work had offered for him to work from home because of corona virus, the GP did not record anywhere that it was his/her advice that the Claimant should not do this but should work only from the office. The sick certificate simply states that he should have a two-month phased return to work. It is inconceivable that, if there was really a medical problem with the Claimant homeworking, the GP would not have mentioned it;

b. It was not until 19 March that Mr Niforas made clear (following the communication to all UK employees at 14.03 on 18 March) that everyone now had to work from home and the Claimant did not return to the GP after this point and so could not have received the advice he alleges he received at a later date; and,

c. Other evidence we have heard suggests that the Claimant felt strongly that the Respondent could not reasonably require him to work from home as his place of work in his mind was (and could only be) the office. We refer in this regard to the submissions he made (and which we have already recorded above) about his contractual terms regarding place of work and his reference in closing submission, *"if you are a plumber and go out to work, you don't go home and start fiddling with the taps, if you go to work you don't naturally go home and work, I categorically said I would go to the office"*. We infer that, as had happened with previous issues that the Claimant regarded as a change to his terms and conditions, the Claimant regarded homeworking as an unacceptable change to his working conditions.

193. On 20 March there was an instant messaging conversation between Ms Owen and Mr Niforas (V5/252), in the course of which Ms Owen told Mr Niforas that government advice was for employees to work from home and that the Claimant should work from home unless he could advise why he could not do so. In cross-examination by the Claimant, Mr Niforas accepted that the Respondent could make exceptions for employees to come into the office and that he did not specifically convey that to the Claimant. He did however, ask the Claimant if he had what he needed to work from home. The Claimant did not reply so the Respondent could not have known that the Claimant considered he could not/should not work from home. Mr Niforas' understanding was that the exceptions who were working in the office were those who needed to be there for business reasons, but the Claimant's job did not require him to be there for business reasons, so he did not suggest to the Claimant that he could come into the office.

194. On 22 March 2020 Mr Niforas again texted the Claimant: *"Hope all is well. Can you let me know please if your remote access works? Following government advice on covid-19 we work from home until further notice"* (V5/262, V6/95).

195. On 23 March 2020 the Claimant texted Mr Niforas. He did not answer the question about remote access or working from home. He wrote that he would

wait until the office re-opened to begin his phased return to work and would provide his final doctor's note on his return (V5/263, V6/97). He wrote that he was waiting for communication from HR in response to the letter he says he sent. He wrote that he was waiting for confirmation that the Respondent would comply with *"medical expert advice which was sent 2 weeks ago"* and, *"As the company has a duty of care for all employees I will not put myself or anyone else's health at risk and will therefore await for the company to officially open the office allowing everyone to return to the office carry out the correct process and begin a phase return to work"*. He concluded by stating he would not send any more messages until he had received a letter from HR *"as this is proving quite upsetting"*. In oral evidence, the judge asked the Claimant what he meant in this message about putting other people's health at risk by working from home and the Claimant confirmed there was no risk to anyone else and he was not clear what he meant. On reflection, having now considered all the evidence, we conclude that the reason the Claimant was unable to answer the judge's question was because it was based on an incorrect premise. We infer that when the Claimant wrote that text message he was not contemplating working from home and had simply 'blanked out' or ignored Mr Niforas' instructions to work from home. The Claimant's position was that work was to be done in the office and as people were not supposed to come to the office, nor would he as to do so in the pandemic would be putting other people's health at risk and he would therefore wait for the office to re-open before starting to work.

196. Mr Niforas did not reply to the Claimant's text message as he understood from the Claimant's final remark that the Claimant did not want to continue the discussion (as is clear from Mr Niforas' email at the time: V5/265). Mr Niforas did, however, pass the Claimant's message on to Ms Owen in an email of 23 March (V5/265-6). This internal email chain does not otherwise mention the Claimant's wellbeing, but includes questions about whether he can work from home and what he means by his messages. Ms Owen agreed to contact the Claimant to seek clarification.

197. By letter of 24 March 2020 Ms Owen advised that she understood the Claimant had texted Mr Niforas yesterday and that he had stated he had written to HR. She wrote: *"Please note that due to Covid-19, current working arrangements mean that we are unable to receive post. As such, we are not in receipt of your letter or the medical advice that you mention is enclosed with the letter. Your health and well-being is of key importance … ".* It referred to remote working arrangements that had been implemented for him to perform his role and reminded him of the requirement to provide further medical certificates (V5/278). This letter was sent by email to the Claimant's work email address and the Claimant did not receive it as he did not have remote access. The letter was not also posted.

198. On 24 March 2020, at Ms Owen's request, Mr Niforas texted the Claimant to say: *"HR asked for your personal email (as not sure you are able to access work account) so they can send you a letter. Please note that HR are not in the office to print documents. Let me know if you can provide this and I will let them know so they can email you the letter. Thank you"* (V5/280). The

Claimant did not reply. When questioned about this by the Respondent in oral evidence, the Claimant said that this was because he had been advised to stop screen use, he was suicidal and his doctors were making a crisis plan to protect him. We reject the Claimant's evidence in this regard as his GP notes show that he did not visit the GP at all between 18 March 2020 and 22 April 2021 (V7/327). We observe that it should have been clear to the Claimant from this text message that the Respondent was not in a position to be able to send him a letter by post at this point (as he maintained he was expecting and would wait for) and that unless he replied to that text message and provided a personal email address, the Respondent was at that point unable to send him a letter.

199. On 1 April 2020 Ms Owen telephoned the Claimant on his mobile phone but was unable to leave a voicemail. She followed up with a text asking him to confirm receipt (V5/313, V6/240). The Claimant did not respond to any messages from Ms Owen. His position as explained in oral evidence was that he was suffering from stress and the person causing that stress was Ms Owen. In cross-examination, he refused to say when asked whether he had received calls and texts from Ms Owen. In closing submissions, however, he confirmed that he accepted she had called and texted him during this period and he had not replied. We find that the Claimant's position in closing submissions reflects the actual facts.

200. On 14 April 2020 Ms Owen attempted to call the Claimant, but was not successful.

201. On 15 April 2020 (V5/333) Ms Orban (HR Advisor) emailed Ms Owen with suggested text for a letter to the Claimant that included informing him about sick pay entitlement, PHI and referral to OH and other forms of assistance. Ms Owen did not advise the Claimant of any of this at the time. The Claimant sought to make much of this in cross-examination, but we find there was no need for Ms Owen to advise him about any of these matters at this point as the Claimant was not signed off sick but was absent without authorisation and not answering all attempts to contact him.

202. On 20 April 2020 Ms Owen followed up with a text to the Claimant in which she said that they were very concerned about him and would contact the police if they did not hear from him (V6/241). The Claimant did not respond.

203. On 1 May 2020 Ms Owen attempted to call the Claimant and was unable to leave a voicemail (V6/241).

204. On 1 May 2020 Ms Owen contacted the police regarding her concern about the Claimant. The police attended the Claimant's house, together with an ambulance. The police then called and Ms Owen emailed Mr Williams immediately: *"He's at the address and is safe and in their words seems very well. They have asked him to contact me. I'm relieved to hear he's ok"*. Mr Williams replied, *"Wonderful. At the same time a little rebuke to him for not replying to any messages at all given the anxiety this has caused. Presume he is able to send a whats app at least"* (V6/10A-10C). In her subsequent

email, Ms Owen added, *"The police said we don't want to get involved in your employment dispute. We have told him to contact you but we don't think he will."* The Claimant disputes that he said any of this to the police. He may be right, but what matters for the purposes of these proceedings is what Ms Owen and Mr Williams understood and believed and we accept that Ms Owen's genuine understanding is reflected in these contemporaneous emails.

205. From 1 May 2020, Mr Niforas began exploring the possibility of getting a temp to replace the Claimant as his return was uncertain.

206. On 4 May 2020 Ms Owen attempted to call the Claimant and followed up with text to the Claimant referring to having heard from the police that he was well (V6/241). The Claimant still did not reply.

207. On 5 May 2020 (V6/24) the Respondent's Pension and Benefits team sent him a letter about changes. They sent it hard copy as the Claimant was out of the office.

208. On 27 May 2020 Ms Owen emailed the Claimant's personal email address explaining that she was concerned about him and asking him to contact her or get a friend, family member or colleague to contact her on his behalf (V6/87). Ms Owen obtained the Claimant's personal email address from the emails that IT had found he had sent to his personal email address. The Claimant, however, maintained in oral evidence that he did not get this because he does not use his personal email.

209. On 28 May 2020 Mr Niforas texted the Claimant informing him that it was compensation communication day the following day (V6/100). In fact, there was no communication with the Claimant about compensation at this point. The Claimant had been allocated a (relatively small) bonus by Mr Syson for 2020, but in the end it was decided to put his bonus on hold pending resolution of the unauthorised absence issue. Mr Niforas was not involved in the decisions that led to the Claimant's bonus being deferred. Internal messages between Ms Owen and Mr Syson on 28 May 2020 suggests that the Respondent took legal advice on whether or not to pay the Claimant's bonus and at this point were going to pay (V6/88). However, a few days later they decided to withhold the bonus (V6/120) pending obtaining an occupational health assessment (V6/88B). Ms Owen gave the instruction for the bonus to be withheld, but it was Mr Syson's decision (V6/120). The Claimant was very exercised about this decision during the hearing, but we record that we find the Respondent's decision to withhold the bonus to be reasonable and unexceptional. The Claimant had by this time been absent without authorisation for two months and was not responding to messages, although he was at home and well enough to speak to the police. It would in our judgment have been inappropriate to pay him a discretionary bonus in those circumstances, particularly given the FCA guidance about the need to take account of employee conduct in determining discretionary pay.

210. In an internal email exchange of 3 June 2020 Ms Orban asked Ms Owen if she had received a fit note for the "first period of absence" (V6/116) as she was unable to find any sick certificates for him on the system.

211. On 4 June 2020 Ms Owen sent a letter to the Claimant by courier (and email) (dated 3 June 2020) informing him that the Respondent was considering *"formal action"* in relation to his unauthorised absence and failure to maintain contact, that Occupational Health (OH) advice would be sought and he was strongly encouraged to attend. The letter stated that the Claimant would be sent details of an appointment. It did not require him to do anything at this stage (V6/124-126). This letter refers to the Respondent not having received a sick certificate since the one expiring on 9 March and says that no letter has been received from him. A copy of the Sickness Policy was enclosed. The letter set out sources of support available. He was urged to contact the Respondent as soon as possible to discuss absence and next steps. Enclosed with this letter was the MUFG Bank Employee Handbook, rather than the Respondent's Handbook as was intended (and has had been attached to the email version that was sent out at the same time, but not received by the Claimant). We observe regarding this letter that although its import and intent is reasonably clear, it could be worded more straightforwardly. In particular, it could have been clearer that sickness certificates were required to cover the whole period of absence if the Claimant was sick, and it would have been better to use the word *"disciplinary"* rather than the (somewhat vague) *"formal action".* However, the Respondent's policy on these issues is clear and it should have been obvious to the Claimant that the reason why his absence was regarded as unauthorised was because he had failed to provide sickness certificates covering the whole period.

212. The couriers who attended the Claimant's home to deliver the letters that the Respondent sent from this point on did not wear face masks/PPE. The Claimant complains that this amounted to harassment and put his life at risk. However, there is no evidence that the Respondent knew in advance that the couriers would not be wearing face masks, or otherwise did this deliberately. Nor has any evidence been provided to suggest that the brief interaction with a courier that would be necessary to receive such a letter would pose any risk of Covid-19 infection. And, in any event, the Claimant did not in fact answer the door to any of the couriers, each of whom in the end placed the letters for the Claimant in his mailbox situated near the entrance to the block of flats in which he lives.

213. The Respondent did not receive a response from the Claimant to its letter of 4 June, so a week later on 11 June 2020, the Respondent sent the Claimant another letter by courier arriving at 4.30pm, referring to the earlier letter of 4 June 2020, expressing concern for his wellbeing and informing him that an OH appointment had been scheduled for a virtual consultation on 15 June 2020 at 09.45 and asking him to confirm he would attend (V6/217). It warned again that his current absence was regarded as unauthorised and that failure to engage with OH may lead to 'next steps'. It told him to contact Ms Owen immediately by phone or email or nominate someone else to communicate

with her on his behalf. The Claimant's position was that this letter just required him to 'attend' a virtual appointment for which he had been provided with no joining details. We observe that it is unfortunate that the last whole paragraph on V6/217 is worded in such a way as to enable the letter to be read at first blush as the Claimant read it at this hearing, and note again that the Respondent could use plainer English in its correspondence. However, in our judgment, when the letter is read as a whole, it is in fact clear that he should contact Ms Owen (or in any event that if he was uncertain about how to attend the OH appointment, it was obvious that he should check with Ms Owen), but he did not do so. Ms Owen explained that she was following the Respondent's normal OH process, which is to schedule an appointment, then get the employee to consent to release of his personal data to OH and OH would then contact him to arrange how to hold the appointment. The OH form is supposed to be with the doctor 24 hours in advance (V6/232) but Ms Owen said in her experience, OH was flexible about timing and that if the Claimant had responded at any time on Friday or over the weekend the appointment could have gone ahead. When we suggested to her that she had set an unreasonably short deadline, she said that she considered it to be sufficient as there was time for the Claimant to respond. If he had responded and asked for more time, that could have been allowed, but he did not.

214. The Claimant did write a letter of response to the Respondent's letter of 4 June, but he did so on 11 June and he posted it and it was not received by the Respondent until several weeks later (although a copy of it was hand-delivered by him to the Respondent on 19 June 2020 along with his further letter of that date). The Claimant's letter of 11 June (V7/23) explains that his position is that he had been told not to come to the office by his manager, that he did not wish to be communicated with other than by letters in writing. He accepted that he had not communicated with Mr Niforas since his text message of 23 March 2020 because it was 'too distressing'. In connection with his own complaints of bullying, harassment, discrimination and victimisation by the Respondent, he referred to *"I can't breathe"* and *"Get your knee off from my neck"* (a reference to the killing of George Floyd by Minneapolis policeman Derek Chauvin on 25 May 2020 – a crime for which Mr Chauvin was subsequently convicted of murder). He complained that he had not been sent the data he had requested and suggested that the reason for this was because he is black. He wrote that he had been off sick and was waiting a safe secure return to work at an office that was free from bullying, harassment and discrimination. He stated explicitly that he had not consented to a report from OH and suggested that the Respondent officially re-open the office first and confirm that it had *"taken care of an completed all pre-existing, existing and known issues first"*. He referred to other international events relating to the Covid-19 pandemic and race discrimination. He suggested that the people sent to his house (i.e. couriers) had put his life at risk. He did not complain specifically about communications from Ms Owen, or suggest he could not communicate with her personally.

215. Around this time, the Respondent (Ms Orban) completed a draft OH referral form (V6/228). This was not used because the Claimant never provided his consent to a referral to OH.

Disciplinary process

216. The Respondent still not having received any communication from the Claimant at all since 23 March 2020, by letter of 17 June 2020 Ms Owen invited the Claimant to a disciplinary hearing on 19 June 2020 at 13.00 with Mr Williams (Chief Human Resources Officer). The letter was sent by courier and by personal and work email (V6/234-242, including Appendix). The Respondent's policy provides for notice of disciplinary hearings to be between 24 hours and 5 days. The Claimant was given (just) more than 24 hours' notice. The Appendix set out details of attempts to contact the Claimant. This letter makes clear that, so far as the Respondent is concerned, the Claimant's last medical certificate expired on 9 March 2020. It also referred to the OH appointment which he had not responded to or attended. It described the purpose of the meeting as being to discuss the following two allegations:

> 1. Your unexplained and unauthorised absence from work from 10 March 2020 to date. In accordance with MUFG's sickness absence policy, if absence continues beyond the period shown in the certificate further doctor's certificates must be submitted. You have not provided an updated medical certificate since your medical certificate dated 19 February 2020 expired on 9 March 2020;
>
> 2. Your failure to maintain contact throughout your period of absence. The reporting requirements under MUFG's sickness absence policy provide that employees are required to keep their line managers informed of their progress and likely return to work date. You have not responded to your line manager since 23 March 2020. I have also attempted to contact you on numerous occasions to request that you make immediate contact but you have failed to respond. Details of the attempts made to contact you have been set out in the enclosed Appendix.

217. The Claimant complains that Ms Owen took all the decisions up to this point, and wrote the disciplinary invite letter, rather than getting Mr Williams to take them. The Claimant is right that Ms Owen wrote the letter, and right also that this constituted a departure from the Respondent's written policy. However, it is in our judgment inconsequential. It is apparent from the documentary evidence we have about contacting the police that Ms Owen and Mr Williams had been liaising over the way forward with the Claimant for some time. They were both adamant that it was Mr Williams who was responsible for taking the decision that disciplinary was the appropriate way forward, and we accept their evidence in this respect. However, we observe that Ms Owen evidently also considered that to be the right course and for the purposes of considering the Claimant's claims in these proceedings, we regard Ms Owen as a joint decision-maker with Mr Williams. There was, however, nothing improper about that; indeed, it is what we would expect to see in terms of HR involvement in a case such as this.

218. Mr Williams had not had any prior contact with the Claimant. He had first heard about him in one-to-one meetings with Ms Owen during 2019. He was aware that the Claimant had raised grievances, with extensive documentation, but he was not aware of the subject matter of those

grievances. Mr Williams was very clear that he had been the person to decide disciplinary was appropriate, and that he did so on the basis of the bare facts of the period of absence without an authorising sick note. He did not need to read the whole file in relation to the Claimant, and did not do so until 18 June (V7/7).

219. The Claimant complains that the procedure at V5/303-304 was not followed because Mr Williams had not reviewed the whole file before deciding to proceed to disciplinary, but again we consider that to be insignificant. Mr Williams did not need to read the whole file as the position was very simple. The Claimant had not (successfully) communicated with the Respondent at all since 23 March 2020. He had been absent without explanation, let alone authorisation, for nearly three months. The grounds for proceeding to a disciplinary were clear.

220. On 19 June 2020 the Claimant walked to the Respondent's offices and scanned in a letter that he had typed which was then forwarded by email from the security guard to Ms Owen (V7/9, 10-13, 14-15, 16-25). He attached to the letter a copy of his letter of 9 March 2020, the letter of 11 June 2020 and sick note dated 18 March 2020 signing him off to 22 March 2020. There is a dispute between the parties regarding whether the sick note of 9 March 2020 was enclosed at this point, but it is clear from the scanned documents that it was not. The Claimant's letter took the position that the Respondent had not sent a letter of 24 March 2020, or otherwise replied to his letter of 9 March 2020 until 17 June 2020. There was no mention of the Respondent's other attempts at correspondence. He referred to the requested adjustments and recommended phased return and quoted ACAS advice on absence from work and fit notes. He wrote, *"To assist with your letter dated 11 Jun 2020 – the government has confirmed to work from home where possible"*. He explained, *"If I am to attend occupational health referral I will advise them of all the information you already have and have not actioned, as well as the advice of others. Therefore, why would you not complete these steps first and confirm."* He did not state he could not work from home (indeed, he wrote, *"To assist with your letter dated 11 June 2020 – the government has confirmed to work from home where possible."* He asked that the disciplinary hearing be cancelled. He concluded that the Respondent's actions had left him 'fearful' in his home, *"Black Lives Matter – or do they at MUFG"*.

221. The Claimant's letters and documents were emailed to Ms Owen and Mr Williams at 9.37am. They neither of them had time to read them properly before the scheduled 1pm disciplinary hearing. They agreed between them to postpone the disciplinary hearing and accordingly at 1pm only Ms Owen dialled into the meeting with the Claimant. Unbeknownst to Ms Owen, the Claimant recorded the meeting and has produced a transcript for this hearing (V/33-36). We listened to the recording in open Tribunal.

222. Ms Owen began by asking him how he was as she had been so worried about him. She said that they were not going to hold the meeting today so that they could consider his letter. The Claimant said that as they had got the letter now he would be expecting to hear that the disciplinary hearing was closed

and that he would be sticking with the position he had previously advised of waiting for the office to be open. Ms Owen said that she would take a look at his letter as she had not had a chance to review it in any detail as yet. It is apparent from the transcript that her understanding (reasonable in the light of a quick review of the Claimant's letters) was that he was still sick. Ms Owen confirmed that the office was going to stay closed for the time being in line with government guidance, that most people were working from home and that is something he should do too when he was well enough, but they would not talk about that today. She reminded him that support services were available to him.

223. The Claimant's position is that this meeting was a sham hearing, that the disciplinary hearing was not postponed and that if he had not dialled in he would have been dismissed on the spot without any involvement from Mr Williams. We reject the Claimant's case in this respect as it has no evidential basis at all. It apparently stems from his misconception that it is not possible to postpone a hearing once it has started and as he had not been informed in advance that it had been postponed, this must have been (and was) the disciplinary hearing. That is fanciful. Not only is it apparent from Ms Owen's and Mr Williams' internal communications (and the letter to the Claimant that follows) that they genuinely believed they had rescheduled the disciplinary hearing, but that is in fact what Ms Owen told the Claimant in the meeting on 19 June 2020.

224. Mr Williams and Ms Owen then had a meeting with Ms Orban present to take notes at which Mr Williams asked Ms Owen some questions about matters raised in the Claimant's letters and Ms Owen provided a response (V7/60-61).

225. On 23 June 2020 the Prime Minister announced a national easing of lockdown restrictions, and on 24 June 2020 the Respondent announced that some staff would be returning to the office on a voluntary basis (V7/43) from 6 July, including *"members of staff who have found working from home difficult and have a preference to return to the office"*. Mr Niforas did not communicate that to the Claimant because he understood the Claimant's case was being dealt with by HR and he did not think he should interfere. That day (V7/50) Ms Owen told Mr Niforas by message that they were still trying to engage with the Claimant to understand if he was well enough to work or remained sick and that she would let him know if she had any further information. Mr Niforas was evidently from this unaware that there had been any prior communication with the Claimant. Ms Owen responded on 25 June (V7/51) that she had spoken to the Claimant once.

226. By 25 June Mr Niforas was given the go-ahead to recruit temporary resource for sickness cover for the Claimant (V7/52).

227. On 29 June 2020 Mr Williams wrote to the Claimant setting a new date for the disciplinary hearing for 6 July 2020. This was slightly more than the maximum 5 working days provided for in the Respondent's policy (V7/55-59). This was again sent to the Claimant by email and courier. The letter made

clear that the previous disciplinary hearing of 19 June had been postponed. In this letter, Mr Williams stated the Respondent's understanding that he was currently fit to work (on a phased return basis) and had been fit since 23 March 2020. He indicated that subject to the outcome of the disciplinary hearing, a rescheduled OH appointment would be arranged. Mr Williams and Ms Owen were both working on the basis of their understanding that the Claimant had thus far refused to attend the OH appointment. The letter set out the allegations against the Claimant as follows:-

> 1. Your unexplained and unauthorised absence from work from 23 March 2020 to date. At the time the original disciplinary invitation letter was sent to you, the only sick note we had on record for you expired on 9 March 2020. However, we have now seen a copy of the sick note you provided with your correspondence of 19 June 2020 which expired on 22 March 2020.
>
> 2. Your failure to maintain contact throughout your period of absence. The reporting requirements under MUFG's sickness absence policy provide that employees are required to keep their line managers informed of their progress and likely return to work date. Numerous attempts to contact you were made by your line manager and Karen Owen as set out in the Appendix enclosed with the original disciplinary invite letter. At the time the original disciplinary invitation letter was sent to you, we had not received a response to you since 23 March 2020.

228. The Claimant complains that the Respondent acted improperly in amending the allegations to take account of the further sick note he had provided. This is a misguided complaint. The effect of taking into account the further sick note was to improve the position for the Claimant, albeit only slightly because there still remained a long period of unauthorised and unexplained absence and thus clearly a disciplinary case to be answered.

229. The letter gave the Claimant an opportunity to provide written representations, and stated that if written representations were provided, it would be assumed that the hearing would not proceed and a decision would be made on the basis of written information. The Claimant was offered the opportunity to bring a companion. The letter made clear that the Respondent had not received the Claimant's sick certificate of 9 March, and that the original letter of 11 June 2020 was not received until 24 June 2020. The letter referred to the Claimant's references to Black Lives Matter and sought to assure the Claimant that the Respondent was committed to promoting an environment of inclusivity and respect.

230. On 4 July 2020 the Claimant wrote a letter that he stated was an additional grievance to add to that he had previously raised (V7/69-76). He asked that the Respondent not send any further non-PPE-wearing couriers to his house or he *"might seek to report it to the police as a hate crime, racially motivated harassment attempted murder or manslaughter".* The letter was mostly concerned with complaints about Mr Williams who he alleged was abusing power, not impartial or independent. He maintained that the disciplinary hearing had taken place on 19 June and that the proposed second disciplinary hearing was unfair and related to different allegations. He quoted ACAS guidance on unauthorised absence which includes the following:

> *"Unauthorised absence is when someone does not come to work and gives no reason for their absence or does not contact their employer.*
>
> *The employer should try to contact the absent employee as soon as possible, including using any emergency contact they have.*
>
> *If contact cannot be made, the employer should discuss the absence with the employee when they come back to work.*
>
> *If the employee cannot provide good reason for the absence and lack of contact, the employer might consider further investigations for possible disciplinary action."*

231. He argued that the effect of that guidance was that if an employer was unable to contact an employee who was absent without authorisation, they should not attempt to make any further contact or take any disciplinary action until the employee came back to work. He suggested that the Respondent was acting in breach of that guidance in commencing disciplinary proceedings before he had come back to work. We observe that the Claimant's argument here is misguided and based on an overly literal interpretation of the third sentence of the guidance, which clearly assumes that the absent employee actually returns to work within a relatively short time. It does not mean that where an employer is unable to contact an employee who is absent without authorisation that they cannot commence disciplinary proceedings.

232. Regarding his medical certificates, he wrote:

> *"You have been advised that the Doctors notes from both Doctors notes remain valid, but are choosing to acknowledge only the information in the second Doctors note; to re-iterate the Doctors notes and letter dated 9 March 2020 is the advice of the Doctor, which should aid my return to work in the office.*
>
> *If you take notice of the evidence of your text messages between me and my manager on 18 March 2020 and 23 Mar 2020 which is the advice of the Doctor to reduce likely issues and aid my return to work i.e. I have to work from the office.*
>
> *I have checked and no one has advised me that the office is open OR confirmed the details as per my letter dated 9 Mar 2020."*

233. We have already rejected the Claimant's case that his doctor had advised he had to work from the office. We further observe that the Claimant's doctor's notes did not 'remain valid' because they were all time-limited and the last one had expired on 23 March 2020. Even the two months proposed in that last sickness note for a phased return had also long-since expired by this point.

234. The Claimant also complained about not having been provided with the information he sought in his grievance. He suggested that the Respondent

"have issue with me because of one of the protective characteristics example sex, age, race, colour, disability, etc".

235. The Claimant's letter of 4 July was received by the Respondent on 6 July 2020, just before the scheduled disciplinary hearing was due to start (V7/81, V7/102B). Mr Williams emailed Mr Kyle later that day to state that the hearing would accordingly be heard in the Claimant's absence and he and Ms Owen arranged to meet the next day (V7/102A). Mr Kyle wrote that there needed to be 'closure' on the issue (V7/102B). Mr Williams maintained (and we accept) that he did not regard that as an instruction to him. There was a suggestion in the course of the hearing before us that the re-arranged *"hearing"* on 7 July referred to by Mr Williams and Ms Owen in their emails was a *"hearing"* that the Claimant should have been invited to and given another opportunity to attend. On reflection, we do not consider that is realistic. Mr Williams and Ms Owen were just using the word *"hearing"* because that was what the original scheduled meeting with the Claimant was due to be. Once that had not taken place, all that was happening was that Mr Williams and Ms Owen were meeting to enable Mr Williams to take a decision 'on the papers', in much the same way that we as a Tribunal panel might meet on a day after the conclusion of a hearing to deliberate on a case but without the parties attending.

236. Mr Williams and Ms Owen then duly met and Mr Williams decided that the Claimant should be dismissed.

Dismissal

237. On 15 July 2020 a disciplinary outcome letter (V7/104) was sent to the Claimant's personal and work email and by courier. Mr Williams concluded that the Claimant had not sent the 9 March 2020 letter enclosing the sickness certificate or 11 June 2020 letter prior to them being hand delivered by the Claimant on 19 June 2020. It was confirmed that Mr Williams still did not have the sick note of 9 March 2020. It was concluded that the Claimant must have been aware of the requirement to submit sickness certificates and that it was unacceptable to wait until return to work to submit a certificate where absence was prolonged. In any event, there had been no sick certificate since 23 March 2020. Mr Williams noted in relation to this that *"there is no reference to you only being able to return to work if this involves a physical return to the office".* It was also concluded that the Claimant had received the Respondent's letter of 24 March 2020 setting out details of a possible return to work on a remote working basis as Mr Williams assumed that the Claimant had access to his work email. Updated medical evidence had not been submitted and the Claimant had not engaged with OH. Under the Respondent's disciplinary policy "Unauthorised or unexplained absence", "serious breach of any of the Company's policies" and "any form of dishonesty" are all listed as potential gross misconduct and it was concluded that the Claimant's behaviour amounted to gross misconduct. The Claimant's

employment was terminated summarily on grounds of gross misconduct (V7/103-110).

238. Ms Owen notified Mr Syson and Mr Niforas of the dismissal (V7/120), and also Mr Conway (V7/121), who had been identified as the HR person to assist with any appeal the Claimant might make.

No severance package

239. The Claimant complains about the Respondent's failure to provide him with a severance package on dismissal on 15 July 2020 and compares himself (so far as direct race discrimination) is concerned with Employee 9, Employee 7 and Employee 8. He argues that Employee 8 was paid a discretionary bonus in 2013 notwithstanding being off sick and subject to a 12-month disciplinary warning. This is correct, but the bonus letter on its face explains that decision was taken on an exceptional basis and Employee 8's circumstances were completely different to those of the Claimant as the Claimant was dismissed for gross misconduct, which is the most serious disciplinary sanction in response to his more serious misconduct. Employee 8 had only been subject to a written warning, he was not dismissed, he resigned and a settlement agreement was reached when he instructed lawyers to act on his behalf and they negotiated one. Likewise, the evidence was that Employee 7 had solicitors negotiate a severance package. He was not dismissed for gross misconduct either. Employee 9 left in July 2015 and was not paid a severance package, as the Claimant accepted at the hearing.

240. The Claimant also points to the Respondent's published information on severance payments made to Material Risk Takers (MRTs) on the termination of their employment each year (see eg V5/191-192 and V5/185-196), but the Respondent's evidence, which is unsurprising and we accept, is that no employee dismissed for gross misconduct has been paid a severance package.

Appeal and ET proceedings

241. On 20 July 2020 the Claimant posted his appeal letter to Mr Conway. The post code was again incorrect (V7/123-140). In his 17-page, close-typed appeal letter, the Claimant contended (in summary) that sending couriers to his house constituted 'hate crime'; that his dismissal was unfair; that he had abided by the Respondent's sick pay policy by providing the sick notes he had provided; that the Respondent had not abided by its disciplinary policy as his line manager had not contacted him about the disciplinary allegations before Ms Owen did; that the Respondent had failed properly to investigate what had become of the Claimant's letter of 9 March 2020; Ms Owen should not have been involved in the investigation of the matter because she had a 'direct involvement with the situation' contrary to the Respondent's policy; Ms Owen should not have been the person inviting the Claimant to a disciplinary hearing; he had not agreed to the hearing on 19 June 2020 being postponed

and the 'alleged' re-scheduled hearing should have occurred within 5 days of the original date; he argued that as the Respondent had not made all the adjustments he sought in his letter of 9 March 2020 that he should have been treated as if he was still on sick leave; that breaches of sick pay policy could not be treated as disciplinary matters as the sick pay policy was not part of his contract of employment; that *"the second unfair hearing on 6 Jul 2020 was also just another attempt to get me to talk about matters which were unrelated to the alleged allegations or* ***to threaten me to work from home or be unfairly dismissed*** *as you are clearly not allowed to use the company sick pay policy"* (our emphasis); that investigation had been carried out after the first scheduled disciplinary hearing; the notice he was given for the hearing on 19 June 2020 was too short to allow him to find a companion or prepare; the information provided by the Respondent about the allegations was unclear; at what he maintained was the disciplinary hearing on 19 June 2020 he had not been given any witness statements or opportunities to call or cross-examine witnesses; he should have been referred to OH and that details for the appointment on 15 June 2020 had not been provided and there was no enough time to do anything about the appointment; that he had not been working from home prior to lockdown, that his place of work was the office and no one had asked him to work from home; he made specific complaints about the conduct of Ms Owen, Mr Niforas and Mr Williams; he argued that the Respondent should only have contacted him by ordinary postal letter to his home address and should not have disciplined him for failing to respond to other communications; that the Respondent was using the conduct dismissal as a cloak for staff reductions; summary dismissal was unreasonable given his 10 years' service with the company; he asked that prior to arranging an appeal hearing, the Respondent should disclose to him various items of information, including the following and about 10 other requests of similar length and complexity: *"disclose and provide details of all grievance and disciplinary investigations and grievance disciplinary hearings over the last 6 years or going back further if possible, please include allegations, outcomes, decisions, appeals, appeal decisions, final outcomes, person who conducted the investigation, persons who conducted the hearing and as much information as possible to allow me to understand the issues (including the ethnicity, sex, age, disability, corporate title, salary, pension contribution percentage, department, dates, duration, names, addresses and contact details of persons who brought the grievance or was subject to a disciplinary) – please provide within 5 working days"*; he complained he had not been paid a bonus for 2020 and raised again a number of the complaints he had raised in his earlier grievances.

242. The Respondent's position is that this letter was not received until 25 September 2020 (V7/194).

243. In the meantime, by letter of 7 August 2020 Mr Williams provided a specific response to the letter from the Claimant dated 4 July 2020 (V7143-145). This had been taken into account by Mr Williams in deciding to dismiss the Claimant, but he now asked the Claimant if he wished to proceed with his whole grievance with Byrne Dean investigating. The Claimant did not respond.

244. By email of 25 September 2020, a Ms Woods notified Mr Conway that the Claimant's appeal had been received (V7/194). The Claimant argues that Mr Conway is lying about not having received the appeal letter shortly after 20 July and points to the Respondent's solicitors training materials (V7/146) as evidence that they had received his appeal earlier. However, the matters highlighted there are entirely generic and raise no reasonable cause for suspicion that the Claimant's appeal had been received earlier. We accept the Respondent's evidence, supported by Ms Woods' email, that the Claimant's email was first received on 25 September 2020.

245. Normally, the Respondent's policy requires an appeal hearing to be arranged within 5 days. Two months had passed before the Claimant's letter even arrived. Mr Conway then took over a month to write to the Claimant because he was struggling to understand the Claimant's letter and because of pressure of other work. We accept that these were the reasons. Mr Conway was unaware at this stage of the Claimant's alleged protected acts relied on in these proceedings, not having read anything more than the dismissal letter at this point.

246. On 9 October 2020 the Claimant filed his ET1 in these proceedings (PB/1-20).

247. On 27 October 2020 Mr Conway wrote to the Claimant to ask if he wished to proceed with an appeal (V7/243). The Claimant did not reply.

248. On 11 December 2020 Mr Conway followed wrote again to ask if he wished to proceed with an appeal (V7/288). The Claimant did not reply.

249. On 8 January 2021 Mr Conway wrote to the Claimant informing him that an appeal hearing would be scheduled for 12 January 2021 despite the lack of response (V7/299-300).

250. At the hearing on 12 January 2021 the Claimant did not dial in.

251. On 8 February 2021 a Preliminary Hearing in the Employment Tribunal proceedings took place (OB/1-2). At that hearing, the Claimant said, by way of explanation for his non-response to Mr Conway's communications, that he had thought he should not communicate with the Respondent while the litigation was ongoing.

252. As a result of this, by letter of 16 February 2021 Mr Conway re-scheduled the appeal hearing for 24 February 2021 (V7/304-5). At this point, an appeal hearing manager was identified by Ms Owen. Mr Robertson agreed to act (V7/303). He had a short 15 minute chat with Ms Owen by way of briefing. Mr Conway then contacted him with information about the appeal (V7/306). Mr Robertson was a peer of Mr Conway, both reporting to the same people. However, he explained that Ms Owen had specifically told him that the Respondent was looking for someone to deal with the matter independently and impartially, and he took his role seriously. He was provided with relevant

documents in order to consider the Claimant's appeal. These included some of the letters relied on by the Claimant as including his protected disclosures in relation to requesting adjustments and equal pay data, but he was not aware of the prior history of those matters and in oral evidence denied that they had influenced his thinking at all. We accept Mr Robertson's evidence as to his approach to the appeal, and his denials that either Ms Owen or Mr Conway sought to steer him in any particular direction. It is apparent to us both from his oral evidence, the questions he asked Ms Owen after the appeal hearing and the appeal outcome letter that Mr Robertson did take his role seriously and applied independent thought to the matters raised by the Claimant.

253. The appeal hearing was scheduled for 24 February 2021. The Claimant did not attend. His position as explained at this hearing was that he was still waiting to be provided with the further information he had requested. Mr Robertson and Mr Conway proceeded to determine the appeal in his absence. Mr Robertson had some questions for Ms Owen following the appeal, which she answered by email on 8 March 2020 (V7/309).

254. On 9 March 2021 Mr Robertson sent the Claimant the appeal outcome letter (V7/312-318). In a lengthy and detailed letter he explained why he considered that the process and decision in relation to the dismissal was fair, and that the investigation carried out had been reasonable. He too concluded that the doctor's notes did not advise that the Claimant could only work in the office. He wrote that the Claimant's *"letter of appeal seems to suggest that you had interpreted that only employees working from home prior to the Covid-19 pandemic would continue to work from home. This is incorrect and in view of many employees working from home since the pandemic began, I do not consider this is a reasonable interpretation for you to have arrived at"*. He concluded that the Claimant had failed to work from home or to take any steps to show that he was willing to work from home. He concluded that there was no discrimination and no breach of employment contract.

255. Further preliminary hearings in these proceedings took place on 10 March 2021 (OB/3-4); 19-20 July 2021 (OB/22-27); and 13-14, 17-18 January 2022 (OB/30-32).

Holiday pay

256. The Claimant considers that he may be owed holiday pay, but does not explain his case on this. The Respondent's position, which we find to be correct, is that the Claimant was overpaid wages on termination and so this was set off against his holiday pay balance. He was paid in full for 12 days from 16 to 31 July 2020 even though his employment had ended on 15 July 2020. This sum of £2,769.23 was set off against the holiday balance of 10 days (£2,307.69). The Claimant was accordingly overpaid £528.96 by the Respondent, but the Respondent has not sought to recover this (V7/151).

The law

Harassment

257. By s 40 EA 2010 an employer must not harass any employee or applicant for employment. By 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating the claimant's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Claimant relies on the protected characteristics of race, sex and age.

258. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*.

259. While the threshold for the type of acts that may amount to harassment is higher than the detriment threshold for the purposes of direct discrimination, the EAT (Slade J) explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, that harassment involves a broader test of causation than discrimination and a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic.

260. The provisions on harassment take precedence over the direct discrimination provisions: conduct which amounts to harassment does not (save where the harassment provisions are disapplied for the specific protected characteristic) constitute a detriment for the purposes of ss 13 or 27: see EA 2010, s 212(1).

261. The burden of proof works in the same way as for direct discrimination (below).

Direct discrimination

262. Under ss 13(1) and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, by dismissing him or subjecting him to any other detriment, discriminated against the Claimant by treating him less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are race, sex and age.

263. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in

which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

264. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated. In some cases construction of a hypothetical comparator may be difficult, and the Tribunal may instead focus on what is the *"reason why"* question, using any evidence as to how others are treated (whether or not their circumstances are materially the same or not) to inform that assessment: see in particular *Shamoon* at [8] *per* Lord Hope and at [109]-[110] *per* Lord Scott.

265. The Tribunal must determine "what, consciously or unconsciously, was the reason" for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

266. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010 especially at [33] per Underhill LJ. What matters is what was in the mind of the individual taking the decision. It is also important to remember that only an individual natural person can discriminate under the EA 2010; the employer will be liable for that individual's actions, but the legislation does not create liability for the employer organisation unless there is an individual who has discriminated. As Underhill LJ explained in that case at [36]:

> 36. … I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way [what is now

> the EA 2010 works], rendering E liable would make X liable too …. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and—assuming we are applying the composite approach—that act was influenced 'Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under [EA 2010, s 109] and would accordingly be deemed by [EA 2010, s 110] to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

267. However, in that case the Court of Appeal also observed, that where a decision is taken jointly by more than one decision-maker, a discriminatory motivation on the part of one decision-maker will taint the whole decision: ibid at [32].

268. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach under the EA 2010: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

269. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

270. We have also directed ourselves to *Bahl v Law Society* [2003] IRLR 640, in which Gibson LJ provided helpful guidance on the approach to reasonableness and unreasonableness in a discrimination context as follows:

> 98.. Accordingly, to the extent that the tribunal found discriminatory treatment from unreasonable treatment alone, their reasoning would be flawed and the finding of discrimination could not stand. That is the clear ratio of Zafar and that decision remains unaffected by Anya.
>
> The relevance of unreasonable treatment

> 99.. That is not to say that the fact that an employer has acted unreasonably is of no relevance whatsoever. The fundamental question is why the alleged discriminator acted as he did. If what he does is reasonable then the reason is likely to be non-discriminatory. In general a person has good non-discriminatory reasons for doing what is reasonable. This is not inevitably so since sometimes there is a choice between a range of reasonable conduct and it is of course logically possible the discriminator might take the less favourable option for someone who is say black or a female and the more favourable for someone who is white or male. But the tribunal would need to have very cogent evidence before inferring that someone who has acted in a reasonable way is guilty of unlawful discrimination.
>
> 100.. By contrast, where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups.
>
> 101.. The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination But it will depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. If the findings of the tribunal suggest that there is such an explanation, then the fact that the alleged discriminator has been less than frank in the witness box when giving evidence will provide little, if any, evidence to support a finding of unlawful discrimination itself.

271. We have also taken account of *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 at [22] where Elias J observed:

> "(I)t is crucial that the Tribunal at the second stage is simply concerned with the reason why the employer acted as he did. If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter. It would obviously be unjust and inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. If that were so, an employer who selected [for redundancy] by adopting unacceptable criteria or applied them inconsistently could, for that reason alone, then potentially be liable for a whole range of discrimination claims in addition to the unfair dismissal claim. That would plainly be absurd. Unfairness is not itself sufficient to establish discrimination on grounds of race or sex, as the courts have recently had cause to observe on many occasions: see *Bahl* and the House of Lords decision in *Glasgow City Council v Zafar* [1998] ICR 120."

<u>Indirect discrimination</u>

272. By s 19(1) EA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the Claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic; (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it; and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

273. The burden of proof is on the claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

Victimisation

274. Under ss 27(1) and s 39(4)(c)/(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by dismissing him or subjecting him to any other detriment because he did, or the Respondent believed he had done, or may do, a protected act.

275. By s 27(2) a protected act includes (so far as relevant in this case): (a) bringing proceedings under the EA 2010; or (c) doing any other thing for the purposes of or in connection with this Act or (d) making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). An act is not protected if it is done in bad faith (s 27(3)).

276. In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' or 'harassment' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination/harassment, it only prohibits discrimination/harassment on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani v London Borough of Ealing* UKEAT/0454/2012/RN, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at [27]:

> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act . All is likely to depend on the circumstances, which may make it plain that although he does not

> use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

277. In determining whether something amounts to a detriment, or what the reason for the treatment was, and the burden of proof, we apply the same approach as for direct discrimination.

Detriment pursuant to s 44 of the ERA 1996 /automatic unfair dismissal pursuant to s 100 of the ERA 1996 (health and safety)

278. By s 44(1) ERA 1996 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that (as relevant here): (c) being an employee at a place where (i) there was no such representative or safety committee, or (ii) there was a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety; or (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

279. Section 44 does not apply where the worker is an employee and the detriment in question is dismissal: s 44(4). Such claims must be brought as automatic unfair dismissal claims pursuant to s 100.

280. By s 100(1) an employee who is unfairly dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is a health and safety matter as defined. The sub-sections are the same as s 44(1) and the Claimant relies on s 100(1)(c), (d) and (e).

281. In *Rodgers v Leeds Laser Cutting* [2022] EWCA Civ 1659 the CA (Underhill LJ giving the judgment of the Court) at [17] agreed with the EAT (HHJ Tayler) that the words *"in circumstances of danger which the employee reasonably believed to be serious and imminent"* in s 100(1)(d) (which is the same as s 44(1)(d)) require only that it is established that *"the employee has a (reasonable) belief in the existence of the danger as well as in its seriousness and imminence"*. There is no requirement for there objectively to be any danger. The CA further held that it is necessarily implicit in the sub-section that it applies only where the employee has left the workplace (or proposes to do so, or has not returned) because of the perceived danger rather than

for some other reason (ibid, [18]). The CA also suggested that the perceived danger must arise at the workplace (although it need not be limited to the workplace). It is not sufficient that the perceived danger arises on the employee's journey to work (ibid, [19]). All of these observations by the CA were *obiter*, but we find them persuasive and apply them.

282. At [21] the CA set out the questions that a Tribunal must ask itself on such cases as follows:-

> 21. … the questions which the ET has to decide in a case under section 100 (1) (d) can be analysed as follows:
> (1) Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:
> (2) Was that belief reasonable? If so:
> (3) Could they reasonably have averted that danger? If not:
> (4) Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:
> (5) Was that the reason (or principal reason) for the dismissal?
>
> Questions (1) and (2) could in theory be broken down into two questions, addressing separately whether there was a reasonable belief in the existence of the danger and in its seriousness and imminence; but in most cases that is likely to be an unnecessary refinement.

283. The same questions must also be asked under s 44, save that so far as a detriments claim under s 44 is concerned, the CA's fifth question becomes whether that reason materially influenced the person who subjected the Claimant to a detriment, taking the same approach to causation as for direct discrimination cases.

<u>Detriment for making protected disclosures pursuant to s 47B ERA 1996</u>

284. Under s 47B(1) ERA 1996, a worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of her employer done on the ground that the worker has made a protected disclosure. Under s 47B(1A)(a) ERA 1996 a worker has the same right not to be subjected to a detriment by another worker of the employer done in the course of that other worker's employment.

285. The same approach to 'detriment' is to be applied in whistle-blowing cases as in discrimination cases: *Tiplady v City of Bradford MDC* [2019] EWCA Civ 2180, [2020] ICR 965 at [42].

286. Section 43A ERA 1996 defines a protected disclosure as a qualifying disclosure, which is in turn defined in s 43B(1) as *"any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more"* of a number of types of wrongdoing. These include, (b), *"that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"*.

287. A *qualifying* disclosure must be made in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

288. In the light of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] ICR 325, [24]-[26], it was for a time suggested that a mere allegation could not constitute a disclosure of information. However, in *Kilraine v Wandsworth LBC* [2018] ICR 1850 the Court of Appeal clarified (at [30]-[36]) that *"allegation"* and *"disclosure of information"* are not mutually exclusive categories. What matters is the wording of the statute; some 'information' must be 'disclosed' and that requires that the communication have sufficient *"specific factual content".* In *Simpson v Cantor Fitzgerald Europe* [2020] EWCA Civ 1601, [2021] ICR 695 the CA at [53] approved the approach of the EAT (UKEAT/0016/18/DA) at [42] in relation to the use of questions in an alleged protected disclosure, holding that the fact that a statement is in the form of a question does not prevent it being a disclosure of information if it *"sets out sufficiently detailed information that, in the employee's reasonable belief, tends to show that there has been a breach of a legal obligation"*.

289. Information disclosed in cumulative communications can constitute a single protected disclosure; whether it does is a question of fact: *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, approved in *Simpson v Cantor Fitzgerald Europe* ibid at [41].

290. A 'disclosure of information' can take place when the information being communicated is already known to the recipient. This is clear from section 43L(3) ERA 1996, and was confirmed by the Employment Appeal Tribunal in *Parsons v Airplus International Ltd* (UKEAT/0111/17/JOJ).

291. What must be established in each case is that the Claimant has a reasonable belief that the information disclosed tends to show one of the matters in s 43B(1), i.e. that the information disclosed 'tended to show' that someone had failed, was failing or was likely to fail to comply with one of the legal obligations set out there. 'Tends to show' is a lower hurdle than having to believe the information 'does' show the relevant breach or likely breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) [66]. The word *"likely"* appears in the section in connection with future failures only, not past or current failings where what is required is that the Claimant reasonably believe that the information disclosed 'tends to show' actual failures.

292. In the light of *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026, [74]-[81], what is necessary is that the Tribunal first ascertain what the Claimant subjectively believed. The Court of Appeal in *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, [2020] IRLR 224 (see especially [14]-[17] and [25]) has confirmed that it is the Claimant's subjective belief that must be assessed when considering the public interest element as well. The Tribunal must then consider whether the Claimant's belief in both respects was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all the elements of s 43B(1) were satisfied, specifically that the disclosure was in the public interest, and

that the information disclosed tended to show that someone had failed, was failing or was likely to fail to comply with a relevant legal obligation. The Court of Appeal in *Babula* emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not. As such, it is not necessary that the disclosure identify or otherwise refer to the legal obligation (or any of the matters in s 43B(1)), although whether it does or not may be relevant to the reasonableness of the claimant's belief that the information disclosed tends to show a relevant breach: see *Twist DX Limited v Armes* (UKEAT/0030/20/JOJ) at [87] and [103]-[104] *per* Linden J.

293. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: *Darnton v University of Surrey* [2003] ICR 615. It is to be assessed in the light of all the surrounding circumstances and as such witness evidence will be relevant to determining whether or not a written disclosure satisfies the statutory requirements or not. What was or was not known to the Claimant and relevant witnesses at the time will be relevant to whether or not the Claimant could reasonably believe that the disclosure met the statutory requirements: see *Twist* ibid at [57]-[59].

294. Prior to the amendment to s 43B of the ERA 1996 (by the Employment and Regulatory Reform Act 2013, s 17) to introduce the 'public interest' requirement, it had been held (in *Parkins v Sodexho* [2002] IRLR 109) that a disclosure concerning a breach of the employee's own contract could be a protected disclosure. In *Chesterton Global and anor v Nurmohamed* [2017] EWCA Civ 979, [2018] ICR 731 the Court of Appeal (*per* Underhill LJ at [36]) made the following observations about the policy intent of the introduction of the 'public interest' requirement:

> The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers—even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

295. The Court of Appeal in that case approved guidance formulated by counsel as to the matters that may be relevant to assessing the reasonableness of

the Claimant's belief in the matter being a matter of public interest which included the following ([34]):

> (a) the numbers in the group whose interests the disclosure served [see above];
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
> (c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
> (d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, ie staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.

296. If a protected disclosure has been made, the Tribunal must consider whether the Claimant has been subjected to a detriment *"on the ground that"* he made a protected disclosure (s 47B(1)). This means that the protected disclosure must be a material factor in the treatment: *Fecitt v NHS Manchester* [2011] EWCA Civ 1190, [2012] ICR 372 at [43] and [45]. This requires an analysis of the mental processes of the worker who is alleged to have subjected the claimant to a detriment. In order for a decision-maker to be materially influenced by a protected disclosure, they must have personal knowledge of it: see *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) at [85]-[87]. As Choudhury J explains there, that is because in whistle-blowing cases, as in discrimination, the focus is on what is in the mind of the individual alleged to have subjected the claimant to a detriment. As was held in the discrimination case of *CLFIS (UK) Limited v Reynolds* [2015] IRLR 562, it is not permissible to add together the mental processes of two different individuals for the purposes of a whistleblowing detriments claim: see *per* Choudhury P in *Malik v Cenkos Securities Plc* (UKEAT/0100/17/RN) at [93].

297. The burden of proof is on the Claimant to establish a protected disclosure was made, and that he or she was subject to detrimental treatment. However, s 48(2) provides that it is then *"for the employer to show the ground on which any act, or deliberate failure to act, was done"*. It has been held that, although the burden is on the employer, the Claimant must raise a *prima facie* case as to causation before the employer will be called upon to prove that the protected disclosure was not the reason for the treatment: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 at [40] (deciding this point so far as dismissal cases are concerned, persuasive *obiter* on the same point for detriment cases). As such, the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under s 136 of the Equality Act 2010 (EA 2010). Unlike in discrimination claims, though, if the employer fails to show a satisfactory reason for the treatment, the Tribunal is not bound to uphold the claim. If the employer fails to establish a satisfactory

reason for the treatment then the Tribunal may, but is not required to, draw an adverse inference that the protected disclosure was the reason for the treatment: see *International Petroleum Ltd v Osipov and ors* UKEAT/0058/17/DA and UKEAT/0229/16/DA at [115]-[116] and *Dahou* ibid at [40].

Unfair dismissal (including automatic unfair dismissal pursuant to s 100(1) ERA 1996 and/or s 103A and/or s 104)

298. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct, capability, redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). There are exceptions to that approach, as identified in *Jhuti*, and we have borne the principles in *Jhuti* in mind in considering the Claimant's case.

299. By s 103A an employee is to be regarded as automatically unfairly dismissed if the sole or principal reason for dismissal is that the employee has made a protected disclosure (defined as set out above in relation to whistleblowing detriments claims).

300. Section 104(1) ERA 1996 provides that an employee who is dismissed shall be regarded for the purposes of Part X of the ERA 1996 as unfairly dismissed if the reason or principal reason for the dismissal is that the employee … (b) alleged that the employer had infringed a right of his which is a relevant statutory right. Sub-para (2) provides that it is immaterial for this purpose whether or not the employee has the right, or whether or not the right has been infringed, although the allegation must have been made in good faith. Sub-para (3) further provides that is sufficient that the employee, without specifying the right makes it reasonably clear to the employer what the right claimed to have been infringed was. The relevant statutory rights include (s 104(4)(a)) any right conferred under the ERA 1996 that is enforceable by way of complaint to an Employment Tribunal.

301. Automatic unfair dismissal under s 100 we have already dealt with above.

302. In this case, the Claimant must raise a *prima facie* case that the sole or principal reason for his dismissal was that he had made protected disclosures or asserted a statutory right. If he does, then it is for the Respondent to prove that the protected disclosures were not the sole or principal reason for the dismissal: see *Dahou v Serco Ltd* [2016] EWCA Civ 832, [2017] IRLR 81 held at [29]-[30].

303. Once a potentially fair reason for dismissal is established, the Tribunal must consider whether it was fair in all the circumstances, taking into account the size and administrative resources of the employer, to dismiss the employee for that reason: s 98(4).

304. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

305. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48]. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. Unfairness at the appeal stage is always relevant and may render a dismissal unfair even if dismissal was fair in all other respects, but not necessarily: it is a matter for assessment by the Tribunal on the facts of each case: *Mirab v Mentor Graphics (UK) Limited* (UKEAT/0172/17) at [54] *per* HHJ Eady QC. It follows from *OCS* that a fair appeal may remedy even wholesale unfairness at the first stage, but whether it does or not is a question of fact to be determined by the Tribunal in all the circumstances of the particular case.

306. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Conclusions

307. We now set out our conclusions on each of the Claimant's claims, addressing first of all the matters that the Claimant relies on as protected acts / protected disclosures / assertions of statutory right / health and safety issues. As there are a large number of these matters, falling under different statutory headings, for convenience where we need to in this judgment refer to all of these matters together we refer to them as his "Protected Acts" with capital letters to signify that we encompass all of the things that the Claimant says

he has done, by reference to his various statutory rights, in respect of which he alleges he has suffered detriments or was dismissed. We deal first with whether these Protected Acts meet the respective statutory definitions and who knew about them. We then deal in turn with each of the items in the Practical Working List of Issues that we provided to the parties at the start of the hearing. Although we have analysed below whether the various Protected Acts relied on by the Claimant met the statutory definitions for the purposes of the various claims, where we conclude that they do not, we have nonetheless in our conclusions on the substantive claims considered whether, if we had found the Protected Act in question constituted a protected act or protected disclosure (etc), we would have found the Claimant's claims succeeded or not.

Protected acts relied on for the purposes of the victimisation claims under EA 2010, s 27

308. By way of protected acts for the purposes of his victimisation claims, the Claimant relies first on his requests for reasonable adjustments made on 3 April 2019, 9 March 2020, 18 March 2020, 23 March 2020 and 19 June 2020. Regarding those, we find as follows. In each case, we set out both whether we find the communications amount to protected acts, and who knew about them:-

    a. 3 April 2019 – we do not accept that this letter, which is the Claimant's first request for adjustments, constitutes a protected act. While a request for reasonable adjustments because of a disability would constitute a 'thing done for the purposes of or in connection with this Act' for the purposes of s 27(2)(c), the Claimant's letter does not mention a disability and nor could it in our judgment reasonably be understood as relating to a claimed disability. The Claimant had only been off work for a short period with stress. The 'adjustments' sought did not on their face obviously relate either to stress or any other particular long-term medical condition. Having regard to the guidance in *Durrani,* we do not therefore consider it constitutes a protected act. The letter was sent to Ms Owen and on the evidence before us was not shared with anyone else that the Claimant alleges has treated him unlawfully in these proceedings;

    b. 9 March 2020 – this is the Claimant's letter that accompanied his sick note of the same date. The letter was first received by the Respondent (Ms Owen and Mr Williams) on 19 June 2020. We do not accept that, viewed in isolation, it constitutes a protected act as it refers only generically to adjustments, discrimination, bullying, harassment, victimisation without reference to any protected characteristic and on the basis that he had only been off work for a short period when it was first written, we do not consider that it could reasonably be inferred to refer to a claimed disability, nor to any particular protected characteristic. Applying *Durrani* again, therefore, it is not a protected act;

c. 18 March 2020 – this is a text message to Mr Niforas that just refers to the Claimant being signed for stress at work. The Claimant had not been signed off for long at this point and we consider this brief message cannot reasonably be construed as referring to the protected characteristic of disability under the EA 2010;

d. 23 March 2020 – this was the Claimant's text message to Mr Niforas. This is also a 'high level' message that says even less than the 9 March 2020 letter and we do not consider it can reasonably be construed as constituting a protected act;

e. 19 June 2020 – we accept that this letter, with its references to discrimination, victimisation, equal pay, and "Black Lives Matter – or do they at MUFG" constitutes a protected act.

309. The Claimant also relies on what he describes as his disclosure requests in relation to equal pay on 26 Mar 2019, 6 Jun 2019, 24 Jul 2019, 18 Oct 2019, 29 Jan 2020, 11 Jun 2020, 4 Jul 2020, 20 Jul 2020, 24 Nov 2020 and 22 Jan 2021. Regarding those, we find as follows:-

a. The request of 26 March 2019 was not a protected act as the request was made in the context of the Claimant's complaint about the Respondent's changes to his terms and conditions. It made no reference to equal pay or anything else under the EA 2010;

b. We are – just – persuaded that the Claimant's grievance of 6 June 2019 constitutes a protected act. The Claimant relies on it as being a disclosure request in relation to equal pay, but it does not actually say that is what it is, and the requests for pay data are made in relation to multiple different criteria, not just sex, so that it is not obvious that it is a request for equal pay data. However, the grievance does refer expressly to the EA 2010 and we are just persuaded that, read as a whole, this can be construed as a protected act in relation to equal pay. We give the Claimant the benefit of the doubt in part because the grievance plainly does contain a protected act in relation to an allegation of age discrimination as he complains about more favourable treatment of younger employees and we consider it would be wrong to turn a blind eye to this although it was not the element of the grievance relied on by the Claimant. This grievance was, on our factual findings, only ever seen by Ms Owen (and the Respondent's lawyers and data protection officer) and she did not communicate this aspect of the content of the grievance to anyone;

c. Insofar as the Claimant's emails of 24 July 2019, 18 October 2019 and 29 January 2020 refer back to his original grievance, we accept they also constitute protected acts for the same reasons. They too were only ever seen by Ms Owen (as material for our purposes);

d. The Claimant's letter of 11 June 2020 was not received by Ms Owen and Mr Williams until 19 June 2020. We do not consider that this letter includes a protected act in relation to equal pay, but it plainly does constitute a protected act insofar as it makes explicit allegations of race discrimination. Again, although this was not the basis on which the Claimant relied on this letter, we consider it would be wrong to turn a blind eye to the allegations of race discrimination in this letter. We therefore treat this as a protected act for the purposes of our conclusions, although if we found that the Claimant had been victimised because of this protected act he would in our judgment in principle need to apply to amend in the light of our judgment;

e. The Claimant's further communications of 4 Jul 2020, 20 Jul 2020, 24 Nov 2020 and 22 Jan 2021, we accept constituted protected disclosures on the basis that they all refer back to the 4 July 2020 letter which does include a complaint about not having been provided with the information sought in his grievance and suggests that the Respondent *"have issue with me because of one of the protective characteristics example sex, age, race, colour, disability, etc"*.

Alleged protected disclosures relied on for the purposes of the PID claims:

310. We accept that the Claimant's reporting of client money breaches in 2012 and 2013 met the definition of a protected disclosure as the Respondent subjected employees to disciplinary proceedings for failure to comply with FCA requirements in relation to client money. Given that, although the evidence we have on this is limited, we are prepared to accept the Claimant's evidence that he did disclose information that reasonably tended to show a failure to comply with a legal obligation and that this was a disclosure in the public interest. However, no one who the Claimant has complained about in these proceedings knew that the Claimant had made these disclosures and so they cannot have been any part of the reasons for any of the treatment about which he complains.

311. On 14 January 2020 the Claimant disclosed to Ms Owen in writing that he *"would report the health and safety assessment failure, which had gone on for over 8 months to the HSE and/or local authority"*. We accept that this constituted a disclosure of information to Ms Owen about the position regarding his workstation assessment that he subjectively believed tended to show a failure to comply with a breach of a legal obligation in relation to health and safety, and which it was reasonable for him to regard as such given the delay in action by the Respondent. We are less convinced about the public interest element. We accept that the Claimant subjectively believed it was in the public interest as he considered it was an HSE matter, but we do not accept this belief was reasonable. The alleged failure concerned only the Claimant; it was regarding a workstation assessment and thus not in our judgment a health and safety failing of wider public interest; it concerned a workstation assessment which had been delayed through administrative error/oversight and which he had not, until this email, chased in the way a

reasonable employee would have done, so that he had in our judgment no justification for regarding it as a serious or deliberate failure. This was not therefore a protected disclosure within the statutory definition. In any event, apart from Ms Owen, none of the other individuals against whom the Claimant has made allegations in these proceedings knew of this alleged protected disclosure.

312. The Claimant alleges that in his letter of 11 June 2020 (which was received by Ms Owen and Mr Williams on 19 June 2020) he disclosed to Ms Owen in writing that bullying, harassment, discrimination and victimisation and a failure to make reasonable adjustments placed him in imminent danger. His letter does not quite say that, but we accept that it constituted a protected disclosure. We have already found that it contained allegations of race discrimination that amounted to protected acts for the purposes of the s 27 of the EA 2010. We further find that the content of the letter disclosed information that in the Claimant's subjective belief tended to show he had been unlawfully discriminated against and we further find that his belief that the letter contained such information was objectively reasonable. Given the importance of discrimination law, we also accept that this met the public interest test (subjectively and objectively). (We emphasise that this does not mean that we consider anyone reading the letter would consider that the Claimant had disclosed information that tended to show that he had been treated unlawfully, just that it was reasonable for him to consider that he had conveyed information that, if true, tended to show that.)

313. We do not, however, consider that the 11 June 2020 letter contained a protected disclosure about non-PPE wearing couriers, as we understand the Claimant to allege. All the letter states is: *"You have sent several people to my house, not once, not twice, but on at least three separate occasions, totalling a minimum of at least 5 different people, putting my life at risk."* While we are prepared to accept that the Claimant had a subjective belief that the couriers were putting his life at risk, we do not consider that the information disclosed in this letter could reasonably have been regarded by him as tending to show that. We have already observed in the course of our findings of fact that the Respondent did not know the couriers would not wear PPE, and that in any event no evidence has been provided (and nor are we aware of any from our own general knowledge and experience) to suggest that the brief interaction with a courier that would be necessary to receive a letter would pose any risk of Covid-19 infection. The postal service continued throughout the pandemic, delivering post across the country. Those who were especially cautious were able if they wished to make arrangements to quarantine their post. As, indeed, the Claimant effectively did by not answering the door to any of the couriers, each of whom in the end placed the letters for the Claimant in his mailbox situated near the entrance to the block of flats in which he lives. As such, we find that there was, objectively, no risk to the Claimant from the couriers. Further, the information he put in the letter of 11 June 2020 does not even include the information that the couriers were not wearing PPE. As such, it does not meet the threshold for a protected disclosure.

314. The Claimant also relies as protected disclosures on his grievances of 6 June 2019, 29 January 2020, 19 June 2020 and 4 July 2020. We have already concluded that the grievance of 6 June 2019 met the definition of protected act for the purposes of s 27 of the EA 2010. We further accept for the same reasons that it met the definition of protected disclosure for the purposes of s 47 ERA 1996, on the basis that discrimination allegations can inherently reasonably be regarded as a matter of public interest. As such, as the subsequent additions to that grievance on 29 January 2020, 19 June 2020 and 4 July 2020 supplement or repeat the initial grievance and form part of a sequence, we accept that they all constituted protected disclosures. The grievances of 6 June 2019 and 29 January 2020 were, however, only seen by Ms Owen (of the individuals with which we are concerned). The letters of 19 June 2020 and 4 July 2020 were additionally seen by Mr Williams, and subsequently by Mr Robertson and Mr Conway.

Allegations of infringement of statutory rights relied on ERA 1996, s 104 claim:

315. The Claimant relies first on his requests for reasonable adjustments in his communications of 3 April 2019, 9 March 2020, 18 March 2020, 23 March 2020 and his allegation of failure to make reasonable adjustments in his letter of 19 June 2020. We cannot construe any of these communications as an allegation that a statutory right of his under the ERA 1996, TULR(C)A 1992 or the WTR 1998 had been infringed. If those communications related to any statute, it was the EA 2010, which is not one of the relevant statutory rights for the purposes of s 104.

316. The Claimant relies on complaints he made in relation to his pension rights on 6 June 2019, 29 January 2020, 19 June 2020 and 4 July 2020. As these communications refer to each other and include express allegations of breach of statutory rights including unlawful deduction from wages, holiday pay and pensions, we accept that these constitute allegations of breaches of statutory rights for the purposes of s 104 ERA 1996.

317. The Claimant also relies on his requests for disclosures in relation to equal pay made on 26 Mar 2019, 6 Jun 2019, 24 Jul 2019, 18 Oct 2019, 29 Jan 2020, 11 Jun 2020, 4 Jul 2020, 20 Jul 2020, 24 Nov 2020 and 22 Jan 2021. We have already set out above our analysis of whether many of these communications could be construed as requests for disclosures in relation to equal pay. We found that some of them – just – could be. However, a request for disclosure is not the same as an allegation of infringement (even allowing for the fact that the sex equality clause in EA 2010, s 66 means that complaints of discrimination in relation to pay can in principle be brought as unlawful deductions from wages claims under the ERA 1996). We do not accept therefore that these communications constituted allegations for the purposes of the s 104 ERA 1996 claim. In any event, the only two of these communications of which Mr Williams was aware of (i.e. the person who decided to dismiss the Claimant) were the letters of 11 June and 4 July 2020.

Health and safety issues

318. As to the health and safety matters relied on by the Claimant as reasons for detriments claimed under ERA 1996, s 44 and/or automatic unfair dismissal under s 100, we find as follows:-

319. First, the Claimant relies on communications of 3 April 2019, 6 June 2019, 24 June 2019, 18 October 2019, 14 January 2020, 29 January 2020, 4 February 2020, 9 March 2020, 18 March 2020, 23 March 2020, 19 June 2020 and 4 July 2020 (Grievance) as being communications where he brought to the Respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. It is not apparently contended by the Respondent that the Respondent had a health and safety representative or committee to whom the Claimant should have gone first. We accept that the Claimant in each of these communications brought to the Respondent's attention by reasonable means circumstances connected with his work that he reasonably believed were harmful or potentially harmful to his health and safety, either physical (workstation arrangements) or mental (workstation arrangements and allegations of discrimination and harassment).

320. Secondly, we deal with the Claimant's case that "in circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not have reasonably been expected to avert, the Claimant left (or proposed to leave) or (while the danger persisted) refused to return to his place of work on 23 March 2020, 11 June 2020, 19 June 2020 and 4 July 2020". The alleged danger relied on is: (i) the risk of harm to the Claimant's health of the Respondent's alleged failure to make reasonable adjustments; and (ii) (in relation to dismissal) the risk of Covid exposure from the Respondent sending couriers to his house.

321. Regarding (i), the alleged risk of harm to the Claimant's health of the Respondent's alleged failure to make reasonable adjustments, we do not consider that this meets the statutory criteria. The adjustments that the Claimant requested in his 9 March 2020 letter were: a new PC; privacy, anti-glare and anti-blue light screens fitted to all monitors; *"all health and safety recommendations to be completed"*; and *"I will not be bullied, victimised, harassed, discriminated or suffer any other detriment"*. The only health and safety recommendation in the Roodlane report that consisted of something the Respondent was to provide, rather than a strategy to be followed by the Claimant, that was not specifically mentioned by the Claimant in his 9 March letter was the provision of a headset.

322. While we accept that the Claimant subjectively believed that there was a serious and imminent risk to his health from these matters, we do not consider the statutory criteria are met because:-

    a. It was not reasonable for the Claimant to regard the Respondent's failures as constituting a serious and imminent danger to his health. The provision of a new PC was not a health issue at all. It was not

recommended by Roodlane, but was a preference of the Claimant. Privacy screens were not a health issue either, and not recommended by Roodlane. Anti-glare and anti-blue light screens were recommended by Roodlane, but the reason for this is not stated in the report. There is nothing to suggest that not having them posed a serious and imminent danger to the Claimant's health. They were apparently recommended by his optician in April 2019 as a possible way of alleviating headaches, but that was 9 months previously and there is no evidence that his headaches got significantly worse over that period, or that the right screens would have alleviated the headaches, or that these were serious headaches (in this respect we remind ourselves that EJ Adkin's found that the Claimant was not disabled by virtue of headaches), so in all the circumstances we are not satisfied that he could reasonably regard the failure to provide these screens as constituting a serious and imminent danger to his health. The phone headset was a long-standing issue in respect of which there is also no medical evidence of need (save for the Roodlane recommendation) and could not reasonably be regarded as posing a serious and imminent danger. (Indeed, given that the Claimant did not mention the phone headset in his letter of 9 March 2020, we are not satisfied that he even subjectively believed that the failure to provide this posed any risk.) Finally, while we accept that in certain limited respects (in particular regarding equipment requests), it was reasonable for the Claimant to consider that he was being badly treated by the Respondent (even though we have concluded he was not treated unlawfully), we do not consider it was reasonable for the Claimant to regard himself as having been subject to a serious campaign of bullying, victimisation, harassment, discrimination or other detriment, or that it was reasonable for him to believe that such treatment as he had received posed a serious and imminent danger to his health. Our reasons for that conclusion are to be found in our assessment of all the Claimant's other claims in these proceedings; further,

b. We consider that any danger there was, the Claimant could reasonably have been expected to avert. There were many steps the Claimant could reasonably have taken to deal with the issues that he has identified as dangers, including: waiting the short time necessary for Mr Zemaitis to source the anti-glare screen; speaking to Mr Zemaitis and/or Mr Niforas and/or Ms Owen (multiple times if necessary) until the missing equipment was secured; investigating alternatives to the anti-blue light screen, with advice/assistance from Roodlane as necessary (such as anti-blue light glasses); seeking or (later) agreeing to a referral to OH; and/or agreeing to his grievance being investigated as proposed by Ms Owen so that his concerns about bullying etc could be considered and addressed.

323. We therefore conclude that to the extent that the Claimant was after 6 February 2020 refusing to work or return to work because of these alleged

dangers, he did not meet the statutory criteria in ss 44 and 104 ERA 1996 for protection from detrimental action or dismissal for that refusal.

324. Regarding (ii), the risk of Covid exposure from the Respondent sending couriers to his house, the Claimant's case is misconceived for the following reasons:-

    a. The Claimant did not as a matter of fact leave or refuse to return to his place of work because the Respondent was sending couriers to his house. That was not his case and is not what happened;

    b. Even if the Claimant's workplace was supposed to be his home from mid-March 2020 onwards, the couriers were not part of that workplace and any danger from them did not 'arise' at his workplace. They only came to his door and would never, in the ordinary course, even if he had opened the door to them, have crossed the threshold into his home;

    c. It was not reasonable for the Claimant to regard the couriers as posing any threat to health, let alone a serious and imminent one for the reasons we have already set out in assessing the reasonableness of the Claimant's belief he had made a protected disclosure about the couriers;

    d. The Claimant could and did avert any risk there was by not opening the door to the couriers.

<u>(1) Mr Niforas' failure to put the Claimant up for promotion 2015-2020 (direct race/sex/age discrimination/PID detriment/victimisation)</u>

325. Our findings of fact in relation to the promotion issue are in the section beginning at paragraph **Error! Reference source not found.** above, with our findings in relation to potential comparators in the section beginning at paragraph 81 above. We have also made findings of fact about the Claimant's attempts to compare himself with Employee 10 at paragraphs 46-47, and findings regarding the Claimant's pay in comparison to his peers in the section beginning at paragraph 84. All those findings must be read together with these conclusions.

326. We make a preliminary observation, relevant both to this issue and the others we have to consider. The Claimant in his grievance of 6 June 2019 stated his belief that, *"anywhere one employee is entitled to receive more than another employee regardless of corporate title is discrimination"* and asked *"to be given the same notice period as the person with the longest notice period to ensure no discrimination occurs"* and *"the same rate of pay as a Director"* for Weekend/Bank Holiday pay, thus *"removing the discrimination"*. We observe that the Claimant's understanding of what constitutes discrimination as set out in the grievance is incorrect because, as we have set out above in The

Law section, it is not unlawful discrimination to treat a person with one protected characteristic less favourably than a person with a different protected characteristic. Indeed, that is not even enough to shift the burden of proof. For the burden of proof to shift, the Claimant has to have evidence from which we could conclude that the protected characteristic is a material part of the *reason* for the treatment. Unfortunately, the Claimant's misunderstanding about what constitutes discrimination, as set out in his grievance, appears to have shaped the Claimant's approach to these proceedings as a whole. Thus, he has named as comparators a large number of people who are not black or male or who are either older or younger than him, who he believes have been treated differently to him, but he has done so regardless of whether their circumstances were in any way comparable to his own, and regardless of whether there is anything to suggest that the reason for the difference in treatment is a prohibited reason. He has also, in relation to his promotion claims, relied in each year on different protected characteristics and/or suggested that the 'discrimination' was because he had done Protected Acts, varying each year according to the happenstance of the identity of the comparator he has named for that year. It is truly a 'scattergun' claim.

327. So far as the Claimant's complaints about not being put forward for promotion are concerned, we accepted as fact the reasons that Mr Niforas gave for why the Claimant was not promoted and others were promoted were his genuine, reasonably-held conscious views, and that they reflected the Respondent's promotion criteria as they applied from year to year. We also found as a fact that Mr Niforas inherited the situation of the Claimant being an AVP and Employee 10 being a VP and that he had genuine and reasonable grounds for believing that there was nothing wrong or unfair about that state of affairs. We further made findings of fact that the Claimant became aggrieved about not being promoted as early as 2015 and 2016, in which years it was wholly unrealistic to expect promotion as he had not been three years in grade and there were no other circumstances that merited promotion at that point, and that subsequently the Claimant's failure to put himself forward for promotion at any point after 2016, his career break and his refusals to accept changes to his terms and conditions, dual-hatting and performance management all contributed to his not being in a position where promotion was a realistic possibility. We also considered the evidence about the pay of the Claimant and some of his colleagues. This evidence could only shed light on Mr Niforas' motivations regarding promotion insofar as the pay decisions in question were influenced by Mr Niforas, and for the most part they were not. In the section beginning at paragraph 84, we explain why, save in one respect, we were satisfied that the Claimant was receiving more than AVP colleagues in comparable situations and/or why there were explanations for differences in pay that on the face of it had nothing to do with race, sex or age. We also explained why we were satisfied that even if a question about the difference between the Claimant's and Employee 3's and Employee 6's pay remains to be considered in due course as part of his equal pay claim, we have concluded that this has no bearing on the issues we have to decide.

328. What remains is for us to consider whether, these facts notwithstanding, we should draw any inference that the Claimant's race, sex or age influenced Mr Niforas' decision-making in relation to promotion. However, the Claimant has not adduced any evidence from which we could reach that conclusion. Given the centrality of the line manager to the promotion nomination process, we do not consider any sensible comparison can be made between the Claimant and people who were put forward for promotion by other managers. So far as Mr Niforas' decisions are concerned, no named comparator has been treated more favourably by Mr Niforas than the Claimant in materially similar circumstances, and we do not consider a hypothetical comparator, identical to the Claimant in all respects save his protected characteristics, would have been treated any differently either. Indeed, the evidence we have received about other individuals in relation to promotion does not support the Claimant's case at all. Those whose circumstances were closest to the Claimant's (Mr Nagi, Mr Wade and Employee 10) were all treated the same during the period with which we are concerned and not put forward for promotion by Mr Niforas, despite the differences in age, sex and race. We have also not found anything, standing back and looking at all the complaints and all the evidence in the round, that would lead us to conclude that Mr Niforas's treatment of the Claimant was influenced in any respect by his age, sex or race. All the direct discrimination claims relating to promotion therefore fail.

329. We further find that for the years in which the Claimant relies on one or more of his Protected Acts, either as a victimisation claim under s 27 EA 2010, or as a detriment under s 47B ERA 1996, the Protected Acts had no influence whatsoever on Mr Niforas' decision-making as he was not aware of any of them, and in any event Mr Niforas' failure to put the Claimant forward for promotion is wholly explained by the lawful reasons we have identified above. (As explained above at paragraph 307, we include in our reasoning here all the alleged Protected Acts, regardless of whether we have in fact found the communications in question to meet the statutory definitions in the various statutory provisions on which the Claimant relies.)

330. Finally, we should add that the Claimant in fact withdrew the claim in relation to the 2015 promotion decision in the course of oral evidence, but then sought to reverse that decision in closing submissions. We have therefore above considered the facts of what happened in 2015 in order to decide whether it would be fair to let the Claimant 'withdraw his withdrawal' in that way, but as we cannot see that the Claimant has any ground for legitimate complaint in respect of not being promoted in 2015, just one year after his 2014 promotion, we consider that he was right to withdraw his claim in respect of this year and it would have failed in any event for the reasons we have given.

(2) Equipment requests (direct race discrimination)

331. Our findings of fact on this issue begin at paragraph **Error! Reference source not found.** above and must be read together with these conclusions.

332. The Claimant identified a large number of people as comparators for his equipment requests claim, but nearly all of them concerned requests that had been made by employees managed by people other than Mr Niforas. We do not consider that those examples assist us at all as on this sort of issue what matters is what Mr Niforas' usual practice was when dealing with equipment requests. Of all the examples we have of the handling of other equipment requests, it is only those relating to Employee 10, Mr Nagi and Mr Brachi that actually required Mr Niforas' approval. In Mr Brachi's case, his first request was ignored by Mr Niforas in exactly the same way as the Claimant's. It was only when Mr Brachi submitted a second request and chased Mr Niforas that Mr Niforas approved his request. Save for the very last request on 23/24 January 2020 (which we deal with below), the Claimant did not chase or speak to Mr Niforas about his requests at all. He was not therefore treated less favourably than Mr Brachi in materially similar circumstances because the fact that the Claimant did not chase or repeat his request was, we conclude, the only reason for the difference in treatment.

333. As for Mr Nagi's requests, the first one was clearly a different situation as from the timing it is clear that Mr Niforas was trying to secure equipment for Mr Nagi as a new joiner. We infer that there would therefore have been discussions between them about the equipment and that Mr Niforas' focus would have been different as Mr Nagi was just starting.

334. As to Mr Nagi's second request (for a headset) and Employee 10's request, on the face of the documents before us, they were approved by Mr Niforas at first request and without any documentary evidence that he was chased. However, the evidence we have on Mr Niforas' handling of these requests is extremely limited. Mr Niforas did not deal with them in his witness statement and they were barely touched on in cross-examination (the Employee 10 request was not dealt with at all; the Mr Nagi request was only dealt with because the judge asked the Claimant about it as her original reading of the document had been that Mr Nagi's request was refused – which it was, but not by Mr Niforas). These were both historic matters (occurring, respectively, nearly four and six years ago) and matters that Mr Niforas does not recollect (and reasonably so given their minor nature). Given these factors, and our finding that Mr Niforas' working practice was such that he was likely to ignore an automated request unless chased about it, we are not prepared to assume, as the Claimant effectively invites us to do, that Mr Nagi's and Employee 10's requests were made in materially similar circumstances to the Claimant's, i.e. that they were made as the Claimant made his requests, solely on the automated system and without any other communication with Mr Niforas. On the balance of probabilities, we consider that unlikely. In other words, the Claimant has not proved the necessary facts to show that he was less favourably treated than someone of a different race in materially similar circumstances.

335. As to the Claimant's last request for a desktop install of 20 January 2020, this one the Claimant did chase on 23/24 January 2020 as we have noted in our findings of fact. Mr Niforas still did not approve that request, but we have found as a fact that that the Claimant has not shown Mr Niforas ever received

a formal notification of that request in the system and we find that this is the explanation for his failure to approve it in January/February 2020. When Mr Niforas was contacted about the request in April 2020 by Mr Cullen, he responded promptly and immediately approved a revised request submitted by Mr Cullen on the Claimant's behalf for the Claimant to have a wyse terminal as the Respondent was not issuing new desktops by that point. In the circumstances, we do not find that the one occasion when the Claimant did chase an equipment request puts him in a materially similar position to Mr Brachi or Mr Nagi or Employee 10. All of the factors that we have just mentioned are material differences between their situations.

336. Although we therefore conclude that the Claimant has not shown that he was less favourably treated than any actual comparator, we have nonetheless considered a hypothetical comparator, and done so by considering whether, in the light of all the evidence we have heard, the Claimant has adduced sufficient evidence from which we could conclude, in the absence of another explanation, that the treatment he received from Mr Niforas in relation to equipment requests was materially influenced by the Claimant's race. We find that there is not such evidence. There are other reasons why the Claimant's requests were not approved by Mr Niforas on each occasion, as we have found, and we do not consider that we can infer from the fact that there were a lot of equipment requests by the Claimant that Mr Niforas ignored over the years that his race had something to do with it. Although as a matter of good practice, Mr Niforas ought to have been more efficient at dealing with equipment requests, given the way the automated system worked, we do not consider that his failure to respond to the Claimant's requests was so unreasonable that we should draw an inference of discrimination on that basis alone. Indeed, Mr Niforas' failures to respond to the Claimant, in the absence of chasing by the Claimant, are understandable. Even if we had accepted that the Claimant had established he had been less favourably treated than a comparator in materially similar circumstances, his case would still have been one founded on a mere difference in treatment and difference in race, without more. In the circumstances, we find that the way the Claimant's equipment requests were handled is wholly explained by Mr Niforas' working practices, the Claimant's peculiar failure to chase or speak to Mr Niforas about equipment requests and/or other particular circumstances relating to each request as we have set out. Racial considerations played no part.

<u>(3) Failure to offer the Claimant voluntary redundancy between 21 May 2019 and 31 August 2019 (indirect race/sex discrimination)</u>

337. Our findings of fact in relation to this issue are at paragraph 136 above. This claim is misconceived. The Claimant's case is that in not offering voluntary redundancy to employees at his level the Respondent indirectly discriminated against him on grounds of race and/or sex. However, even if we accept that the Respondent's policy decision to offer voluntary redundancy only to Managing Directors and Directors amounted to a provision, criterion or practice (PCP) for the purposes of s 19 of the EA 2010:

a. The Claimant did not want to take voluntary redundancy and so was not himself disadvantaged by the PCP;
b. The Claimant has not shown that the application of the PCP put or would have put other men or black people at disadvantage in comparison to people who do not share the Claimant's protected characteristic. We do not know what proportions of employees at the Claimant's grade are male or black. We know that women and black employees are under-represented at Managing Director/Director level, but we have no information about the make-up of the allegedly disadvantaged group; and,
c. In any event, the Respondent was plainly justified in only offering voluntary redundancy to the group of employees that it had identified it wished to reduce and who were thus at risk of compulsory redundancy.

(4) Failure to carry out a health and safety risk assessment for over 8 months between April 2019 and 14 January 2020; recommendations never completed prior to 15 July 2020 and the Respondent informing the Claimant that he would be required to return to work on a phased basis from 23 March 2020 at a time when the Claimant was awaiting a response to his letter of 9 March 2020 and asking for adjustment to workstation and changes to duties advised by the Claimant's doctor, followed up on 19 June and 4 July 2020 (direct race discrimination/health and safety detriments)

338. Our findings of fact in relation to this issue are at paragraphs 124-133 and need to be read together with these conclusions. Our conclusions in relation to the preliminary ingredients of a health and safety detriments claim at paragraphs 315-324 must also be read together with this section.

339. We deal first with Ms Owen's failure to arrange a workstation assessment for the Claimant between April 2019 and January 2020. This was a very unfortunate delay that should not have happened. There is no actual comparator for this claim. We cannot, however, infer that a hypothetical comparator would have been treated any differently or that Ms Owen's handling of the matter was in any way influenced by the Claimant's race. This is because when first contacted by the Claimant, she did act promptly to arrange for a workstation assessment to be carried out on 13 May 2019. Whatever the reason why that did not take place as arranged, it was clearly not Ms Owen's fault. Thereafter, we find as a fact that the reasons why Ms Owen did not arrange an assessment were, first, because after stating in her email of 24 June 2019 that she would arrange one, she forgot. Secondly, after that the Claimant's sole attempt to chase her was in his confusing email of 18 October 2019 and we accept that she genuinely missed that part of his email. Thirdly, when the Claimant did communicate with her clearly in his email of 24 January 2020, she took action immediately and arranged the assessment. We find Ms Owen's actions are wholly explained by the factors we have mentioned and the Claimant's race played no part whatsoever in her handling of his request for a workstation assessment.

340. We further find that Ms Owen's failure (successfully) to arrange the workstation assessment during this period had nothing to do with the matters that the Claimant relies on as him bringing health and safety failings to his employer's attention for the purposes of his s 44 ERA 1996 claim. On the contrary, it was because he made the communications that he relies on for these claims that Ms Owen took action to arrange the workstation assessment. His requests/allegations were not the cause of her failing to arrange the workstation assessment. The opposite is true.

341. Once the assessment had been carried out, Ms Owen was not responsible for what happened thereafter. Mr Niforas' role in what happened next we have already dealt with above in relation to equipment requests generally. It was not race discrimination. The Claimant's claim would have to be that thereafter it was Mr Zemaitis who was directly discriminating against him because of race in failing to secure the equipment recommended by Roodlane. However, that has not actually been the Claimant's case in these proceedings. He does not suggest that Mr Zemaitis was discriminating against him and rightly so because there would be no basis for such a suggestion. Mr Zemaitis has (understandably, given the lack of allegation against him) not been a witness in these proceedings, but his part in the process is apparent from the emails that we have seen. He tried to source what was requested, but the blue-light screens were not available. We do not know what happened regarding the headset, but the Claimant did not identify this as one of the specific outstanding matters in his 9 March 2020 letter and what happened about that has not been explored in these proceedings. Mr Zemaitis and Mr Niforas were not aware of the communications that the Claimant relies on for the purposes of his s 44 detriments claim, so that claim too fails so far as their part in the process is concerned.

342. That leaves what happened in the period while the Claimant was away from work after 23 March 2020 and until he was dismissed on 15 July 2020. Our findings of fact regarding this period are at paragraphs 176-238 above. We deal with this in more detail when considering the Claimant's dismissal below. For the purposes of this claim concerning failure to complete the workstation assessment and recommendations, it suffices to say that we are satisfied that the Claimant was not directly discriminated against because of his race, or subjected to detriments for having raised health and safety issues. The reason why adjustments were not made to his office equipment during this period was because he was not working in the office, or expected to work in the office and from 18 March 2020 until 23 June 2020 the office was closed with only a handful of employees with exceptional reasons to work in the office being in the office. Mr Niforas, Mr Cullen and Mr Zemaitis had between them made arrangements for the Claimant to have such screens as they could obtain and a new wyse terminal as and when he returned to work. In fact, the Claimant never returned to work because he was dismissed for unauthorised absence for reasons unconnected with his race or his raising of health and safety issues as we conclude below.

(5) Failure to award the Claimant a pay rise in the annual pay rise occurring in 2019 and 2020 (victimisation)

343. Our findings in relation to pay are in the section beginning at paragraph 84 above. Although the Claimant's general complaints and evidence in relation to pay have been wide-ranging, there are actually only two legal claims in relation to pay that we have to consider, and that is whether the Claimant was victimised within s 27 EA 2010 in not being awarded a pay rise in 2019 or 2020. The timing of the decisions in relation to pay rises is such that these victimisation claims must rely on the Claimant's alleged Protected Act of 3 April 2019, but we have concluded that this was not a Protected Act (see above paragraph 308). The letter of 9 March 2020, the second Protected Act relied on by the Claimant was not received by the Respondent until 19 June 2020, by which time pay decisions had not only been taken but also communicated to employees. These victimisation claims do not for these reasons get off the ground. However, lest we are wrong that the 3 April 2019 letter did not constitute a Protected Act, we have also considered whether it materially influenced Mr Syson's decision (in which Mr Niforas and Ms Owen played a small part) not to award the Claimant a pay rise either in 2019 or 2020. We find it did not. Only Ms Owen was aware of the content of the 3 April 2019 letter, but in any event we find as a fact that pay decisions in relation to the Claimant in 2019 and 2020 were not materially influenced by the fact that he had written the 3 April 2019 letter (or even that he had subsequently raised a grievance on 6 June 2019). We accepted Mr Syson's evidence as to why there was no case for the Claimant to receive a pay rise. Most employees did not and the Claimant was not a deserving case. He was better paid than most of his peers, there was no market case for increasing his pay, he had not been promoted and he had not distinguished himself in any positive respect in terms of his performance or contribution to the Respondent's business. By the end of 2019 he was refusing to participate in the performance management process.

(6) Harassment in January 2020 (race/sex/age)

344. There were five allegations of harassment in January 2020. We take each in turn:-

a. On 7 January 2020, Filippos Niforas verbally harassing the Claimant by speaking to him in an aggressive derogatory manner when receiving too many automated emails

345. Our findings of fact are at paragraphs 160-161 above. While we accept that Mr Niforas's conduct on this occasion was 'unwanted' so far as the Claimant was concerned, we find as a fact that Mr Niforas' purpose was not to harass the Claimant, and nor do we accept that the Claimant at the time found the conduct reached the threshold for harassment under s 26. If he had done, we consider that there would have been some reflection of his claimed feelings either in his communication to Employee 10 immediately after the incident or in his 24 January email. In any event, we do not consider that it

would have been reasonable for the Claimant to regard it as harassment in the circumstances as we have found them to be, which include a reasonable cause for Mr Niforas' irritation (an increase in automated emails) and nothing particularly objectionable about how Mr Niforas reacted other than the Claimant's perception that it was 'aggressive'. Other than an assertion that Mr Niforas does not speak to other people like that, which is not supported by any other evidence, and in any event amounts only to a claim of a difference in treatment and a difference in protected characteristic, without more, the Claimant has adduced no evidence that Mr Niforas' conduct on this occasion related to age, sex or race.

b. On 7 January 2020, Filippos Niforas denying the Claimant any promotion, pay, bonus, or increased compensation

346. There was no factual basis for this claim: see paragraph 162.

c. On 17 January 2020, David Boston, Rob Hammond and Joanne Kelliher bullying the Claimant regarding David Boston not receiving his data

347. Our findings of fact in relation to this claim are at paragraphs 163-165. As noted there, although the Claimant appeared at the time to have regarded Mr Boston and Mr Hammond as equal wrong-doers with Ms Kelliher, after hearing that Ms Kelliher was not being called to give oral evidence, he dropped his allegations against Mr Boston and Mr Hammond and focused on Ms Kelliher. Regarding the evidence against her, we accept that her conduct towards the Claimant was *"unwanted"* and that he subjectively believed it met the threshold for harassment, but we do not find that it was reasonable for the Claimant to think that as for the reasons set out in our findings of fact we consider that the Claimant here again misinterpreted another employee's frustration about a work situation as personal to him. We further find that there is no evidence at all to show that Ms Kelliher's conduct had anything to do with the Claimant's race (or his sex or age for that matter). Indeed, he accepted that this was not her usual way of speaking to him.

d. On 23 January 2020, Filippos Niforas threatening the Claimant for not signing dual hatting arrangements

348. Our findings of fact are at paragraph 165. We accept that the Claimant regarded Mr Niforas raising the dual-hatting with him was 'unwanted conduct', and that he subjectively regarded this as meeting the harassment threshold, but we do not find that it was reasonable for him to do so. The Claimant's refusal to dual-hat had been long tolerated by the Respondent, although it evidently (and reasonably) created a difficulty within the team as it meant that the Claimant was not doing work that his team members were doing. The terms in which Mr Niforas raised the issue with the Claimant on 23 January 2020 were moderate and reasonable, and it was the Claimant's reaction that was unreasonable. There is also nothing at all to suggest that

Mr Niforas raising this with the Claimant had anything to do with race, sex or age. It was solely because the Claimant was the only person in the team who had refused to sign the dual-hatting arrangements.

e. On 29 January 2020 Karen Owen discussing confidential matters others

349. This allegation was withdrawn at the hearing.

(7) Ignored advice from the Claimant's Doctor in relation to a phased return and/or workplace to make adjustment to duties and workstation in March 2020 and June 2020 (direct race discrimination)

350. This claim is without merit. The Claimant's 9 March 2020 fit note was not received by the Respondent until 19 June 2020. In any event, all it says is that unspecified adjustments were required to duties and workstation. There was no actual substantive advice that could be followed at all. Further, so far as the Respondent was concerned (specifically Ms Owen as the only person to thom this advice was sent), the advice could only reasonably be understood as a reference to the workstation assessment that had just been carried out, the implementing of recommendations from which Ms Owen reasonably believed was being dealt with by Mr Zemaitis. In any event, what had or had not been recommended for the Claimant's office workstation was essentially academic as he was supposed to be working from home, but was refusing to and did not (successfully) communicate with the Respondent at all at any point between 23 March 2020 and 19 June 2020. There is no basis here for a race discrimination claim. The Claimant has not shown that he has been less favourably treated than any actual comparator and it is impossible to imagine a hypothetical comparator of a different race being treated any differently. What happens is wholly explained by the factual sequence of events that we have set out in our findings of fact at paragraphs 176-238 above.

351. So far as the recommended phased return is concerned, this is also unmeritorious. The Claimant accuses the Respondent of ignoring his doctor's advice that he should have a two-month phased return to work beginning on 23 March 2020, but the Claimant himself failed to return to work and deliberately withheld the doctor's advice from the Respondent and did not provide it to the Respondent until the two-month period in question was well past on 19 June 2020. There was therefore no 'failure' to follow the doctor's advice. By the time the advice was brought to the Respondent's attention, it was irrelevant as the Claimant had been absent from work without authorisation for three months, for which he was reasonably subject to disciplinary proceedings, and was not claiming to be suffering from any medical condition which could make a phased return to work necessary on medical grounds in the event that he was not dismissed. Again, the Claimant has not shown that he has been less favourably treated than any actual comparator and it is impossible to imagine a hypothetical comparator of a different race being treated any differently.

(8) Failure to provide severance package on dismissal 15 July 2020 (direct race discrimination, victimisation, PID detriment)

352. This is equally unmeritorious. Our findings of fact on the issue are at paragraphs 239-240. The Claimant was dismissed for gross misconduct. His named comparators were not. That is a very significant difference between his case and theirs. The Respondent does not, as a matter of policy, and consistent with FCA guidance, reward gross misconduct with severance packages. That is eminently reasonable. Another material difference between the Claimant's case and that of his named comparators is that they instructed lawyers and negotiated settlements under which the Respondent paid a sum so as to avoid legal proceedings. While it is possible that even without lawyer involvement if the Claimant had advanced a strong enough legal case to the Respondent, he might have secured a settlement offer (and the Respondent would then have had to pay for him to instruct lawyers for advice to make it a binding compromise agreement under the ERA 1996/EA 2010), the fact is that he did not. We find that the failure to pay the Claimant a severance payment is wholly explained by the fact that he was dismissed for gross misconduct and did not advance (with or without lawyers) a case that would have merited the Respondent reaching a compromise agreement with him. The Claimant's race and Protected Acts had nothing to do with it.

(9) Unfair dismissal (victimisation/automatic unfair dismissal under ss 100/103A/104)

353. Our findings of fact regarding the dismissal and what preceded it are at paragraphs 176-238 above. These conclusions must be read together with those findings.

354. We must first consider what the reason was for the Claimant's dismissal. We are satisfied that it was the Claimant's conduct in being absent from work without explanation or authorisation from 23 March 2020 onwards. The Claimant was from 23 March 2020 fit to work according to his GP's advice. Even once he was back in contact from 19 June 2020, it was not the Claimant's position that he was or had been unwell in the intervening period. He had been asked by Mr Niforas by text messages that he had received to work from home, and to confirm that his remote access was working to allow him to do that. Those were in our judgment reasonable management requests, but the Claimant ignored them, maintaining that he would only return to work when he was allowed to return to the office. Moreover, the Claimant for over two further months ignored Ms Owen's messages and refused to comply with her (also reasonable) management instructions to contact her. He continued to ignore her communications even after she had arranged a police visit to check he was safe. We found as a fact at paragraph 192 that there was no medical advice that the Claimant should not work from home, it was just that the Claimant did not wish to and considered that the Respondent could not require him to. The Respondent's written policies (above, paragraph 55 and following) are entirely standard, and clear, in requiring sick certificates to be submitted for all periods of sick absence, and

in providing that unauthorised absence will be treated as misconduct or, for serious cases, gross misconduct.

355. Mr Williams was the person who took the decision to dismiss and, having considered his evidence, we are satisfied that his sole reason for dismissing the Claimant was his conduct in being absent without authorisation for a lengthy period. Mr Williams was not aware of any of the Claimant's Protected Acts prior to his letter of 19 June 2020, but in any event we are satisfied that the Claimant's Protected Acts played no part (let alone the sole or principal part) in Mr Williams' decision to dismiss.

356. We have also considered Ms Owen's role in relation to the dismissal. Although it was not her decision, she was in a position to influence Mr Williams, and she knew about all the Claimant's Protected Acts, but we are also satisfied that they played no part in her thinking in relation to the discipinary and dismissal process. If Ms Owen had been minded, consciously or unconsciously, to retaliate against the Claimant for his Protected Acts, we consider that she would have pushed the Respondent to disciplinary proceedings at a much earlier stage. She could quite reasonably have done so in response to the Claimant's refusal to engage in the performance management process, and, in relation to the unauthorised absence, she could have pushed for a disciplinary process as early as April 2020 after the Claimant had ceased responding to attempts at communication. The fact that she did not push the Respondent to earlier action is strong evidence against the Claimant's case.

357. For these reasons therefore, the Claimant's claims of victimisation in relation to his dismissal, and claims of automatic unfair dismissal under ss 100, 103A ERA 1996 fail, as well as that under s 104A insofar as it relies on the communications dealt with at paragraph 319 above. We have further already found above at paragraphs 320-324 that the Claimant was not absent from work for reasons which brought him within the scope of the protection against dismissal in s 104 ERA 1996.

358. The only remaining matter we have to consider in relation to the Claimant's dismissal is whether it was 'ordinarily' fair having regard to s 98(4) ERA 1996. We have dealt with a number of the Claimant's arguments about fairness in the course of our findings of fact above and we do not revisit all of those points here. In overview, however, we are satisfied that the Claimant's dismissal was fair in all the circumstances for the following reasons:-

    a. The Claimant's absence between 23 March 2020 and his dismissal on 15 July 2020 was unauthorised and unexplained. It was not covered by a doctor's note. The Claimant has argued, with reference to guidance on the ACAS website about fit notes and reasonable adjustments, that because the Respondent had not made the reasonable adjustments he says his doctor recommended that he was 'deemed' still to be on authorised sick leave. That is not correct. The ACAS advice refers to the option on medical certificates for a doctor to state that someone 'may be fit for work taking account of

the following advice' and states that the position is that if that advice is not followed by the employer, the certificate is to be treated as being a certificate that the employee is not fit for work. None of the Claimant's medical certificates take this form and, in any event, they were all time limited, with the last one expiring on 23 March 2020. The Claimant has never obtained a medical certificate covering his absence beyond that point. Further, and in any event, his doctor never gave any specific advice about any reasonable adjustments. The 'advice' in the 9 March 2020 fit note is 'contentless'.

b. The Respondent's policies were clear that sickness absence certificates were required to cover the whole period of absence (and in any event that is obvious), and that unauthorised absence and/or serious breaches of the Respondent's policies could be treated as gross misconduct.

c. It was well within the range of reasonable responses for the Respondent to treat unauthorised absence for three months (a very long time indeed) as serious enough to be classified as gross misconduct meriting summary dismissal.

d. It was irrelevant what adjustments had or had not been made to the Claimant's workstation in the office because he had been asked to work from home for the whole of the period in question.

e. Despite being asked, the Claimant never told the Respondent that he could not work from home, or provided any legitimate reason why he could not work from home. He just maintained he would only work in the office. This was not reasonable: see further paragraph 192 above.

f. It was not relevant that the Claimant had not exhausted his sick pay and not been told about the Respondent's PHI as he was not sick.

g. Even if the Respondent's written policy suggests there will normally be an informal stage before disciplinary or a discussion with a line manager, the Respondent is free to depart from its policies where it is reasonable to do so. Here, it was plainly reasonable. The Claimant had been given multiple 'informal' opportunities to contact Ms Owen since the end of March 2020 but had failed to do so. There was no need for the Claimant's absence to be discussed with Mr Niforas again after March 2020 and prior to dismissal. There was nothing that Mr Niforas could have told Ms Owen or Mr Williams about the situation as he had not been dealing with it, and there was no reason for him to deal with a long-term absence issue like this if HR was handling it, as they were.

h. It was within the range of reasonable responses for the Respondent to continue with the disciplinary process rather than giving the Claimant the opportunity to return to work in the office once lockdown

restrictions began to ease from 23 June 2020. The serious misconduct had already occurred by that point, and the Respondent acted reasonably in continuing to address it in the way that it did.

i. A fair procedure was followed. Although very short notice was given of the first disciplinary hearing on 19 June 2020, the amount of notice was in accordance with the policy and the Claimant did in fact receive it and draft a long letter in response to the allegations in the time he was given. In any event, that first disciplinary hearing was postponed and more than ample time was given before the second hearing, which the Claimant chose not to attend. The fact that more notice was given for the second hearing than was provided for in the Respondent's policy was to the Claimant's advantage not disadvantage and does not render the process unfair.

j. The Claimant was offered the opportunity to attend OH before the Respondent commenced a disciplinary procedure. He failed to respond to that offer by contacting Ms Owen as required by the letter of 11 June 2020. Although very short notice of that OH appointment was given, we accept Ms Owen's evidence that if the Claimant had contacted her and asked for it to be rearranged, she would have done so. However, the Claimant's position in his subsequent correspondence (as it was reasonably understood by the Respondent) was that he would not attend OH. He had reasons for that, specifically that he considered the Respondent should do everything he had asked first, but in our judgment it was within the range of reasonable responses for the Respondent to take the Claimant's position as being an unreasonable failure to attend an OH appointment. After all, there was no 'downside' for the Claimant in attending an OH appointment, and no good reason why he could not have done so, whatever his view on the Respondent's failings up to that point. Indeed, most employees would have seen the offer of an OH appointment as a step that could help them.

k. The Claimant did not ask for an in-person disciplinary hearing and there was no disadvantage to him of having a virtual hearing. Indeed, if his Covid concerns were genuine, we would have thought he would have preferred that.

l. The Respondent acted reasonably in proceeding with the disciplinary notwithstanding the Claimant raising grievances. The Respondent's written policy permits it to continue with a disciplinary procedure in those circumstances. Insofar as the Claimant raised points in his grievances that were relevant to the decision to dismiss, Mr Williams properly took them into account and explained in the dismissal letter why (the main points) the Claimant raised did not mean that dismissal was inappropriate.

m. Although the Claimant's grievance, which began with his letter of 6 June 2019, was not in the end dealt with at any point, that did not

take the dismissal decision outside the range of reasonable responses. The reason why the Claimant's grievance had not been dealt with prior to him going absent from work was because he had refused to agree to it being investigated as Ms Owen proposed. In any event, even if the failure to investigate the grievance had been Ms Owen's fault, it would not justify or excuse the Claimant going absent in the way that he did and failing to respond to the Respondent's communications for three months. It was well within the range of reasonable responses for the Respondent to proceed to disciplinary and dismissal notwithstanding the outstanding grievances in the circumstances of this case.

n. The Claimant was offered a right of appeal, and the appeal was in our judgment also fair in all the circumstances for reasons we deal with further below. The delay in holding the appeal was (bar one month of delay by Mr Conway in September 2020) wholly attributable either to the Claimant's appeal letter getting lost or the Claimant failing to respond to correspondence. In any event, even if the appeal had not been conducted fairly, we consider that the Claimant's dismissal was so conspicuously fair in all the circumstances that any error at the appeal stage would have made no difference.

(10) Wrongful dismissal

359. The Claimant was absent from work for three months and failed to respond to multiple reasonable management instructions to work from home, or identify if he could not, or to communicate with his employer. The absence was not authorised by any sick note and unjustified by any reasonable excuse. It amounted to gross misconduct under the Respondent's written policies and in our judgment constituted a serious and repudiatory breach of his contract of employment. It follows that the Respondent was entitled to dismiss him summarily without notice. He was not wrongfully dismissed.

(11) Delay in carrying out the appeal (victimisation)

360. Our findings of fact on this issue are in the section beginning at paragraph 238. There was a very long delay between July 2020 and March 2021 in holding the Claimant's appeal hearing. However, the cause of the delay from July to 25 September 2020 was the Claimant's appeal letter getting lost in the post; the cause of the delay from 27 October 2020 to March 2021 was the Claimant's failure to respond to correspondence or attend any arranged appeal hearing. The only period of delay for which Mr Conway was responsible was between 25 September 2020 and 27 October 2020 which he says (and we accept) was owing to pressure of work and difficulties understanding the Claimant's appeal letter. We infer there was also some hesitation on his behalf because he was doubtful as to whether the Claimant had really written the letter on 25 July 2020 and thought he had possibly

deliberately delayed in raising his appeal. In any event, we are satisfied that the Claimant's Protected Acts had nothing to do with the delay because we accept Mr Conway's evidence that he was unaware of any of them. We would add that even if Mr Conway was aware of the Claimant's Protected Acts, it would be surprising if they had had a material influence on his delay in writing to the Claimant given that they are such small parts of the factual matrix in this case, which is really dominated by the length of the Claimant's unexplained and unauthorised absence, his handling of his sick notes, inaccurate assertions about his doctor's advice, his peculiar resistance to homeworking and, finally, the unexplained two-month delay in his appeal letter turning up.

(12) Unlawful deduction of wages – Holiday pay

361. Our findings of fact are at paragraph 256. For the reasons set out there, the Claimant is not owed any holiday pay.

Time limits

362. We address time limits very briefly because this is already a very lengthy judgment and, since the Claimant's claims have all failed, it is now academic whether they were brought in time or not.

363. The Claimant's unfair dismissal claim was brought in time. The primary time limit for all the Claimant's discrimination and detriments claims was three months from the date of the act complained of, or where the acts formed part of a 'continuing act', three months from the last act in the series. Everything that happened prior to 10 July 2020, i.e. prior to the dismissal decision, was therefore in principle out of time. Given that the decision to dismiss was one taken in response to the Claimant's unauthorised and unjustified absence, unrelated in our judgment to anything that had happened previously, we would have concluded that there was no continuing act in respect of prior events that linked to the (in time) dismissal. That is especially so given that the prime decision-maker was Mr Williams, who had had no prior involvement with the Claimant. Ms Owen's involvement potentially provided a link back to earlier complaints, but only respect of her own conduct and, given the very different nature of the earlier complaints about her (i.e. workstation assessment vs handling of the disciplinary process) and the absence of any claim about her handling of the grievance (which was the only 'ongoing' matter covering the whole period), we would have concluded that these were not all part of one continuing act. There was no possible link back from the Claimant's dismissal to the Claimant's complaints about the actions of other individuals who had nothing to do with the Claimant after he left the office on 6 February 2020 or, in Mr Niforas's case, after 23 March 2020. A further reason why we would have found there was no continuing act was because there were no allegations of direct discrimination that had been brought in time at all, apart from the direct race discrimination claim in respect of the lack of severance package which was obviously hopeless.

364. For the detriments claims where time can only be extended if it was not reasonably practicable to bring the claim earlier, we would have concluded that time could not be extended because the Claimant in his grievance of 6 June 2019 had made clear that he knew of his right to bring a claim to the Employment Tribunal and the time limit for doing so, but did not do so despite there being no practical impediment to that and, in our judgment, no reasonable basis for not making a claim earlier. The fact that the Claimant wanted the Respondent to provide further disclosure does not excuse his not pursuing claims to the Tribunal.

365. We also would have concluded that it was not just and equitable to extend time for the EA 2010 claims given the following factors: the historic nature of many of the allegations and the difficulties that created for the evidence (particularly regarding the equipment requests); the Claimant's knowledge of his legal rights from an early stage; his failure to allow the Respondent to progress his grievance; the lack of any alleged 'something more' to indicate that race, sex or age played any part in his treatment; the prejudice to the Respondent of responding to a historic claim of this nature and on such a scale, which in our judgment outweighed the prejudice to the Claimant of being permitted to proceed on all the historic allegations, particularly given that he had an in-time claim in respect of his dismissal which would, if he had succeeded, have represented the bulk of any financial compensation he could have hoped to obtain in these proceedings.

366. For these reasons, we conclude that all of the Claimant's complaints relating to matters that occurred prior to 10 July 2020 were out of time and the Tribunal did not have jurisdiction to hear them.

Overall conclusion

367. The unanimous judgment of the Tribunal is:

(1) The Claimant's claim of unfair dismissal under Part X ERA 1996 (including automatic unfair dismissal under ss 100, 103A and 104 ERA 1996) is not well-founded and is dismissed.

(2) All claims relating to matters that occurred prior to 10 July 2020 were out of time and the Tribunal did not have jurisdiction to hear them, having regard to EA 2010, s 123, and ERA 1996, s 48(3).

(3) The Respondent has not contravened the EA 2010 by directly discriminating against the Claimant because of race, sex or age contrary to ss 13 and 39(2)(d) EA 2010. Those claims are dismissed.

(4) The Respondent has not contravened by the EA 2010 by harassing the Claimant for reasons related to race, sex or age contrary to ss 26 and 40 EA 2010. Those claims are dismissed.

(5) The Respondent has not contravened the EA 2010 by victimising the Claimant contrary to ss 27 and 39(4) EA 2010. Those claims are dismissed.

(6) The Claimant's claim that he was subjected to detriments for making protected disclosures contrary to s 47B ERA 1996 is not well-founded and is dismissed.

(7) The Claimant's claim that he was subjected to detriments for raising health and safety matters contrary to s 44 ERA 1996 is not well-founded and is dismissed.

(8) The Claimant's claim for wrongful dismissal is not well-founded and is dismissed.

(9) The Claimant's claim for unlawful deduction from wages is not well-founded and is dismissed.

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Employment Judge Stout

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Date: 3/04/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

03/04/2023

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FOR THE TRIBUNAL OFFICE

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