EMPLOYMENT TRIBUNALS

Claimant: Mr Delroy Downer

Respondent: London Borough of Lewisham

Heard at: London South Croydon, in public, in person

On: 21-25 & 30-31 August 2022 (partially in chambers 30 and all day 31)

Before: Employment Judge Tsamados
Mrs C Wickersham
Ms N Beeston

Representation
Claimant: Mr C Ijezie, Solicitor
Respondent: Ms A Palmer, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The Claimant's complaints of direct race discrimination are unfounded and his claim is dismissed.

REASONS

Background

1. The Claimant, Mr Downer, presented a Claim to the Employment Tribunal on 28 January 2019 alleging that his employer, the London Borough of Lewisham, had discriminated against him on grounds of race. The Claim was presented following a period of ACAS Early Conciliation between 10 and 27 December 2018. In its Response received on 5 April 2019, the Respondent denied the Claim.

2. A preliminary hearing on case management took place before Employment Judge Ferguson on 14 June 2019 at which the full hearing was listed for dates in October 2020 and case management orders set. These dates were subsequently vacated due to lack of judicial resources and the full hearing was relisted for 6 days from 22 August 2022 (22-26 and 30 August 2022).

3. On 14 June 2022, the Respondent sent an email to the Tribunal explaining that one of its witnesses, Mr Wilkinson, was going to be on holiday in Greece at that time and asked if he could give evidence on the last day of the hearing on his return or provide evidence by video link.

4. The Respondent also requested the Tribunal to make an application to the Foreign & Commonwealth Development Office's, Taking of Evidence Unit, to determine whether the Greek Government objected to persons giving evidence to a UK court or tribunal from its territory. It can take some time for responses to these requests to be received and sometimes no response is forthcoming. The Tribunal administration belatedly made the request on 7 July 2022. Unfortunately, no response had been received from the Greek Government by the time of the hearing.

5. It would appear from our file that at some point in June 2022, the Claimant made allegations to the Respondent that Mr Connors, its Strategic Crime Enforcement & Regulation Service Manager, had offered to pay witnesses interviewed in respect of the incident which resulted in disciplinary action being taken against the Claimant (which forms the central issue in this claim) to change their statements. These allegations were subject to an internal investigation by the Respondent.

6. After the preliminary hearing, the Claimant wrote to the Tribunal by email dated 18 July 2019 seeking an amendment of the list of issues produced from that hearing to include this allegation.

7. In a letter from the Tribunal dated 17 October 2019, EJ Ferguson responded that the list of issues does not include this allegation, it is not mentioned in the ET1 and she does not recall the claimant saying at the preliminary hearing that he wanted it to be included or indeed making a comment attributed to her as to the seriousness of such an allegation. The letter stated that if the Claimant wish to amend his claim, he must provide full details within 14 days of the date of the letter. No application was received.

Evidence

8. We heard evidence from the Claimant by way of written evidence and in oral testimony. He had intended to call two further witnesses, his union representative at the time of the events in question, Mr John Collins, and his daughter, Miss Delicia Downer. However, Mr Collins was unwell during the hearing and whilst we arranged for him to give evidence by CVP, having reviewed his witness statement we had no questions for him and Ms Palmer indicated that the Respondent accepted this evidence without the need to call him. Miss Downer did not give evidence.
9. We heard evidence on behalf of the Respondent from members of its staff, Ms Hooper, Mr Connors and Ms Stirling by way of written statements and in oral testimony. Ms Stirling had been called by the Respondent to provide evidence in the event that Mr Wilkinson was not able to do so. Whilst there had been no response from the Greek Government, with some rescheduling of the hearing days, Mr Wilkinson was in fact able to attend in person and

give evidence on his return to the UK on 30 August 2022. We agreed to sit on 31 August 2022 if needs be in order to accommodate this.

10. We were provided with paper and electronic documents.

11. Certain pages were added to the bundle during the course of the hearing as indicated above. In addition pages were added at 285A-D and 866A-L by agreement. The final electronic bundle consisted of 1052 pages. We refer to this as "B" followed by the page number(s) where necessary. We were also provided with a map and photographs of the locus in quo.

12. Shortly before the start of the first day of the hearing, Mr Ijezie disclosed two additional documents, which after some discussion, Ms Palmer did not object to being admitted in evidence. These have been inserted into the bundle as pages 105A and 191A-E. Similarly, Ms Palmer provided additional documents in the form of photographs and maps of the locus in quo, a chronology and cast list and after discussion, Mr Ijezie did not object to these documents being admitted in evidence.

13. In addition, at the start of the hearing, the parties indicated that there was evidence in the form of CCTV footage which Mr Ijezie asserted was significant but Ms Palmer disagreed. After lengthy discussion with both representatives as to the format of the CCTV and the ability to view it, we indicated that we were willing to look at it, provided arrangements were made for it to be provided to the Tribunal to broadcast it on our large TV monitor in the hearing room.

14. On the second day of the hearing, we watched the CCTV footage and were also provided with an email from Mr Wiggins, the Respondent's Solicitor, containing information from Mr Fish-Halvorsen, the Respondent's SCS ASB/SN & Public Space CCTV Manager. The CCTV footage was taken from a camera situated in the middle of the road between the Black Horse & Harrow public house and Little Nan's Bar on Rushey Green.

Issues

15. The issues are agreed and are set out in the record of the preliminary hearing held on 14 June 2019. This is at B39-40.

16. The parties also wished us to consider the bribery allegation although no application has been made to amend and so it is not a pleaded issue. We were referred to the letter from the Employment Tribunal at B45-46 and the Respondent's investigation of the matter at B899 finding that there was no evidence to support the Claimant's allegation. Mr Connors' witness statement refers to this matter in any event.
17. After some discussion, we agreed to deal with liability only given the limited evidence before us as to remedy.

Conduct of the hearing

18. The hearing had been listed for 23-26 and 30 August 2022. Mr Wilkinson was only available to give evidence in person on 30 August. We completed the Claimant's evidence and all of the Respondent's witnesses' evidence save for Mr Wilkinson by 25 August. This meant that there was no point sitting on 26 August and we were fortunately able to offer 31 August as an additional day if required.

19. At the start of the hearing, Mr Ijezie asked for the following adjustments on account of his stammering disability/Dysfluency to be given sufficient time to speak and to exercise patience when he is speaking (he provided a letter from his therapist in support). He also asked for Miss Downer, the Claimant's daughter, to have the same adjustment because she suffers from anxiety. We were happy to agree these adjustments. In the event, Miss Downer did not give evidence.

20. We spent 22 August 2022 dealing with the above applications and then adjourned to read the witness statements and referenced documents. We heard evidence from the Claimant on 23 & 24 August 2022, although we did break during the course of the day to view the CCTV footage. Towards the end of the day on 24 and on 25 August, we heard evidence from Ms Hooper on behalf of the Respondent. We also heard evidence from Mr Connors and Ms Stirling on 25 August. Mr Wilkinson gave evidence on 30 August 2022 and we then dealt with submissions. Ms Palmer had indicated that due to a personal matter she had to leave promptly at 3 pm on 30 August 2022 to catch a flight to Scotland. On 31 August 2022 we met in chambers to deliberate and reach a decision.

21. I would apologise to the parties for the length of time that it has taken to perfect this judgment. This was due to a combination of my part-time sitting schedule, pressure of work and ill-health.

Conduct of the representatives

22. On a number of occasions the interaction between the parties' representatives was fractious and became heated, with each repeatedly interrupting the other's cross-examination and questioning. To compound matters, both representatives, but particularly Mr Ijezie, over-pressed their objections to the other's questioning and my rulings. This reached a point where I had to warn them several times that they were in effect arguing with me and/or each other, this conduct had no place in the Tribunal, to refrain from doing so and to move on.

23. On the first day of the hearing (23 August 2022), Ms Palmer complained several times that the Claimant was not answering her questions in a focused manner or at all and that Mr Ijezie kept interrupting her. I told her that Mr Ijezie was entitled to raise matters by way of interruption and it was for me to decide whether these were valid or not. On a number of occasions I also directed the Claimant to focus and to answer the specific questions put to him, tempting as it might be to add in other matters by way of a narrative.

Notwithstanding this, Ms Palmer's cross-examination was over lengthy because she prefaced most of her questions with commentary or submissions rather than just asking questions. I did warn her at the end of the proceedings on the second day of the hearing (23 August 2022) that I would, if necessary, impose time limits on her questioning the following day.

24. On the morning of 24 August 2022, having reviewed the position as a Tribunal panel, I advised the representatives that the Claimant's cross examination was to be concluded by lunchtime and that I instructed the Claimant to simply answer the specific questions he was asked and not provide extraneous commentary. I also instructed Ms Palmer to simply ask questions and not raise matters by way of commentary or submissions although we accepted that she was entitled to probe answers to questions so as to understand the Claimant's case. In addition, I reminded Mr Ijezie firmly on a number of occasions that it was my role to control the proceedings and that he should not interrupt cross examination unless it was absolutely necessary and, when I gave my ruling, he should not press the point further.

25. We also noted that Ms Palmer did have a tendency to allow her reaction to Mr Ijezie's questioning to betray her thoughts. For example, on a number of occasions during his cross examination or re-examination, she lent forward and banged or put her head on the desk in an indication of what appeared to be her impatience. This was inappropriate and discourteous.

26. After the Tribunal panel had asked questions of the Claimant, I invited the representatives to deal with any matters arising. Ms Palmer flatly declined to do so on the basis that our questions had resulted in new evidence coming out and that these matters had to be put firmly to her witnesses. There was some discussion about this in which I asked who was going to do this, pointing out that this is an adversarial system and we are not a board of inquiry. Ms Palmer replied that Mr Ijezie should do this. Mr Ijezie replied that she could not compel him to put evidence to her witnesses, it was for the Respondent. Ms Palmer insisted that he had to put the evidence to her witnesses. My response was that I had never come across such a dispute as this in 30 years of employment law experience and I was very surprised by the position Ms Palmer was taking because it was not a novel point. Witnesses raise new matters, it is par for the course and we are entitled to ask questions. Indeed, witnesses do not always succinctly and narrowly answer cross examination questions, as she had already complained about. I directed that the matter could be addressed in submissions. Ms Palmer pressed the point. I said that I had offered a solution and that this discussion was at an end.

27. In the afternoon of 24 August 2022, Mr Ijezie started cross-examining Ms Hooper. He continued on 25th. His questioning was somewhat repetitive and there were a number of occasions where I had to interrupt him and move him on. By 12:55 pm that day he still had not finished and I asked him how much longer he was going to be because he had indicated at the start of his cross examination on 24th that he would finish by lunchtime and the Respondent still had several witnesses to call. The intention was to complete two further witnesses that day. This engendered a dispute between the representatives

which I had to interrupt and again caution them against arguing with each other and me. I then imposed a strict timetable for questioning of the two further witnesses but in the event we were able to deal with three witnesses that day.

28. Ms Palmer had already indicated that on 30 August 2022 she had to leave by 3 pm to catch a flight to Scotland.

29. At the end of the hearing on 25 August 2022, I said clearly to the representatives that we expected the evidence and submissions to be concluded by 1 pm on 30 August. Both representatives indicated that they would prepare written submissions.

30. However, Mr Ijezie's cross examination was lengthy and we did not finish the evidence until approximately 1.10 pm on 30 August 2022. At this point, I said we would have a short lunchbreak and then deal with submissions. I asked the position regarding written submissions. Mr Ijezie said that he thought that I said that we would deal with written submissions at some later point. Ms Palmer responded that this was not her understanding of what I had said. She had produced written submissions but Mr Ijezie did not have a copy at this point and said he needed time to consider them and then prepare his own submissions. I reminded him that I had clearly said we would hear submissions today and both representatives had indicated that they would prepare written submissions. In view of our need to finish the hearing by 3 pm, I directed that we would adjourn until 1.50 pm to allow him time to consider Ms Palmer's submissions, complete his own and on return then I would allow them each 30 minutes to talk to their submissions.

31. On resuming the hearing, Mr Ijezie said he had not had sufficient time to consider Ms Palmer's written submissions or complete his own and he requested more time to do so overnight. Ms Palmer became quite agitated at this and to use modern parlance "lost her cool". Indeed Mr Wiggins had to intervene to silence her from any further outburst.

32. Frankly, we were quite shocked by this behaviour. However, we took into account that Ms Palmer was flying to Scotland that afternoon to attend to a personal matter and we can understand that she was concerned that Mr Ijezie's proposal would in effect prolong the case and would thereby delay her or impact upon her ability to deal with her personal affairs.

33. After some discussion and at my direction Ms Palmer spoke to her submissions and Mr Ijezie gave oral submissions. Given the limited amount of time, I further directed that Mr Ijezie had until 8 pm that evening to submit a written reply to Ms Palmer's submissions and for Ms Palmer to submit any response to this by 10 am the following morning. These timings were at Mr Ijezie's behest. Ms Palmer kindly agreed to this arrangement, although we appreciated that it meant that she would have to deal with the matter in her own time after her arrival in Scotland.

34. On 31 August 2022, when we were sitting in Chambers, we were forwarded copies of an email received from Mr Ijezie sent at 12:32 am on 31 August

2022 attaching full written submissions and an email from Mr Wiggins sent at 10:03 am objecting to Mr Ijezie's submissions and attaching Ms Palmer's reply to his submissions. In addition, we were forwarded an email from Mr Ijezie sent at 10:30 am that morning objecting to certain paragraphs of Ms Palmer's reply.

35. We considered the position and instructed our clerk to write the representatives as follows:

> *"You were directed to provide a reply to the Respondent's written submissions by 8 pm on 30 August 2022. This came about because you ignored a clear instruction that evidence and submissions were to be concluded by 1 pm that day believing that written submissions could follow. Further, this was in the face of a clear indication that you gave on 25 August 2022 that you would provide written submissions. However, by belated close of evidence on 30 August it was clear that you had not prepared any written submissions. Both parties gave oral submissions in the limited time left, but I gave you the additional time in which to read Ms Palmer's written submissions of 17 pages and to reply given the lack of time at the hearing. This was not an invitation to produce full written submissions. I also directed Ms Palmer to reply to your reply by 10 am on 31 August 2022, if she wished. These time limits were at your behest. However, you did not provide a reply by 8 pm but instead produced full submissions which were not sent until 00:32 on 31 August 2022. Ms Palmer replied to your submissios as she indicated as best she could in the time left and set out her objections to your actions. You have now objected to paragraphs 1-13 of her reply on the basis that they go further than a reply to your submissions.*
>
> *In the circumstances we have decided to consider your submissions even though you have gone far beyond what you were asked to and agreed to do by 8 pm. This clearly prejudices the Respondent but our concern is more for the Claimant who is at the heart of this. For this reason we decided it was on balance fair to read your submissions. However, we do note Ms Palmer's concerns and will take care to determine that any submissions arise from matters that were put to the appropriate witness for comment (as we would with both parties).*
>
> *We do not accept that the matters within paragraphs 1-13 of Ms Palmer's submissions go beyond a reply to your submissions and given the extent of your breach of the direction given, we believe that it cannot be proportionate to expect that 15 pages of written submission should be considered and to then query 13 paragraphs of a reply.*
>
> *We are not prepared to enter into any further correspondence with regard to this matter which has already taken up most of our morning when we should be focusing on reaching a decision. As I explained several times, if we cannot finish our deliberations today, we are unlikely to be able to meet again until the end of October 2022."*

36. We do not raise these matters lightly but do so because the conduct set out above made our task all the more difficult and did not really assist the representatives' respective clients.

Findings

37. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

38. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

39. The Claimant is Black and a Jamaican/British citizen. For the purposes of his race discrimination claim he identifies himself as of Black Caribbean origin. The other protagonists are White unless stated otherwise.

40. The Claimant has been employed by the Respondent since 18 April 2008 and from 2015 onwards as a Crime Enforcement Regulation ("CER") Officer. His employment is continuing.

41. The Respondent is the London Borough of Lewisham.

42. As we understand it, the CER Service is divided into teams. The Claimant was in one team, the North Team, and at the time of the events in question he reported to Julian Wyard, his CER Manager. Lisa Hooper at the time of the events in question was the CER Manager of another Team.

43. The CER Service is responsible for Licensing Enforcement, including conducting enquiries into breaches of relevant legislation, interviewing and taking statements, and the preparation of and submission of files for review or prosecution. This also includes responsibilities to undertake compliance audits of licensed premises and identifying breaches of licensing objectives and conditions.

44. We were not referred to the Claimant's contract of employment or written statement of terms and conditions under the Employment Rights Act 1996. We were referred to the Respondent's Disciplinary Policy and Procedure at B791-866.

45. Ms Hooper had previously been the Claimant's line manager from February 2014 to August 2015 and she gave evidence that they had a good working relationship up until the events in question. This was not disputed.

46. On the evening of 15 December 2017, Ms Hooper received an email from Clare Turner, the Venue Manager of Little Nan's Bar ("Little Nan's"), an independent bar located in premises owned and subject to licensing control by the Respondent. Little Nan's is opposite the Respondent's main offices in Catford in a building which contains The Broadway Theatre and the Old Town Hall. The email was also addressed to Angela Mullins, a CER Officer. The email is at B89 and is set out below:

"Hi Lisa and Angela,

I hope you are well and seasons greetings!

Tonight at about 6.15pm I told Monique my security officer that we were at capacity. We had a big turn out from the offices with early evening xmas parties, we previously had walk in space but this had been taken up. Two employees of Lewisham council had just been admitted when I told Monique we were full, there were over five other individuals just about to enter, we had let the other two in under the assumption they were not part of a group. The five plus who were refused kicked up a fuss saying that Monique was rude although she had only told them the decision had been made, they just constantly wanted to override that decision. The other thing that was said, which is why I'm emailing, is that they said they were part of Lewisham licensing meaning they should be allowed in anyway.

I thought that was a slight miss-use of their role as they were coming in for a drink and really they should be honouring the fact that I was at capacity. Why I am writing is just to find out if I was wrong or right in this situation. If you could advise I would appreciate it.

Many thanks

Clare"

47. It is fair to say that Ms Hooper had dealings with Ms Turner before in an official capacity and to that extent they knew each other and were on familiar terms.

48. Ms Hooper did not see this email until the following Monday, 18 December 2017. She acknowledged receipt at B89:

"Hi Clare

Thanks for your email. I will investigate this. I am not aware of any work drinks that were taking place from our team on Friday. You did exactly the right thing managing your capacity, any officer from our service here would know that and should have regard for this if they were refused entry.

Has the CCTV been installed yet? We could look at this.

Many thanks"

49. Ms Hooper discussed the contents of the email from Ms Turner with two members of her team. The Claimant overheard the discussion and told her that some of the CER Officers had been drinking in Catford on Friday. As we later understood, the occasion was the North Team's Christmas lunch and a number of the CER staff from both the North and South Team swent to the Black Horse & Harrow public house in Rushey Green and had later gone onto Little Nan's Bar, which is across the road from the pub. Ms Hooper asked him to name who was there and he did so.

50. The Claimant alleges that Ms Hooper asked to know who was working over the weekend as she had received a complaint from Little Nan's that some officers had gone there and when denied access had produced their ID badges and said that they were from Lewisham Licensing. He further alleges that she asked for the names of those who were there, which he provided and she wrote down, but he told her that he did not see anyone showing their ID badge. This is also set out in a statement that he gave to the Respondent dated 16 January 2018 at B254.

51. Ms Hooper denies saying that any badges or warrant cards were shown by officers at this stage because she was unaware that this was part of the complaint until she met with Ms Turner on 19 December 2017. Her evidence is that she asked the Claimant if anything inappropriate had happened and he replied no.

52. On balance of probability we accept Ms Hooper's evidence and think it more likely than not given the date on which the Claimant wrote his statement that he has conflated a number of earlier and later conversations.

53. Later that day, Ms Hooper contacted Gary Connors, who at the time was the Service Manager, and told him about the email that she had received. He told her that he was part of a group that was outside Little Nan's that evening but had not seen the alleged incident.

54. Mr Connors' evidence was that he wandered off and was on the phone at the time. The Claimant acknowledged that Mr Connors had left the entrance of Little Nan's before the incident in question in his fact finding meeting held on 10 January 2018, both in the Respondent's and his own notes of that meeting (B155 and 193). He repeated this in his witness statement. However, in oral evidence the Claimant said that he was at the front by the door to Little Nan's and ambiguously: "Gary Connors was right there". He became emotional as he said this. This was one of a number of inconsistencies in the Claimant's evidence at the time as opposed to at our hearing.

55. On balance of probability we accept Mr Connor's testimony and the more contemporaneous evidence contained within the notes of the fact finding meeting and given the other inconsistencies in the Claimant's evidence which we will come onto.

56. On Tuesday 19 December 2017, Ms Hooper and Mr Connors met with Ms Turner at Little Nan's to determine what she said had happened. Ms Hooper did not take full notes of the discussion because they agreed she would come back and take a full statement at a later date if it was necessary. However Ms Hooper said that what Ms Turner described was broadly in line with the statement that she subsequently took from her on 11 January 2018, which is at B232.

57. Mr Connors said in written evidence that Ms Turner explained the following. She went to speak to a number of individuals/a group who were trying to gain entry to Little Nan's and were already engaged in discussions with the door staff to this effect. Whilst the group collectively were looking to gain entry, she was specifically concerned by the actions of a young black male with spikey hair who said the group were from Licensing and a taller white male with greying hair who had his warrant card/ID in his hand (it was agreed by the parties that this was the Claimant and a colleague from the South Team, Mr XY). Mr Connors' further evidence was that he and Ms Hooper were very concerned by what she had said. He apologised to Ms Turner and said that he would look into the incident.

58. We accept this evidence.

59. After the meeting, Mr Connors asked Ms Hooper to undertake an investigation into the matter. He acknowledged in evidence that this involved investigating his own involvement in the incident but he was confident that Ms Hooper was competent to do so notwithstanding that she was his subordinate. His further evidence was that he did not distance himself initially because he believed it was a minor incident but did subsequently, although he said it was difficult because they were his staff. However, he advised Ms Hooper that he could not be involved and to liaise with HR and gave her leeway to conduct an independent investigation. Nevertheless, he was updated and received a copy of her investigation report and recommendations. We accept his evidence.

60. During our hearing the Claimant briefly showed us his Warrant Card. CER Officers carry a Warrant Card which are small credit card sized wallets which when opened have a badge on one side (containing the London Borough of Lewisham's emblem) and we assume, because we were never shown it closely, the officer's individual credentials on the other side. During the evidence this was at times referred to as a Warrant Card or a badge or ID. Confusingly, all of the Respondent's staff also have an ID card which they carry on a lanyard around their necks. Ms Hooper said in evidence that showing the badge alone would not necessarily have identified the holder as a member of the Respondent's Licensing team, it would be a combination of showing the badge and saying "I am from Licensing". The Claimant said in evidence that Ms Turner would have known that he and the others were Council officers regardless of showing a badge because they had been to Little Nan's before. We accept this evidence.

61. On 19 December 2017, Ms Hooper confiscated the Warrant Cards of those CER officers who had been identified by the Claimant as being present at Little Nan's on the evening in question. This was done as a matter of precaution. In oral evidence she added that this was part of procedure given the allegation of misuse of position, that she took all of the warrant cards, was not targeting anyone in particular and it was not a presumption of guilt. We accept her evidence.

62. On 20 December 2017, Ms Hooper sent out invite letters to those officers named by the Claimant, as well as the Claimant, requiring them to attend fact finding interviews at various dates in January 2018. These letters are at B97 and 97a-k.

63. Also on 20 December 2017, Mr XY, a CER Officer in Ms Hoopers' team, approached her as his line manager and confessed that he had taken out his badge at Little Nan's that evening, not in an attempt to gain access to the bar, but to get the door staff to listen to him that his intention was for them to just let two of their colleagues, who had already been admitted, know they were leaving because they had not been allowed in. His colleague, Daniel Power, who was also present, had seen him get his badge out and quickly told him to put it away as it was not appropriate. He immediately put it back in his pocket. Ms Hooper thanked him for his honesty, told him to make a note of what he had just said and that she would be undertaking a full enquiry into the allegations made by the bar manager. She did not make any notes of this discussion.

64. Ms Hooper carried out fact finding interviews between 4 and 11 January 2018 as set out below:

    a. 4 January 2018 Charlotte Smith (at B98-105)
    b. 4 January 2018 Gary Connors (B106-110)
    c. 9 January 2018 Martin Gormlie (B115-124)
    d. 9 January 2018 Fergus Downie (B125-133)
    e. 9 January 2018 Megan Mellor (B134-141)
    f. 9 January 2018 Lisa Spall (B142-154)
    g. 10 January 2018 XY 10.30 am (B157-170)

h. 10 January 2018 Daniel Power 11.30 am (B171-184)
i. 10 January 2018 Selvin Reid 1.30 pm (B185-191
j. 10 January 2018 the Claimant 2.30 pm (B192-212)
k. 11 January 2018 Arnold Kawuma (B213-217)

65. In respect of each we were referred to a typed note of the fact finding interview and then handwritten notes taken by the note taker either within a pro forma list of questions or in a separate document. The was a standard introduction to the majority of the typed notes.

66. During the Claimant's fact-finding interview, he asked Ms Hooper if she had a statement from Little Nan's security guard (Monique, and who is Black). Ms Hooper explained in her written evidence that she told the Claimant that she had statements from the bar and she did so because she was not sure at this stage whether she should be disclosing this information or not. She further explained that she had not received a statement from the security guard, having had no response to her telephone calls. Ms Hooper's written evidence continues that it was not until after the fact-finding meeting when she asked HR if she could provide some further information to the Claimant in a second interview, they agreed she should disclose that she was not in receipt of a statement from the security guard. Indeed, she did tell the Claimant this at the second fact-finding meeting held on 18 January 2018.

67. The Claimant alleges that Ms Hooper has tampered with the fact finding notes of Mr Connors' interview so as to distance him from the incident. The Claimant produced a further version of the notes which are at B105A and are said to be the original notes. In essence, the difference between the two sets of notes is as to specifically where Mr Connors was standing outside Little Nan's at the time of the incident under investigation. In evidence, Mr Connor said that he had asked for this change partly to confirm where he was. He denied that he had overheard the conversation between the group and the bar staff. We accept his evidence and took into account the change in the Claimant's evidence as to where Mr Connors was at the time of the incident.

68. The Claimant also alleges that Ms Hooper has tampered with her own fact finding notes of his interview held on 10 January 2018 and he has produced a further version at B191A-E. Ms Hooper said in evidence she amended the notetaker's notes to expand on what she had said which had been shortened by the notetaker and so was inaccurate.

69. We were provided with a table by Ms Palmer at paragraph 52 of her submissions which we considered as well as paragraphs 53-54. We have also considered the submissions made by Mr Ijezie at paragraph 16 of his written submissions. Ms Palmer accurately records the changes save for at B196 as underlined below:

"DD: You told me that the description from the manager fits me but you can't give me the description given to you by the security guard?

LH: No. This is the process. I ask you questions <u>and you give me your answer</u>."

70. On balance of probability, we accept that Ms Hooper made these changes to the notes taken by the notetaker to reflect what she had said at the meeting. We do not accept Mr Ijezie's submissions that it was, in respect of each change listed at boxes one and two at paragraph 52 of Ms Palmer's submissions: an attempt to remove her incorrect or false statement that she had received a statement from the security guard before this meeting; to support a case of misconduct against the Claimant; and the words *"and you give me answers"* (which Ms Palmer did not deal with in her submissions) rendered the fact finding meeting in breach of the Respondent's disciplinary policy at B823. Whilst it may have been a heavy handed or clumsy way of putting it, Ms Hooper was stating that the purpose of the meeting was for the Claimant to answer questions not pose them. Whilst we were slightly troubled that at this stage Ms Hooper did not have the security guard's statement, she did obtain the signed statement later on; we accept her explanation for not having this and for not telling the Claimant who had identified him. In any event, we did not believe it appropriate to infer anything from this or to find anything untoward in any of these changes.

71. At the Claimant's fact finding meeting on 10 January 2018, Ms Hooper accepts that she did tell the Claimant that he could not take notes. Her evidence was that she had said this to all of the staff that she interviewed as part of her investigation. The reason for this was that she had been trained to say this because there should only be one set of notes. However, with the benefit of hindsight she now realises that perhaps this was wrong. Again this is perhaps indicative of a heavy handed approach. On balance of probability, we accept her evidence.

72. On 11 January 2018, Ms Hooper had a further meeting with Ms Turner from which she prepared a draft statement (at B232) and then emailed it to her to check (B224). Ms Turner emailed Ms Hooper back in which she stated that *"everything in the statement is correct"* (at B242).

73. The Claimant submits that because this statement went much further than the original email complaint, it supported his assertion that Ms Hooper changed Ms Turner's evidence. He relies on Ms Hooper's failure to disclose her original notes. We accept that it is unfortunate that on a number of occasions Ms Hooper has not taken or retained notes of discussions and meetings. Ms Hooper explained that she did not keep her notes or *"jottings"*, as she called them, because she had the email back saying the statement was correct. We note that she had got a prompt response. If we accept what the Claimant asserts this would mean that Ms Turner gave false evidence acting in collusion with Ms Hooper. However, there is nothing from which it would be appropriate to infer this. On balance of probability we accept her evidence.

74. Ms Hooper decided to interview the Claimant again having reviewed the interviews with the other officers and the statement from Ms Turner (which were largely at odds with his explanation of the incident).

75. On 12 January 2018, the Claimant sent an email to Ms Hooper stating as follows (at B966-967):

Just for some clarity and the purpose of this investigation. Please can you provide me with the initial complaint that you obtained either from the security guard or the manager. During the meeting you mentioned that I was having a deep conversation with the manager. Based on the interview I had with you on 10th January 2017, I was only accused of having some type of conversation with the manager. I presumed from this meeting that this is the only thing I'm accused of or otherwise you would have put it to me that I was accused of other things. Please can you provide me in writing what the initial accusation is so that I can present this to the union. To date I haven't been presented with a written transcript or the alleged compliant that I have been involved in.

From the onset you told me that you are investigating the conduct of some officers that went to Little Nan's on 15th December 2017, and presented themselves as licensing officers when they were denied access to enter the premises, ID badge was produced by officer or officers.

I look forward to hearing from you."

76. On 15 January 2018, Ms Hooper sent an email to the Claimant explaining that for the purposes of obtaining a clearer picture around the complaint she would be questioning him further the following day. She attached a copy of the complaint received and Ms Turner's statement. The email is at B966-967) and continued as follows:

"Again for the purposes of clarity, regarding the point in your email below about you being in a deep conversation with the bar manager, I said to you in the interview 'I have been told that you were in deep conversation for a period of time'. This description came from another officer I had questioned.

I told you at the beginning of the meeting the following information (which is what I gave to all officers interviewed):

'As you are aware, we are in receipt of a complaint regarding conduct of officers from the CER service on 15 December 2017. The alleged incident took place at around 6.15pm on Friday 15th December at Little Nan's on Catford Broadway where officers from the CER service visited the premises and attempted to enter. The complaint received was from the manager at the premises who alleges that officer's misused their position as council licensing officers to again entry to the bar when told they could not enter'.

I did not mention that officers used their ID badges.

I have attached the minutes again for your information."

77. We would note that Ms Hooper had already sent the Claimant her notes of their meeting on 10 January in an email dated 11 January 2018 (at B240A) which record her as saying he was alleged to be in deep conversation with the bar manager.

78. On 18 January 2018, Ms Hooper conducted a second fact finding meeting with the Claimant who attended with his union representative. The notes are at B255-258. At this meeting, Ms Hooper told the Claimant that his version of events did not marry up with what the other officers had said in their fact finding interviews and what Ms Turner had said in her statement. She gave him the opportunity to comment. We can see from the notes that it was a difficult meeting for both parties. The Claimant obviously saw it as a disciplinary meeting at which accusations were being made against him and he was seeking answers to questions he raised. Ms Hooper was attempting to conduct an investigation meeting and was seeking the Claimant's answers to three specific questions, addressing inconsistencies with the evidence she had obtained from the others. She clearly found it uncomfortable because as she said she had not yet written her report. She lost control of the meeting

to an extent, having to field questions from the union representative as well as from the Claimant.

79. From 18 January to 16 February 2018 the Claimant was absent from work with stress and anxiety. We refer to medical records from his GP at B911 which indicate that on 24 January 2018 he related brief details of the incident at Little Nan's, that he was under investigation and very stressed as:

"colleague blaming him (claims he encouraged him to use the batch).
Manager at work getting confused versions of the incident
not sleeping well and feeling stressed as colleague lying about him
further investigation and other witnesses versions pending"

80. We we believe on balance of probability that the reference to *"batch"* is a typo for the word *"badge"*.

81. The Claimant submitted a written statement to the Respondent on 18 January although it is dated 16 January 2018. This is at B254 and is as follows:

"On Monday 18'h December 2017, sometime around 9am -10:30am, Lisa Hooper came into the office. She was standing by her office desk at the time. Usa asked everyone inside the office "if any officers worked over the weekend because she received a complaint that officers from this service went to Little Nan's and when they were denied access to the premises, they produced ID badges and said there were from Licensing". This was in the presence of several officers who were in the office at the time.

I wasn't sure what Lisa Hooper was talking about and I asked her for clarification, Lisa then walked up closely to where I was sitting (my desk) and reiterated the question above. Valda Parker said to Lisa that "Theo and Alfene was visiting license premises over the weekend". I suddenly recalled that officers, along with me attempted to go to little Nan's on the Friday and was denied access. Lisa asked me "who was there" and I told her "Martin, Charlotte, Fergus, Daniel, Richard, Lisa Spall, Selvin and Gary and Megan was went but Gary and Megan left straight away". Lisa asked me "who shown their badges"? "I told Usa that "I did not see any ID badges been shown to the security guard". Several officers was present at the time when Lisa asked the open question and approaches me for further information. Lisa was taking written note at the time, she placed her note book on my computer table.

About 5 minutes after Lisa spoke with me in the presents of several other officers inside the office she left the office. Some of the officers presence at the time were asking me who had shown their Badge and I told them I don't know. Officers started speculating who had shown their badge.

I can honestly confirm that the statement I have provided to you is correct to the best of my knowledge and what I can remembered to date."

82. As we have already indicated above, on balance of probability we accept Ms Hooper's evidence and think it more likely than not given the date on which the Claimant wrote this statement that he has conflated a number of earlier and later conversations. In particular, his assertion that Ms Hooper referred to ID badges during this meeting.

83. On 22 January 2018, Ms Hooper produced her investigation report which is at B271-277. This document sets out the background, methodology, allegation/complaint, findings, summary and recommendations.a number of appendices are attached as indicated on B271. The recommendations are at B277 and are set out below:

1. *I recommend that Delroy Downer's actions that evening be looked at a further at a disciplinary hearing based on the findings of this investigation.*
2. *I recommend that (XY's) actions are also reviewed at a hearing.*

3. I recommend that the other officers interviewed as part of this fact finding and listed above as having no involvement in any inappropriate behaviour be reinstated to their normal duties and warrant cards returned.

84. On 25 January 2018, Ms Hooper wrote to the Claimant (at B278). This letter acknowledged that the Claimant was absent from work due to ill-health but stated that Ms Hooper felt that it was better to let him know the outcome of her investigation as soon as possible to avoid causing any further anxiety. The letter advised the Claimant that having concluded her investigation into the complaint received from Little Nan's, she had found that there was a case to answer and that it would be necessary for him to attend a disciplinary hearing, details of which he would be notified of in due course, along with *"full details of the actual allegations which will be around potential misuse of your position, and/or authority."*

85. On 29 January 2018, the Claimant sent an email to Mr Wyard, his line manager (at B281-282). In summary, the letter said as follows: the investigation was not conducted in a transparent, fair and open manner ; he has been singled out for whatever reason but only time will tell ; initially Ms Hooper referenced that officers had produced an ID badge and said there were licensing and subsequently denied saying this, now he has seen why the investigation shifted and the focus is now on him because someone is trying to set him up ; he is on sick leave because he is suffering from work-related stress and the way he has been dealt with by the investigating manager.

86. Mr Wyard responded in sympathetic and supportive terms offering the Claimant advice on how to proceed and offered to speak and/or meet with his union representative should that be constructive in ensuring that the Respondent looked after his welfare, and helped him with getting back to work. He also cautioned the Claimant to maintain perspective regarding the matter. This is email is at B281.

87. On 8 February 2018, Ms Hooper attended Little Nan's for Ms Turner to sign her statement and by chance she also met the security guard who had been working on the night of the incident in question. She told Ms Hooper her name, Monique Adolfus, and Ms Hooper took a statement from her. These documents are at B295 and B323 respectively. Ms Hooper prepared the statement from what she had told her. She subsequently arranged to meet Ms Adolfus to get her to sign the statement but she failed to turn up. On balance of probability, we accept this evidence.

88. On 8 February 2018, Ms Hooper wrote to the Claimant requiring him to attend a disciplinary meeting on 26 February 2018 (at B296-298). The letter set out the allegations to be considered at that meeting as follows:

"Allegation 1

On 15 December 2017 you must use your position as a Crime, Enforcement & Regulation Officer to gain entry to a Lewisham Council licensed premises.

Allegation 2

That your actions on 15 December 2017 brought to the Council into disrepute, which is a breach of the Council's Employee Code of Conduct"

89. The letter continued that these allegations if proven would constitute misconduct as defined in the Respondent's disciplinary policy (a copy of which was attached) and which may result in formal action being taken against the Claimant. The letter stated that the hearing would be conducted by Ralph Wilkinson, who at that time was the Respondent's Director of Public Services, and that Ms Hooper would be conducting the management case. The letter detailed the documentary evidence which she would be presenting and included copies of each. Ms Hooper also indicated the names of possible witnesses that she would be calling and asked the Claimant to advise of the names of any witnesses he intended to call and copies of any documentation he intended to present. The letter advised of the right of accompaniment and indicated that a copy of the letter and pack had been sent to John Collins (at the Claimant's union) for information.

90. On 26 February 2018, the disciplinary hearing commenced but was adjourned because Ms Adolfus' statement was not signed. The Respondent's notes of this meeting are at B304-306 and the Claimant's notes of the meeting are at B307-308.

91. Ms Hooper had consulted HR prior to the meeting and they had advised that she should provide Ms Adolfus' statement to the Claimant ahead of the disciplinary meeting even though it was unsigned. She subsequently met with Ms Adolfus after the disciplinary meeting at Little Nan's to obtain her signature. She signed the statement as Monica Newell, which was different to the original surname that she had obtained from her before.

92. Later that day (on 26 February), Mr Wilkinson conducted a disciplinary hearing with Mr XY, the outcome of which was to issue him with a written warning to remain in force for 9 months. In his written evidence, Mr Wilkinson stated that his rationale for doing so was as follows: he had come forward and volunteered that he had shown his Lewisham card at the bar as he was aware of the complaint; he was remorseful and apologetic at the hearing and said that he had attempted to defuse the situation; Mr Wilkinson considered that as part of the group he did try to gain entry to the bar and that his actions had brought the Respondent into disrepute; however he accepted on the evidence that he had conceded that he was not going to gain entry but was trying to defuse the situation; the staff at Little Nan's did not suggest he had behaved in a similar or worse way to the Claimant. We accept his evidence.

93. On 7 March 2018, Ms Newell signed her statement which is at B322.

94. The Claimant's disciplinary hearing resumed on 8 May 2018. We were referred to notes of that hearing at B335-384 and B385-409 (with Track Changes).

95. From 8 May 2018 onwards (to 14 January 2019) the Claimant was absent from work due to ill-health.

96. By a letter dated 10 May 2018, Mr Wilkinson wrote to the Claimant informing him that the outcome of his disciplinary hearing was to issue him with a final written warning active for 15 months (B417-420).

97. The letter summarised what was said at the meeting by management and the Claimant. Mr Wilkinson then set out his findings from which he concluded that the Claimant had misused his position to try to gain entry to Little Nan's despite the bar manager and bar door person telling him they were at capacity, and had by his actions brought the Council into disrepute and was the cause of serious complaint. Mr Wilkinson also stated that it was vital that Council officers uphold the reputation of the Council especially when those officers are tasked with making sure residents and businesses in the borough uphold the rules and regulations placed upon them. He further stated that he was concerned that the Claimant did not accept that his actions were in any way inappropriate. The letter continued that for this reason Mr Wilkinson considered this a serious breach of the Council's code of conduct. The letter concluded by notifying the Claimant of his right of appeal and the parameters into which grounds of appeal must fall.

98. We were referred to a draft of Mr Wilkinson's letter at B411-415. He sent this to Gill Moss, an HR officer, for comment, on 9 May 2018 (at B410). Ms Moss responded by email later that day with suggested changes which in reply Mr Wilkinson indicated that he accepted. His email also indicated that the final version had been emailed to Ms Moss and the letter sent out to the Claimant and his union representative. These emails are at B432.

99. We considered both the draft and the final letter because the Claimant was relying on it as an indication that there had been some attempt to manipulate the outcome. We note that there are a number of additions, corrections to typos, grammar, as to clarity, formatting and the time limit in which to appeal. The key change is the addition of the words to the third paragraph under the heading *"Conclusion"* at B420:

    "I am also concerned that you do not accept that your actions were in anyway inappropriate".

100. Mr Wilkinson said in evidence that these were not material changes but simply adding wording for the sake of clarity, correcting typos and grammar. Whilst we do not have a copy of the document containing the corrections we can of course see the difference between the draft and the final versions of the letter.

101. Mr Wilkinson was asked questions by the Tribunal as to the difference in sanctions awarded to Mr XY and to the Claimant. He explained that the two cases were different. Mr XY came forward as soon as he was aware that there was a complaint and confessed. The Claimant denied any wrongdoing and argued against it, so that he was not remorseful either. He was asked whether this was a reason for giving the Claimant a final written warning and he responded that it was one reason but the main reason was because of the Claimant's argument with Little Nan's bar manager. He was also asked if the difference in sanction was due to race and he replied *"absolutely not"*. He added that the weight of evidence indicated that the Claimant had committed

wrongdoing and that by doing so he had brought the Respondent into disrepute.

102. By a letter dated 20 May 2018 the Claimant wrote to the Respondent appealing against the issuing of the final written warning. This letter is at B425-431. Broadly speaking, the Claimant alleged that the Respondent's investigation was not carried out in accordance with its procedures and was flawed, that he was unfairly treated during the investigation process and at the disciplinary hearing, indicating bias on the part of all those involved, and the sanction given was excessive and discriminatory. In particular, the Claimant asserted that Ms Spall, Ms Hooper and Mr Wilkinson had discriminated against him.

103. The appeal hearing took place on 5 November 2018. We were referred to several versions of the minutes of the appeal hearing: typed minutes at B573-585; typed minutes with handwritten annotations at B586-597; and typed with track changes made by the Claimant at B598-616. The appeal hearing was chaired by Aileen Buckton, the Executive Director for Community Service, who has since left the Respondent's employment. Mr Wilkinson was the presenting manager. The Claimant attended with his trade union representative, Mr Collins.

104. We did not hear evidence from Ms Buckton. We heard evidence from Jackie Stirling, the Strategic HR Business Partner, who was present at the appeal hearing. She was there as the senior HR officer to advise Ms Buckton and she discussed the matter with her after the appeal hearing and her reasons for reaching her conclusions. She explained that Ms Buckton considered the matter with her, they had a full discussion and they looked at the evidence as to who had said what which she had prepared in a tabular form (at B620a-b & 976-977) This sets out various factors arising from the incident at Little Nan's involving the Claimant and the evidence from each of the witnesses as to each of those factors. Ms Stirling further explained that this was the normal process in which she and the decision-maker would have a full discussion, the decision-maker would reached a decision and she would draft the outcome letter based on what they had said without changing any of it. Under cross examination she reiterated that the decision and the reasons for the decision were Ms Buckton's.

105. The appeal outcome letter is dated 3 November 2018 and is at B621-634. In the letter Ms Buckton advised the Claimant that she had decided to uphold his appeal in part with regard to the severity of the sanction, which she reduced from a final written warning to a written warning to remain live on his personnel record for a period of 9 months. The letter addresses each of the Claimant's grounds of appeal. Ms Buckton rejected his assertion that the investigation or hearing was conducted or motivated by racial bias either consciously or unconsciously or that Mr Wilkinson demonstrated any discrimination.

106. In particular we note the following (at B625-626):

"I am also concerned that you do not accept at any level that you may have behaved inappropriately. Even if your position is that you did not mention that you were from licensing and that the evidence from both Claire Turner and Monique Adolfus has been fabricated, you do not appear to have recognised that in addition to their evidence, 3 of your colleagues referred to your demeanour as being loud and animated and that 5 people in addition to the bar staff, referred in various ways to you being at the front of the group being involved in discussions with bar staff. This has been variously described as a 'deep conversation' to 'having an argument'. Based on this, Ralph Wilkinson said that he had formed a reasonable conclusion that you had been trying to gain entry on behalf of the group and your failure to accept any more involvement than anyone else lent weight to his decision to issue you with a more serious sanction than he might otherwise have done."

107. Ms Stirling said in evidence that in their discussion after the appeal hearing, Ms Buckton said that she thought the sanction was too severe and wanted to reduce it. Ms Stirling then warned her that in reducing the sanction it could be interpreted as saying that it was too severe because of race discrimination. Ms Buckton told her that she would make it very clear the Claimant did not accept any responsibility for his actions. Ms Stirling then drafted the outcome letter, Ms Buckton read it and said it was spot on. In addition, she explained in evidence that by reducing the sanction to a written warning, the only option under the Respondent's disciplinary procedure was for it to be left on the Claimant's personnel file for 9 months.

108. In answer to questions from the Tribunal Panel as to whether there was any other reason not to reduce the sanction other than it being perceived as race discrimination, Ms Stirling replied that she felt that the Claimant had been more culpable. She further explained that Ms Buxton had this concern as well because the Claimant did not accept in any way, shape or form that he had done anything wrong at all, and whilst what Mr XY did was very wrong, he was stopped in his actions, he came to management and confessed what he had done, and that he was very worried that he had got everyone into trouble. She added that the Claimant could have come to his manager and said I may have done something wrong, I had a bit too much to drink, but he did nothing. Ms Stirling was asked whether it is common to look at such things (as remorse) and her response was, yes, we look at mitigation, has the person learned from their actions, and we take that into account.

109. By email dated 21 January 2019 to Ms Buckton, the Claimant raised a grievance against Ms Hooper and Mr Wilkinson (at B671). Ms Buckton ultimately rejected the Claimant's grievance on the grounds that the matters raised had already been considered at the disciplinary appeal hearing (at B684a & 978).

110. We now refer to the CCTV footage that was presented to us to view. As we have indicated this is taken from a camera in the middle of Rushey Green showing the Black Horse & Harrow on one side of the road and Little Nan's on the other. In essence, it shows individuals and groups of the Respondent's staff involved on the day of the incident, walking on pavement on the pub side of the road and then crossing to the pavement on the Little Nan's side of the road.

111. The Claimant relied on this as showing that Ms Spall had provided false information in her fact-finding interview and that Ms Hooper had not considered his version of events and considered Ms Spall's version of events

to be true. He raised this with Mr Wilkinson at the disciplinary hearing as we can see on B355-356 of the notes of that meeting.

112. We can see there that the Claimant attempts to explain the significance of the CCTV footage but Mr Wilkinson does not accept that it supports what he is saying. In essence, the Claimant appears to be saying that the CCTV footage contradicts Ms Spall's evidence by showing that when the group left the Black Horse & Harrow and arrived and left Little Nan's it was together as a group. We were referred to B355 and the exchange between the Claimant and Mr Wilkinson regarding the relevance of the CCTV footage. From this it appears that whilst the Claimant explains this to Mr Wilkinson, he does not accept that the CCTV footage supports this. We viewed the footage twice and did not find it of any evidential value.

113. On 22 January 2018, Mr Connors sent an email to the CER team and a number of other named individuals requesting them to provide dates of availability to attend one-day unconscious bias training which was scheduled for various dates in February, March and April 2018 (at B285A-D - this document was provided by Mr Ijezie during Mr Connors' cross examination). The email also included information setting out the purpose and content of the course. This email was sent out on the same day as the investigation report. Mr Ijezie submitted that this showed that the Respondent was aware that it had either consciously or unconsciously discriminated against the Claimant in relation to the disciplinary process and invited us to make a finding as to such.

114. In cross examination it was put to Mr Connors that he sent out the email requesting attendance at that training course because he knew that there was unconscious bias. In response Mr Connors stated that it was part of a whole range of training and he sent out the email for no other reason than that. On balance of probability, we find that this was purely a coincidence and we do not believe it appropriate to draw any inference from a coincidence of dates.

115. We have already indicated the position as to submissions above. We have taken the parties' submissions fully into account in reaching our decision and have referred to them specifically where appropriate to do so.

Relevant Law

116. Section13 of the Equality Act 2010:

"Direct discrimination

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

117. Section 123 of the Equality Act 2010:

"(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

118. Section 136 of the Equality Act 2010:

Conclusions

Time limits

119. Time limits in which to present complaints to the Employment Tribunal are governed by section 123 of the Equality Act 2010. Given the date that the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 September 2018 is potentially out of time.

120. However, an act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) of the Equality Act 2010.

121. In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.

122. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a 'continuing discriminatory state of affairs'.

123. The Claimant's allegations of direct race discrimination are set out in the agreed list of issues at B39-40. He relies on a number of allegations made against Ms Hooper which occurred between 15 December 2017 and 25 January 2018, an allegation against Ms Hooper and/or Mr Connors which occurred on or around 25 January 2018, an allegation against Mr Wilkinson which occurred on 10 May 2018 and an allegation against Ms Buckton which occurred on 13 November 2018. Details of each of these allegations are set out in the agreed list of issues.

124. Having considered the nature of the allegations, we accept that they are capable of forming a continuing course of conduct ending with Ms Buckton's outcome of the appeal letter dated 13 November 2018 and so all of the alleged acts of discrimination are in time.

125. We do not accept Ms Palmer's submission that we need to find in favour of the Claimant in respect of the allegation regarding the appeal in order to have

jurisdiction to consider the earlier allegations. It is sufficient under section 123 to find that we have jurisdiction to deal with the allegations. The next stage is to consider whether those allegations succeed or not.

Burden of Proof

126. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

127. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

128. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

129. We have also taken into account the guidance from the, then, House of Lords, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. The House of Lords considered the classic Tribunal approach to discrimination cases, which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of the relevant prohibited conduct and stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

130. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Direct discrimination

131. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case race, by reference to an actual or hypothetical comparator in the same or similar circumstances.

132. We took into account Ms Palmer's submission that we did not need to decide what actually happened on the night of the incident in question and that the focus was on whether those persons named by the Respondent discriminated against him on the basis of the evidence before them and the arguments put to them at the time.

133. However, we were concerned by a number of matters where what the Claimant said at the time and what he said in evidence before us differed and we did feel that these went to his credibility. These are as follows:

    a. As to where Mr Connors was at the time of the incident at the door of Little Nan's. In his fact finding interview on 10 January 2018, in both the Respondent's and his own notes, the Claimant stated that Mr Connors had left before they got to the door of Little Nan's (B193 and B191A). He repeated this in his witness statement. However, in oral evidence he said for the first time that Mr Connors was at the front by the door to Little Nan's and, albeit ambiguously: "*Gary Connors was right there".* He became emotional as he said this;

    b. As to when he arrived at the Black Horse & Harrow on the day of the incident. At his disciplinary hearing he stated *"we went for a team lunch"*. In oral evidence he said that he arrived at the pub at 5 pm. The occasion was the North Team's Christmas lunch and the Claimant was a member of the North Team, although members of the South Team were also present, including Mr XY and Ms Spall;

    c. As to whether the group was refused entry to Little Nan's. In cross examination the Claimant was adamant that the security guard had refused them entry but the manager had said *"come in"*. This was clearly at odds with the evidence of the other witnesses, save for (Mr Gormlie) including the security guard and the bar manager and his own evidence at the time.

134. Whilst we did find on at least one occasion that the Claimant appeared to conflate events and this then created an apparant conflict of evidence, for which we gave him the benefit of the doubt, we did not find this to be the case with the above matters which were clear inconsistencies.

135. We were also alert to the fact that the Claimant's account of the incident was at odds with that of not only the majority of the Respondent's employees' evidence but that of the Little Nan's manager, Ms Turner and security officer, Ms Newell.

136. There were a number of matters that gave us cause for concern with regard to the Respondent's conduct:

    a. The treatment of Mr XY initially as compared with the treatment of the Claimant;

    b. That Mr XY was in Ms Hooper's team and they were close colleagues;
    c. That Ms Hooper and Ms Turner knew each other;

d. Mr Connor's involvement in a matter that he was potentially implicated in;

e. Mr Connor being senior to Ms Hooper who was conducting the investigation;

f. Ms Hooper's failure to take or retain notes of key meetings/interviews;

g. That initially it appeared that Mr XY's actions were far more serious;

h. The timing of the notification of the unconscious bias training.

137. For this reason we were very careful to consider the Respondent's explanations in each of these matters to be sure whether they had purely non-discriminatory reasons for their behaviour. We have dealt with these matters in our findings and conclusions.

Unconscious bias

138. Mr Ijezie referred us in his written submissions to a number of authorities which emphasis that discrimination can be conscious or unconscious. The first of these is Warner v Foreign Commonwealth and Development Office [2021] UKET 2207245/2020. This is an Employment Tribunal decision and we were directed to paragraphs 117, 123 and 126 and in particular paragraph 117 in which the Tribunal stated:

"it must be remembered that discrimination is often unconscious".

139. We were also referred to an Employment Appeal Tribunal decision, Home Office (UK Visas & Immigration) v Kuranchie UKEAT/0202/16 and to the words of Judge Peter Clark:

"We accept, first, that Tribunals must be alive to the possibility of unconscious (or subconscious) discrimination as well as overt discrimination; see the observations of Kerr J in Geller v Yeshurun Hebrew Congregation UKEAT/0190/15, 23 March 2016, paras 49 and 52."

140. We are of course alert to the fact that discrimination is often unconscious. However, whilst it is a concept that the law recognises, it is nevertheless hard to prove.

141. In West Midlands Passenger Transport Executive v Singh [1988] IRLR 186, the Court of Appeal talked about the possibility of:

"a conscious or unconscious racial attitude which involves stereotyped assumptions about members of that [racial] group." (at paragraph 18)

142. The most explicit and enlightened guidance on this point was given by the House of Lords (as the Supreme Court was then called) in Nagarajan v London Regional Transport [1999] IRLR 572, HL. Although that case concerned victimisation, the guidance was intended also to apply to direct discrimination:

> *"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of the claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did … Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination." (at paragraph 17)*

143. We were careful to consider this issue. However, there has to be some evidence to indicate unconscious bias. We cannot just assume it. We found no evidence to support the assertion of unconscious bias and there were no grounds on which it was appropriate to infer it.

Alleged treatment

144. The allegations relied upon are set out at paragraph (4) (iv) of the Agreed List of Issues at B39-40. Below we deal with these each in turn.

145. The first allegation is that Ms Hooper, between 15 December 2017 and 25 January 2018, targeted the claimant for disciplinary action in a number of different respects.

146. The first of these at sub-paragraph (a) is by saying the Claimant was under the influence of alcohol on the evening of the incident in question. It is accepted that Ms Hooper did say this. However, it is in the context of looking for an explanation as to why the Claimant's version of events was different to the other witnesses and this was her conclusion from the weight of evidence at B338-339.

147. But it is fair to say that Ms Hooper made a finding that the Claimant was under the influence of alcohol and did not make such a finding about the other members of staff that were present. So to that extent she did focus on the Claimant.

148. We then turned to whether this is less favourable treatment and if so whether it was on grounds of race? The Claimant relies on Mr XY as an actual comparator or in the alternative a hypothetical comparator.

149. Ms Palmer submitted that Mr XY was not a true comparator and so the Claimant could only rely on a hypothetical one and that the definition of the hypothetical comparator changed with each of the allegations of less favourable treatment.

150. We did consider the comparative circumstances of the Claimant and Mr XY.

151. The Claimant is a Black CER Officer accused of a serious act of misconduct, investigated and disciplined and originally given a final written warning to remain on his personnel file for 15 months.

152. Mr XY is a White CER Officer accused of a serious act of misconduct, investigated and disciplined but initially referred for standard setting and

subsequently given a written warning to remain on his personnel file for 9 months.

153. We also considered the differences in the circumstances, namely that these were different levels of offences, that Mr XY admitted his guilt and also tried to defuse the situation.

154. However, in terms of this allegation we agreed with Ms Palmer's written submissions at paragraph 41 to the extent that Mr XY is not a true comparator because there was not the same weight of evidence that he had been drinking to the point where it had an effect on his behaviour. The correct hypothetical comparator is a white man whose account differed from the account given by others and in respect of whom there was much evidence to indicate that not only had be been drinking but that it had had some effect on his behaviour. There is no evidence that Ms Hooper would have treated a hypothetical comparator any differently.

155. Alternatively, adopting the "reason why" approach, suggested in Shamoon, the reason why Ms Hooper said this about the Claimant was that she thought this might explain why his account was so different from the accounts of the other witnesses and that his memory may be obscured.

156. The second allegation is at sub-paragraph (b), Ms Hooper saying that the Claimant was lying.

157. Ms Hooper admits that she did make the comment: *"Delroy may not have given a true account of what took place that evening"* (at B339) but she also states that as he was under the influence of alcohol he had an *"obscured memory of the events of that evening"*. She is not saying he is lying but that his account is not as reliable as the different accounts given by the majority of other witnesses. But again she makes the point that there is evidence in her findings that supports the allegation that he used his position as a licensing officer to influence the bar manager's decision around entry to the bar.

158. We agreed with Ms Palmer's submissions at paragraphs 47 and 48. Mr XY is not a true comparator. The hypothetical comparator would have to be a white officer whose account differed to most of the others, whereas the accounts of the most of the others corroborate each other. Mr XY's account was consistent with the accounts of most of the other officers. There is no evidence to suggest that Ms Hooper would have treated the hypothetical comparator any differently.

159. Alternatively, adopting the "reason why" approach, the reason why Ms Hooper said that the Claimant's account was not reliable was because it did not square with the majority of the other witnesses' testimony.

160. The third allegation is at sub-paragraph (c), tampering with minutes of fact-finding meetings on 4 January 2018 and 10 January 2018.

161. As a matter of fact we have found that this did not happen.

162. The fourth allegation is at sub-paragraph (d), telling the claimant on 10 January 2018 that he was not allowed to take notes of the fact-finding meeting.

163. Whilst Ms Hooper did tell the Claimant this, she was not targetting him because she had said the same thing to everyone she interviewed and so she treated everyone the same regardless of any difference of race.

164. The fifth allegation is at sub-paragraph (e) tampering with the evidence of Clare Turner.

165. As a matter of fact we have found that this did not happen.

166. The sixth allegation is at sub-paragraph (f), ignoring evidence that supported the Claimant's account.

167. This appears from what the Claimant said in cross-examination to refer specifically to the statement from Mr Gormlie in which he said that he heard the Bar Manager telling the group that they could come in. Whilst he was invited to give other instances of Ms Hooper ignoring evidence he was unable to do so and Mr Ijezie objected to the line of questioning and so Ms Palmer moved on.

168. Ms Hooper said in her written evidence that she accepted Mr Gormlie's evidence supported the Claimant on this but no other witness supported it and that she relied on the weight of the other evidence presented which all suggested the contrary. She further said in evidence that at the disciplinary hearing Ms Turner was adamant that she did not say this.

169. Ms Palmer pointed us in her written submissions to a number of other matters set out in Ms Hooper's witness statement at paragraph 64-70 which the Claimant may be referring to with regards to this allegation. However he did not raise them and they were not tested in evidence.

170. We find that Ms Hooper did not ignore the Claimant's evidence in respect of Mr Gormlie, she just weighed it up against that of the other witnesses and rejected it.

171. We then move onto sub-paragraph b. of the Agreed List of Issues, Lisa Hooper and/or Gary Connor, on or around 25 January 2018, recommending disciplinary action against the Claimant.

172. We find that this did happen as a matter of fact.

173. We then turned to consider whether it was less favourable treatment because of race.

174. We were of the view that the actual comparator is Mr XY, in that the Claimant was recommended for disciplinary action whereas initially Mr XY was not. Ms Hooper referred him to standard setting and then, for want of a better

expression, she was pulled up by HR on this. Ms Hooper explained that she took this action because Mr XY confessed early and showed remorse. Her evidence was that the Claimant's race played no part in her decision to refer him for a disciplinary hearing. Mr Connors also denied discriminating against the Claimant in this regard. He stated in evidence that the matter was serious and there was sufficient evidence to proceed to a disciplinary hearing. He further stated that he based his decision on the evidence in the report and he would not have come to a different conclusion in respect of the Claimant if the Claimant had been white.

175. On the evidence before us we find that this was not less favourable treatment on grounds of race.

176. The next allegation of treatment is at sub-paragraph c., Mr Wilkinson, on 10 May 2018, finding that the Claimant had committed misconduct and issuing a final written warning.

177. As a matter of fact we find that this did happen.

178. We then turned to consider whether it amounted to less favourable treatment because of race.

179. We considered whether the correct comparator is Mr XY. However, there is a difference in the circumstances between the Claimant and Mr XY. Namely, the differing nature of the allegations against them and their very different approaches. Mr XY took responsibility for his actions whereas the Claimant denied everything and this is the obvious explanation for the treatment applied to each.

180. Using a hypothetical comparator, that is a White officer in the same circumstances as the Claimant, there is no evidence to indicate that Mr Wilkinson would have treated such a comparator any differently. As Mr Wilkinson said in his written evidence he dealt with each case separately on the basis of its merits in a non-discriminatory way and we particularly note the contents of his witness statement at paragraphs 36 and 37.

181. The final allegation of treatment is at sub-paragraph d, Ms Buckton on 13 November 2018 upholding the finding of misconduct (albeit that she reduced the sanction) against the Claimant.

182. We find as a matter of fact that this did happen.

183. We then turned to whether it amounted to less favourable treatment because of race.

184. We decided that the comparator could not be Mr XY because we had no evidence that he appealed against his written warning and if he did whether it went from a lesser to a greater sanction.

185. We then considered the position of a hypothetical comparator, a White officer in the same circumstances. There was no evidence to suggest that such a

person would have been treated any differently. From our findings it is quite clear why Ms Buckton upheld the finding of misconduct and there was no indication that race played any part in it.

186. We would again refer to the section of the outcome letter at B625 that we have quoted above and would also refer to the following extracts on B626:

> *"I do consider that your conduct was inappropriate and am disappointed that you have not acknowledged this to any degree. The Council's procedures allow for 2 levels of sanction short of dismissal- a warning, and a final warning. In finding a difference between your ability to acknowledge your involvement and that of your colleague, Ralph Wilkinson had 2 options open to him. I do not believe that his decision to apply a different sanction was either discriminatory, or racially motivated.*
>
> *I have however considered myself whether or not a final warning is too severe. In the absence of a sanction less than a final warning, but more than a warning, I, like Ralph, have been left with 2 options.*
>
> *It was apparent to me that you do not understand how your behaviour may have been seen as inappropriate that evening. That does concern me and I am able to see why Ralph Wilkinson took this into account in applying his sanction. I have however concluded that a final warning is probably too severe. The only other sanction available to me is therefore to reduce your sanction to a written warning. I would however ask that you reflect on your conduct that evening, which resulted in the Council, and the licensing service in particular being brought into disrepute."*

187. We find that there was no less favourable treatment on grounds of race.

Judgment

188. In conclusion, we find that the Claimant's complaints of direct race discrimination are unfounded and we dismiss his claim.

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Employment Judge Tsamados
Date: 22 February 2023

Sent to the parties on
Date: 18 April 2023