



EMPLOYMENT TRIBUNALS

Claimant: Miss Jessica Amadou

Respondents: (1) The Co-operative Group Limited
(2) Challenge-TRG Recruitment Limited

Heard at: East London Hearing Centre

On: 8, 9, 10, 11, 15, 16, 17 and 18 August 2023
22 and 23 August 2023 (in chambers)

Before: Employment Judge Barrett,
Members: Professor J Ukemenam
Mr J Webb

Representation

Claimant: Mr N Ijaola, pro bono lay representative
First Respondent: Ms A Williams, counsel
Second Respondent: Mr P Brill, solicitor

JUDGMENT

The judgment of the Tribunal is that: -

1. The Claimant's claims for direct race discrimination, race-related harassment and victimisation are not well-founded and are dismissed.

REASONS

This has been a hybrid hearing, which has not been objected to by the parties. The form of remote hearing was in person and by CVP link. A fully face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a hybrid hearing.

Introduction

1. The Claimant, Miss Jessica Amadou, worked as a Warehouse Operative in the First Respondent's West Thurrock Depot. When she started working there on 25 January 2021, her employer was the Blue Arrow Agency. On 18 April 2021, her

employment transferred to the Second Respondent under regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”).

2. Following early conciliation between 20 and 26 May 2021, on 7 June 2021 the Claimant presented an ET1 claim form bringing a claim of race discrimination. By a rider to the ET1 claim form she set out the factual particulars of her complaints, which relate to events between 10 March and 19 May 2021. The Respondents dispute these complaints.

The hearing

3. The hearing was conducted with the parties over eight days on 8, 9, 10, 11, 15, 16, 17 and 18 August 2023 and the Tribunal spent two days deliberating in chambers on 22 and 23 August 2023.
4. The First and Second Respondents were legally represented by Ms Williams and Mr Brill respectively. At the start of the hearing, the Blue Arrow Agency was also a party, represented by Miss K Barry of counsel. The Claimant was assisted throughout by Mr N Ijaola, a lay representative who confirmed that (in compliance with s.19 Financial Services and Markets Act 2000 and art. 89M Financial Services and Markets Act 2000 (Regulated Activities) Order 2001) he was not charging her for his services.
5. The following witnesses gave evidence:
 - 1) The Claimant.
 - 2) On behalf of the First Respondent:
 - 5.2.1. Mr Steven Fry, Shift Manager, who interviewed three people named in the Claimant’s grievance.
 - 5.2.2. Mr Steven Day, formerly Team Manager, who received a verbal complaint from the Claimant and was the subject of three of the allegations in the claim.
 - 5.2.3. Mr Ryan John Conroy, Team Manager, who was the subject of one of the allegations made by the Claimant in her claim.
 - 5.2.4. Mr Stephen Radley, Shift Manager, who was involved in some aspects of managing the Claimant’s work and grievance and was the subject of six allegations.
 - 3) Ms Rebecca Ludlow, formerly Account Manager of the Second Respondent, who was the Claimant’s line manager until the end of May 2021 and the subject of seven allegations.
6. Mr Day, Mr Conroy and Mr Radley gave their evidence by CVP video link. Due to their dates of availability, Ms Ludlow and Mr Fry gave evidence on the third and fourth days of the hearing, requiring the Claimant’s evidence to be heard in two parts before and after their evidence. The Claimant was cross-examined by Ms Williams in relation to allegations made against the First Respondent and then by Mr Brill in relation to allegations made against the Second Respondent.

7. Witness statements were provided by the First Respondent from the following witnesses who did not attend the hearing to give evidence:
 - 1) Mr Artur Puwalski, Warehouse Team Manager, who was the subject of one of the allegations made by the Claimant.
 - 2) Mr Jonathan Mead, Warehouse Operative, who was the subject of two of the allegations made by the Claimant.
8. The Tribunal accepted that these witnesses had good reasons for non-attendance and read their statements but accorded them limited weight as they had not been tested in cross-examination.
9. The Tribunal was presented with an agreed cast list and an agreed bundle of evidence numbering 545 pages. During the course of the hearing the First Respondent was given permission to two pages to the bundle which related to Mr Mead's evidence.
10. On the third day, the Claimant made a request to the First Respondent for specific disclosure, in response to which the First Respondent voluntarily disclosed one document, which was added to the bundle. Having been given an opportunity to consider the position, the Claimant did not make an application for disclosure of the remaining documents requested.
11. The Tribunal directed that, in accordance with the indicative timetable provided following a preliminary hearing for case management, evidence on liability would be heard first with remedy to be dealt with separately following judgment on liability issues.

Preliminary issues and applications

12. The Blue Arrow Agency, at that time the Third Respondent, made an application to be removed as a respondent from the case. After some discussion, all parties agreed this was appropriate and the Blue Arrow Agency was removed as a respondent pursuant to r.34 of the Employment Tribunal Rules, by consent.
13. The Second Respondent made an application to correct its name on the record to Challenge-TRG Recruitment Limited, which was done by agreement.
14. The Claimant made an application to amend her claim.
 - 1) In her ET1 claim form, the Claimant ticked the box to bring a claim of race discrimination. She appended to the ET1 the text of her 8-page internal grievance letter dated 30 May 2021, which gave details of her complaint. She added the header, "*Direct discrimination*". In relation to an incident on 17 May 2021, the Claimant wrote, "*I felt intimidated, attack and victimized by Igor and the manager*", and in relation to a further incident on 18 May 2021, "*They did gang up around me and I felt like I was victimization by them.*"
 - 2) At a Preliminary Hearing for case management on 6 December 2021, Employment Judge Emory recorded that, in addition to raising complaints of direct race discrimination and race-related harassment, the Claimant had used the word victimisation in her claim and that she said she was victimised

after making complaints to Ms Ludlow and Mr Radley about a colleague, Mr Adrian Girbea. The Employment Judge directed the Claimant to provide further details by 20 December 2021, clarifying whether she was bringing a complaint of “s.27 victimisation”, and if so whether she did a “protected act” and which of the “detriments” set out in her ET1 rider were done because she had done (or the Respondents believed she might do) a protected act.

- 3) In compliance with the order, the Claimant submitted a document which said “*I am adding a claim for victimisation*”, under which she listed ten of the allegations of detrimental treatment that had been included in her ET1 rider. She did not specify what it was that she believed had caused these detriments.
- 4) The Respondents took the view that what the Claimant had done was insufficient for a complaint of victimisation to proceed. In their Amended Grounds of Resistance, the First Respondent said “*The list of issues refers to a potential victimisation claim but no clarification has been provided as requested. For present purposes, the Respondent assumes the Claimant is not seeking to pursue a claim under section 27 of the Equality Act 2010*” and the Second Respondent said, “*The Claimant has not particularised any detrimental treatment by the Second Respondent as a result of the protected act of making complaints against AG. In the absence of any such particulars any claim under this cause of action has no reasonable prospect of success*”.
- 5) After lengthy discussion on the first day of the hearing the Claimant’s representative clarified that the Claimant did wish to pursue a claim of victimisation, as follows:
 - 14.5.1. The Claimant did protected acts in writing on 11 March 2021 to the Second Respondent’s Ms Ludlow and verbally on 24 April 2021 to the First Respondent’s Mr Day. The first was incorporated by reference in the ET1, which stated, “*On the 11th of March, I send my grievance letter to Rebecca Ludlow.*” The grievance letter of that date alleged that Mr Girbea, “*only treated me this way because of my skin colour and culture*” and that he was racist. The second was expressly referred to in the ET1 where it said “*I told him [Mr Day] that I reported Adrian before and he keeps bullying me and I added that this guy is a racist.*”
 - 14.5.2. Because the Claimant had done these protected acts, she was victimised by the First and Second Respondents doing the detriments alleged in her Further Particulars.
 - 14.5.3. Further, because of the protected acts she was also subject to five detriments which were contained in her ET1 rider but not identified in her Further Particulars. The five further detriments sought to be added were those at paragraphs 11(a)(v), 11(b)(iii-v) and 11(c)(i) in Employment Judge Emory’s list of issues.
- 6) Mr Ijaola submitted that the Claimant should be permitted to amend because she had been a litigant in person at the time when she provided her Further Particulars and did not fully understand what had been required

of her. Allowing the amendment would put the parties on an equal footing. All the factual allegations of detriment were contained in the claims for direct discrimination and harassment in any event.

- 7) The First Respondent objected to the proposed amendment on the ground that it would be unfairly prejudiced by the late change to the allegations it had to meet, after a long time had been spent preparing for the hearing. Although the same detriments were contained in the ET1 rider, the causal link to the alleged protected acts had not been previously spelled out and amounted to a new factual and legal basis for the claim. The proposed victimisation claim was also said to have low prospects of success.
- 8) The Second Respondent made a partial objection to the amendment, sensibly observing that the first protected acts and those detriments alleged to have been committed by Ms Ludlow could be addressed by her in giving evidence. Objection was taken to allegations made against other employees of the Second Respondent, who would not be present to address them, thereby causing prejudice to the Second Respondent.
- 9) In deciding whether to exercise its discretion to grant leave for amendment of an originating application, a Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:
 - 14.9.1. the nature of the amendment, i.e. whether it is a minor matter such as the correction of errors or a relabelling of facts already pleaded or a substantial alteration, introducing a new cause of action or making new factual allegations which change the basis of the existing claim;
 - 14.9.2. the applicability of statutory time limits. It is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under applicable statutory provisions;
 - 14.9.3. the timing and manner of the application; why the application was not made earlier, particularly where the new facts alleged must have been within the knowledge of the Claimant when the claim was originally presented (*Selkent Bus Co Ltd v Moore* [1996] IRLR 661).
- 10) If it is to be said that a claim of discrimination is implicit in the facts already pleaded, then the essential elements of the cause of action must be present. For example, in order for a claim of victimisation to be implicit, reference must be made to the causative link between the protected act and the alleged detriment (*Housing Corporation v Bryant* [1999] ICR 123).
- 11) The Tribunal granted the Claimant leave to amend her claim to advance a complaint of victimisation. The Claimant was permitted to argue that the communications of 11 March and 24 April 2021 amounted to protected acts, and that because she did the protected acts the Respondents subjected her to the detriments set out in her Further Particulars, together with two additional detriments which Mr Brill had not objected to (those at

paragraphs 11(b)(iv) and 11(b)(v) of Employment Judge Emory's List of Issues). In respect of those matters, the Tribunal considered that prejudice to the Claimant in refusing the application outweighed the prejudice to the Respondents in permitting it. The Claimant had used the word victimisation in her claim form and intimated at the case management hearing that she wished to pursue a victimisation complaint. She had attempted to comply with the order for further and better particulars, as a litigant in person. The Respondents had not asked her to clarify further or applied to the Tribunal for assistance in finalising the list of issues. It would be unfair for her to be denied the opportunity to ventilate a complaint she had done her best to raise at the appropriate times. While there was some prejudice to the Respondents in being asked to address a different causal test, the same factual chronology was covered in the documentary and witness evidence because all the alleged victimisation detriments had also been raised as complaints of direct discrimination.

- 12) Permission was refused in respect of the remaining detriments. The balance of prejudice was different in respect of those allegations which the Claimant had not identified as part of her victimisation complaint until the first morning of the hearing because the Respondents had no warning these were even potentially relied upon for that purpose. In respect of those allegations, the amendment application was made too late.
15. Subject to that decision, the list of issues was agreed and is set out in full below.
16. In discussing the list of issues, it became apparent that one alleged perpetrator had been misidentified by all parties prior to the first day of the hearing. In her ET1 rider, the Claimant made several allegations against 'Alpha', whom she described as someone who worked in the milk section who was a good colleague of Mr Girbea. At the Preliminary Hearing, Employment Judge Emery recorded that, "*It is understood that 'Alpha' is Artur Puwalski who at all material times was an employee of the First Respondent.*" The Claimant appeared to confirm that was correct in her Further Particulars document sent in December 2021, in which she made the allegations that had previously been attributed to 'Alpha' against Mr Puwalski. Both Respondents treated the Alpha allegations as being made against Mr Puwalski in their Amended Grounds of Resistance. However, by letter dated 22 February 2022, the Claimant wrote, "*I am aware that Arthur Puwalski is a Team Manager at Co-operative. "Alpha" is an agency worker but don't know his full name.*" This attempted correction does not appear to have been picked up on, and Mr Puwalski provided a witness statement addressing (and denying) the Alpha allegations. Ms Williams spotted and raised the discrepancy. The Claimant then stated that the Alpha allegations did not relate to Mr Puwalski but to an agency worker employed by the Second Respondent, whom she only knew by the name 'Alpha'. During the course of the hearing, the Second Respondent reported that all possible searches and inquiries had been undertaken, and no one of that name, and to their knowledge no one ever known by that nickname, had ever been employed. It remains a mystery.

The issues in the substantive hearing

17. It was accepted that the Claimant brought her complaints within the applicable time limits.

The factual allegations

18. Did the First Respondent and Second Respondent, as applicable, do the following things:
- 1) On 10 March 2021, did Mr Girbea put milk in the Claimant's cage, ignore the Claimant and walk away in a rude and aggressive way. Did he then refuse to give the Claimant milk when she asked? This allegation is made against the Second Respondent, Mr Girbea's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
 - 2) On 10 March 2021, did Ms Ludlow tell the Claimant that she was suspended while her complaint against Mr Girbea was investigated? This allegation is made against the Second Respondent, Ms Ludlow's employer. (Alleged to amount to direct discrimination.)
 - 3) On 9 April 2021, did Ms Ludlow text the Claimant to tell her that she could not attend work? Was the Claimant suspended from 10 to 13 April 2021? These allegations are made against the Second Respondent. (Alleged to amount to direct discrimination.)
 - 4) On 14 April 2021, did Mr Girbea ignore the Claimant? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
 - 5) On 24 April 2021, did Mr Girbea give the Claimant dirty looks, stand very closely behind her when she was picking, sigh at the Claimant and stare at her when she asked a question? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
 - 6) On 24 April 2021, did Mr Day fail to address the Claimant's complaint about Mr Girbea? This allegation is made against the First Respondent, Mr Day's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
 - 7) On 25 April 2021, did Mr Radley make an adverse comment about the Claimant's mental health? (Namely, when she called in to report she was sick due to stress, it is alleged that he said, "Do you have mental health?") This allegation is made against the First Respondent, Mr Radley's employer. (Alleged to amount to direct discrimination.)
 - 8) On 29 April 2021, did Ms Ludlow say she had investigated the Claimant's grievance when she had not? Did she make comments during a meeting with the Claimant (namely, that there was no evidence that Adrian was bullying her, that she should stop using the word racist because it was offending him, that it was a misunderstanding and just two people competing against each other)? Did she fail to call the Claimant later about a mediation? These allegations are made against the Second Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation.)

- 9) On 30 April 2021, did Ms Ludlow fail to put the Claimant on the rota? Was the Claimant suspended without pay from 30 April to 3 May 2021? These allegations are made against the Second Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 10) On 4 May 2021 at a conciliation meeting, was Mr Girbea rude and aggressive towards the Claimant? This allegation is made against the Second Respondent.
- 11) On 4 May 2021, did Mr Radley fail to take action against Mr Girbea or take the allegations against Mr Girbea seriously, despite Mr Girbea's bullying and aggressive manner at the mediation meeting? This allegation is made against the First Respondent. (Alleged to amount to direct discrimination.)
- 12) On 4 May 2021 after the conciliation meeting, did Mr Girbea grab the Claimant's arms, stand in front of her and threaten to punch her? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 13) Following the Claimant making an allegation on 4 May 2021 that Mr Girbea had assaulted and made threats of violence against her, did Mr Radley and Ms Ludlow fail to investigate or to take action? This allegation is made against the First Respondent in respect of omissions by Mr Radley and against the Second Respondent in respect of omissions by Ms Ludlow. (Alleged to amount to direct discrimination.)
- 14) Following the 4 May 2021 conciliation meeting, did Mr Radley and Ms Ludlow fail to give feedback to the Claimant? This allegation is made against the First Respondent in respect of omissions by Mr Radley and against the Second Respondent in respect of omissions by Ms Ludlow. (Alleged to amount to direct discrimination.)
- 15) On 9 May 2021, did Mr Girbea (together with an unidentified colleague) re-do the Claimant's work? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 16) Following the Claimant on 9 May 2021 reporting that Mr Girbea had re-done her work, did Mr Radley change the Claimant's role so she was no longer allowed to arrange the milk? This allegation is made against the First Respondent. (Alleged to amount to direct discrimination.)
- 17) On 10 May 2021, were Mr Day and Mr Conroy watching the Claimant? These allegations are made against the First Respondent, the employer of Mr Day and Mr Conroy. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.) In particular, it is alleged that Mr Johnson told the Claimant that Steve and Ryan were watching her.
- 18) On 10 May 2021, did Mr Johnson require the Claimant to sign a form saying she agreed to take an extra break? This allegation is made against the Second Respondent, Mr Johnson's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)

- 19) On 10 May 2021, did Mr Puwalski and an unidentified colleague (first name Steve, from ambient) gossip about the Claimant and make face gestures and movements relating to her? This allegation is made against the First Respondent, Mr Puwalski's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 20) On 10 May 2021, did Mr Girbea bang a box on a table 4 to 5 times beside the Claimant? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 21) On 12 May 2021, did Mr Radley ignore the Claimant and fail to make eye contact with her? This allegation is made against the First Respondent. (Alleged to amount to direct discrimination.)
- 22) On 16 May 2021, did Mr Mead make a gesture and sounds of beating the Claimant's back with a 'rod' and smile when the Claimant challenged him? This allegation is made against the First Respondent, Mr Mead's employer. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 23) On 16 May 2021, did Mr Girbea, another agency worker named 'Alpha' and Mr Mead block the Claimant in and did Mr Mead say "You are going to have a problem working here". This allegation is made against the Second Respondent in respect of the actions of Mr Girbea and (insofar as he can be identified) 'Alpha', and against the First Respondent in respect of the actions of Mr Mead. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 24) On an unknown date, did 'Alpha' call the Claimant a snitch and make an offensive and racist comment towards her about her surname? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 25) On an unknown date, did 'Alpha' reference a white employee next to the Claimant and ask her, "is that your sister"? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 26) On 17 May 2021, did Mr Igor Bysikiewicz deliberately drive his cage into the Claimant's cage? Did he shout in the Claimant's ear? When the Claimant was bent down, did he start banging the cage with his legs near her face? Shortly after, did he bang a piece of metal on a table close to her? These allegations are made against the First Respondent, Mr Igor Bysikiewicz's employer. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 27) On 18 May 2021, did Ms Ola Bysikiewicz ignore the Claimant and shout at her when she asked for help? These allegations are made against the First Respondent, Ms Bysikiewicz's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)

- 28) On 18 May 2021, did Mr Krysztof Bysikiewicz stand in front of the Claimant's cage, shout stop and put his hand in front of her face? These allegations are made against the First Respondent, Mr Krysztof Bysikiewicz's employer. (Alleged to amount to direct discrimination, alternatively alleged to amount to harassment.)
- 29) On 19 May 2021, did the Canteen Manager, Ms Caroline Weeston, tell the Claimant off for not removing her tray when white staff were not asked to do this? Ms Weeston is employed by an external contractor; there is an issue as to whether the First Respondent can be vicariously liable for her actions. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 30) On 19 May 2021, did Mr Johnson tell the Claimant that her performance was low and she was late back from her break? This allegation is made against the Second Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 31) On 19 May 2021, was Mr Day rude and aggressive to the Claimant, did he ask her why her handset was turned off, call her a liar and lazy and say her performance was disgusting? This allegation is made against the First Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation, alternatively alleged to amount to harassment.)
- 32) On 19 May 2021 did Ms Ludlow suspend the Claimant from work? Did she tell the Claimant that she was suspended because Mr Day said she swore at his daughter, her performance was disgusting, and she took an extra break? These allegations are made against the Second Respondent. (Alleged to amount to direct discrimination, also alleged to amount to victimisation.)

Direct race discrimination (Equality Act 2010 section 13)

19. The Claimant's race is Black African, and this is the protected characteristic she relies upon for the purposes of her claim.
20. Did the First Respondent and Second Respondent, as applicable, do the things alleged at paragraph 18 subparagraphs 1) to 32) above?
21. If so, was that less favourable treatment?
 - 1) The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
 - 2) If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.
 - 3) In respect of the allegation at 1) above, the Claimant says she was treated worse by Mr Girbea than Magdalena, a white Romanian agency worker.

- 4) In respect of the allegations at 2) and 3) above, the Claimant says she was treated worse by Ms Ludlow than Mr Girbea, a white Romanian agency worker.

22. If so, was it because of race?

Harassment related to race (Equality Act 2010 section 26)

23. Did the First Respondent and the Second Respondent, as applicable, do the things set out at allegations 1), 4) – 6), 10), 12), 15), 17) – 20) and 22) – 31) in paragraph 18 above?
24. If so, was that unwanted conduct?
25. Did it relate to race?
26. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
27. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

28. Did the Claimant do a protected act as follows:
 - 1) On 11 March 2021, by email to Ms Ludlow titled "My complain", allege that Mr Girbea had acted rudely and aggressively towards her because he was racist.
 - 2) On 24 April 2021, in a meeting with Mr Johnson and Mr Day, allege that Mr Girbea was racist towards her.
29. Did the First Respondent and Second Respondent, as applicable, do the following things:
 - 1) On 29 April 2021, did Ms Ludlow say she had investigated the Claimant's grievance when she had not, make comments during a meeting with the Claimant and fail to call the Claimant later about a mediation? (See allegation 8) above.) These allegations are made against the Second Respondent.
 - 2) On 30 April 2021, did Ms Ludlow fail to put the Claimant on the rota? Was the Claimant suspended without pay from 30 April to 3 May 2021? (See allegation 9) above.) These allegations are made against the Second Respondent.
 - 3) On 10 May 2021, did Mr Johnson tell the Claimant that Mr Day was watching her? (See allegation 17) above.) This is an allegation against the Second Respondent insofar as it concerns Mr Johnson and against the First Respondent insofar as it concerns Mr Day.

- 4) On 16 May 2021, did Mr Mead, Mr Girbea and 'Alpha' gang up around the Claimant in the milk area? (See allegation 23) above.) This allegation is made against the Second Respondent in respect of the actions of Mr Girbea and (insofar as he can be identified) 'Alpha', and against the First Respondent in respect of the actions of Mr Mead.
 - 5) On an unknown date, did 'Alpha' ask the Claimant if her family name was "Goulougoulougoulou"? (See allegation 24) above.) This allegation is made against the Second Respondent.
 - 6) On 16 May 2021, did Mr Mead make a gesture and sounds like beating the Claimant with a rod? (See allegation 22) above.) This allegation is made against the First Respondent.
 - 7) On 17 May 2021, did Mr Igor Bysikiewicz yell at the Claimant when he bumped into her cage and intimidate her by kicking the cage near her face and banging a table with a metal object? (See allegation 26) above.) This allegation is made against the First Respondent.
 - 8) On 18 May 2021, did Ms Ola and Mr Krzysztof Bysikiewicz bully the Claimant because of what happened with Igor (their brother) on 17 May 2021? (See allegation 29) and allegation 30) above.) This allegation is made against the First Respondent.
 - 9) On 19 May 2021, was the Claimant bullied by canteen staff (see allegation 28) above), Mr Johnson (see allegation 30) above), and Mr Day (see allegation 31) above)? These allegations are made against the Second Respondent in respect of Mr Johnson, the First Respondent in respect of Mr Day, and the First Respondent subject to an issue regarding vicarious liability in respect of the Canteen Manager.
 - 10) On 19 May 2021, was the Claimant suspended by Ms Ludlow? (See allegation 32) above.) This allegation is made against the Second Respondent.
30. By doing so, did it subject the Claimant to detriment?
 31. If so, was it because the Claimant did a protected act?
 32. Was it because the Respondent believed the Claimant had done, or might do, a protected act?

Findings of fact

The Thurrock depot

33. The First Respondent is a well-known retailer. It operates a depot in West Thurrock at which goods are received from suppliers and distributed onwards to stores. The depot is divided into ambient, chilled and loading areas. Within the chilled area, there is also a freezer section, milk section and banana room. Warehouse Operatives put away the products received from suppliers and pick them to be loaded into lorries and taken to stores. Their work is tracked and monitored through a labour management system.

34. The workforce at the depot is made up of permanent employees of the First Respondent, and agency workers who are asked to attend work as needed to meet the fluctuating demands of the business. Until 18 April 2021, the Blue Arrow Agency provided agency workers to the First Respondent. From that date onwards, the Second Respondent took over the agency work contract, and a number of people's employment, including the Claimant's, transferred from the Blue Arrow Agency to the Second Respondent. Both before and after the TUPE transfer, the administration of agency workers' employment, including grievance and disciplinary issues, was undertaken by the agency, in consultation with the First Respondent where operationally necessary.
35. Management of the depot was undertaken by the First Respondent's Shift Managers, who were responsible for the whole depot on the shifts they worked. The Shift Managers were assisted by Team Managers who were assigned to particular areas such as ambient, chilled or loading. The Blue Arrow Agency (and after 18 April 2021, the Second Respondent) had Lead Associates who worked with the Team Managers and performed a supervisory function in relation to the agency workers. Line management of the agency workers was undertaken by Ms Ludlow, who was the Account Manager for the Blue Arrow Agency and was based in the Thurrock depot. Before the TUPE transfer, she had an assistant, Ms Charlee Turnau. After 18 April 2020, Ms Ludlow's employment transferred to the Second Respondent and she continued to work in the depot in the same role, but Ms Turnau did not.

Relevant policies

36. Blue Arrow Agency's Flexible Employee Handbook dated June 2019 applied to all its flexible employees, not just those assigned to work for the First Respondent. It contained a commitment to the principle of equality in the workplace and stipulated that:
- "No Flexible Employee of Blue Arrow will be treated less favourably than another on grounds of age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation or trade union involvement."**
37. The Handbook contained an indicative list of what might be considered to amount to gross misconduct, including:
- "Serious and/or persistent harassment or discrimination or bullying whether sexual, racial or otherwise."**
38. The grievance procedure contained in the Handbook stated that,
- "Blue Arrow may adopt any procedure that it considers suitable to the circumstances."**
39. It went on to provide for an informal stage for resolution of concerns. If the matter was not resolved informally, flexible employees were able to submit a written grievance to the Blue Arrow Agency's Employee Relations team, to be followed by a grievance hearing, grievance outcome and (if necessary) appeal stage.
40. The Second Respondent's Grievance Procedure, which applied to agency workers at the Thurrock depot after the TUPE transfer, also provided for an initial informal stage. Employees unable to settle grievances informally were asked to

submit a formal written grievance to the relevant line manager, to be followed by a grievance meeting, written outcome, and appeal stage if required.

41. The Second Respondent's Equal Opportunities & Dignity at Work Policy stated:
- "The Company will... take all reasonable steps to provide a work environment in which all employees are treated with respect and dignity and that is free from harassment and bullying based upon age, disability, gender reassignment, race (including colour, nationality and ethnic or national origins), religion or belief, sex or sexual orientation... All employees are responsible for conducting themselves in accordance with this policy. The Company will not condone or tolerate any form of harassment, whether engaged in by employees or by outside third parties who do business with the Company, such as clients, customers, contractors and suppliers."**
42. The First Respondent's own Grievance Policy applied to its own employees but not to agency workers. Its Inclusion and Diversity Policy applied to both employees and agency workers. That policy did not provide for any particular process to be followed in order to resolve complaints, but stipulated:
- "We won't tolerate bullying and harassment in any form. And we'll do our best to protect colleagues from harassment from third parties and from any kind of negative treatment related to the differences listed below [including]... Race or ethnicity..."**

The Claimant commencing work

43. The Claimant commenced employment with the Blue Arrow Agency in 2020. On 25 January 2021, she was assigned to work in the First Respondent's Thurrock Depot as a Warehouse Operative. Her induction and line management in that role were carried out by Ms Ludlow.
44. The Claimant initially worked in the ambient area of the warehouse moving stock using a vehicle known as a LLOP (low level order picker) truck. Within the first few weeks, she had an accident with the LLOP truck and as a result did not feel confident to continue. She was moved to work in the milk section, located in the chill area, which did not require any driving.

Work in the milk section

45. Milk deliveries came in overnight in cases, packed onto wheeled containers called 'dollies'. When the milk arrived it was put away onto a grid system from which bottles of milk could be 'picked' onto cages for onward distribution. The picking was done in the morning and early afternoon, so the milk could be loaded and delivered to stores in the afternoon and evening. Due to milk's short shelf life, the section would be 'picked to zero' every day, meaning that by 2pm the entire stock needed to be picked ready to be sent out.
46. The Claimant worked on the day shift from 6am to 2pm. She could work on any days of the week depending on the rota. The rota was posted each Friday for the following week (Sunday to Saturday). Notification of shift allocations was made by text message by Ms Ludlow.
47. The Shift Managers responsible for the depot on the day shift were Mr Radley and Mr Fry. The Team Managers responsible for the chill area, including the milk

section, were Mr Day, Mr Conroy, Mr Puwalksi and Mr Tony Parker. The Lead Associate from Blue Arrow Agency with oversight of agency workers in the area was Mr Kelvin Johnson. He transferred to the Second Respondent on 18 April 2021.

48. The number of staff working on milk on the day shift varied according to demand, but on average there would be a team of around 7 or 8 Warehouse Operatives in that section. At the time the Claimant started work in the milk section there was one other Black woman in the day shift team, who left soon afterwards. The majority of her colleagues in her immediate team were white men of Eastern European nationalities. We accept that this differed before and after the Claimant worked there, and that the workforce across the depot included staff of a diverse range of ethnicities and nationalities. We were not provided with any statistical evidence in this regard.
49. Day shift staff were required to clock in and be on the 'shopfloor' by 6.07 am, when a Team Manager would tick off a list of attendees. They were allowed a break of up to 38 minutes, usually taken by around 10 am, which included time for walking between the warehouse and the canteen. They worked until 1.55 pm, with the last 5 minutes allowed for clocking out. If all the milk was picked by then, Warehouse Operatives trained to work in other areas would be moved elsewhere, and otherwise they would be sent home early.
50. When putting the milk away onto the grid, Warehouse Operatives used a handheld scanner to track the cases of milk (also referred to as an 'RF gun'). When picking they used voice-operated headsets which gave audio instructions on which products to collect from which locations (also referred to as a 'Talkman unit'). Both of these devices sent information to the First Respondent's labour management system, which was used to monitor individuals' work rates. The calculation of distances travelled was less precise in the milk section than in other areas of the depot because of the way the grid system was set up, but it nonetheless allowed for a proxy estimate to be calculated for the purposes of the First Respondent's performance management system.
51. Performance was measured against an 'expected performance' or 'EP' rate. This was derived by calculating time allocated to do tasks against time actually recorded. Allowance was given for issues or incidents that caused disruption to the flow of work, by the Warehouse Operative affected recording the issue on a 'downtime sheet', to be manually inputted into the labour management system by a desk clerk. In 2021, the target EP rate was 88%. New starters were allowed a grace period of up to six weeks before they were expected to hit the target.
52. Warehouse Operatives in the milk section also had a picking target of 220 cases per hour. This was the target more frequently monitored and referred to on a day-to-day basis on the shopfloor, because it did not rely on any proxy estimate for distance travelled.

The Claimant's performance

53. After her grace period elapsed, the Claimant's measured EP rates were between 36% and 55% calculated as a weekly average. She never hit the target of 88%. We were not told how many staff failed to meet the target and note that Mr Girbea who was accepted to be a good performer did not himself consistently meet that

target. However, we accept that the Claimant's performance was at the lowest end of the spectrum.

Events of 10 March 2021

54. Mr Girbea was an agency worker who worked on the milk section with the Claimant. He had high performance rates and was a keen and competitive worker. The Claimant described him as 'racing' to pick milk. His spoken English was limited and as a result he tended to communicate in brief phrases and with gestures. He sometimes got frustrated when people did not understand him.
55. On 10 March 2021, Mr Girbea stood behind the Claimant as she was picking milk. Without speaking to the Claimant first, he put milk into her cages. The Claimant was annoyed and thought this was rude. She challenged him and he walked away. Shortly afterwards at a different location in the milk section the Claimant asked Mr Girbea to pass her some milk and he refused. The Claimant formed the impression that his conduct was because of her race. The Claimant says she told him he was racist, and he replied, "*I don't care*". However, on the balance of probabilities we find that he did not understand the nature of her accusation at that time.
56. The Claimant went to speak to Ms Ludlow in her office and told her that Mr Girbea had been racially aggressive towards her. She was very distressed. The Claimant says that Ms Ludlow told her she was suspended while the matter was investigated. Ms Ludlow says she did not suspend the Claimant but understood the Claimant would be unable to return to work the next day because she was suffering from back pain. We find on the basis of the subsequent text message conversations between them that the Claimant and Ms Ludlow agreed she would come into the office the next day at 1pm to discuss her complaint.
57. At 1.36pm, Mr Radley sent an email to colleagues at the First Respondent, copied to Ms Ludlow and Ms Turnau, which stated;
- "Afternoon all,**
- Until further notice, can you please ensure that you do not plan in the following colleagues from the Blue Arrow agency;**
- Adrian Girbea**
- Jessica Amadou**
- Becky or Charlee will update you as to when they can return to work.**
- Regards**
- Steve Radley"**.
58. Ms Ludlow spoke to Mr Girbea that afternoon, because he was due to go on holiday the next day. She told him that the Claimant had felt he was being racist towards her. Ms Ludlow formed the impression that Mr Girbea did not understand the meaning of the word in English and explained it to him. Her perception was that he was shocked by the allegation. He said his only issue with the Claimant was that she was a slow worker.

First period of sick leave and 11 March 2021 complaint

59. On 11 March 2021 at 8.10am, the Claimant sent a text message to Ms Ludlow saying:

“Morning! I wake up this morning with a severe back pain. I had it for few days and I was about to tell you about it yesterday so I can take time off to rest my back but it just got worse last night. I am in pain So I won't be able to come at 1. Sorry I can write my complain down so you can investigate. Let me know. Jessica”.

60. Ms Ludlow replied at 8.31am:

“Sorry to here [*sic*] you don't feel well if you write me an email with as much detail as possible add in times and dates if you can remember as well that would be fantastic...”

61. The Claimant replied saying she was in hospital and would update her soon *“about the letter”*. At 4.16pm, the Claimant sent an email to Ms Ludlow, with the subject line *“My complain”*. She wrote:

“Here is my complain.

Sorry but I can't remember his name. Let's call him A.

Here is some incident that happened while working with A.

On the 11/03/21 around 1Pm [*sic*], I was on the milk section, picking my milk. I was picking 6 of the 4pt of Green Milk. I was working on 2 cages. So one was a cage of 8 that I was taking the milk off and putting on another cage so I can have my 6. A came to me, he was looking at what I was doing then attempt to get a empty cage but didn't. A came to me again, stand on my left and was starring [*sic*] at me! I gave him a [*sic*] eye contact, he was just looking at my cage. I kept doing my picking and at the point he got fed up to wait. He took a full cage near near me and took 4 milk in his hands and put it on my cage that I was picking! I looked at him and said, what are you doing? He ignored me and keep putting the milk in my cage. I told him that I'm using this cage. So he took the milk and putting on my other cage I was using. And I asked him: what is wrong with you? And He [*sic*] ignored me and walked away! I was upset. Note that He [*sic*] came across me without saying no words. He came in my personal space which is disrespectful and rude! With aggressive gesture!

Emmanuella may have see him as she was close to me and give me an eye contact. I was speechless and no words was coming out of my mouth and I carry in doing my job. Then, I was waiting to pick the number 71, A was picking it. I was standing there with Arthur. A was putting the milk away so I said to him give it to me and he said no! I'm not giving it to you and he gave it to Arthur! I asked Arthur why is A doing that? Arthur was laughing and said I don't know! I just walk away and started to realise that this man is racist! And he does not like me. This is why He [*sic*] acts rudely and aggressive towards me!

I was feeling offended by his actions, gestures and attitude so I decided to confront him. A was giving milk to Madelina and I realised that A was only treated [*sic*] me this way because of my skin colour and culture. I told him: I know what's your problem with me. You are a racist! And he said: I don't care! And I replied I will report you and he said I don't care. Then I walked away, finish my pick and went to speak to the manager.

On the 10/03/21 around 2.30, we were doing our last picking and everybody was exhausted. I had to pick 4 of the 4pt and A was picking there so I asked him. How many do you need. He said 4. I said me too and he replied I'm not giving you! And he started taking the milk away and put it in many cages so I can't get 4 from his cage! I was speechless! And I asking [sic] him again what is wrong with you? Why you don't [sic] like me? I will tell Andre and your wife about your behaviour and he said I don't care! I'm the man. They won't do anything! Then he walked away.

A day before, i [sic] accidentally hurt him with the cage. I apologised to him and touch his shoulders. As I was reaching his shoulders, he just moved his body away for me not to touch him. That's [sic] was rude and inappropriate gesture.

I reported him to Andre and his answer was to report him to the manager as his action was inappropriate and unprofessional.

Also, the week before, I was walking towards the printer and I saw him crossing me to get to the printer but my ticket came out first as I say yes before him. He looked at him and shouted. Why did you say yes? I was just speechless and he gave me my ticket.

This guy is always on my back. When I turned around he will be standing behind me with an angry face and his cage for me to get out his way. He does not communicate with me, only gesture and when he does he is rude.

I hope you can talk to him and sort out his problem because me I have problem with nobody I come to do my work, I work as a team and respect everyone I work with and I expect the same from my colleague.

Thank you for your support.

Jessica Amadou”.

62. Ms Ludlow says and we accept that the only person she showed this complaint email to was her colleague Ms Turnau, who would have had no reason to discuss it more widely.
63. The following day, 12 March 2021, the Claimant obtained a fit note from her GP certifying her as not fit for work from 11 to 25 March 2021 due to lower back pain. On 25 March 2021, the Claimant obtained a further fit not certifying her as unfit to work until 9 April 2021 due to lower back pain.
64. Mr Girbea returned to work on or around 1 April 2021. Ms Ludlow had a second meeting with him during which she put to him the specific allegations contained in the Claimant’s written complaint. Mr Girbea reiterated that it was the Claimant’s work pace and work target that was the issue rather than her race. Ms Ludlow told him that it was not his place to manage someone else’s performance and he should just concern himself with his own work. He apologised and said his behaviour would improve. Ms Ludlow believed that he was telling the truth about his reasons for his conduct towards the Claimant because of his initial surprise when told of the allegation and because he had worked with staff from a variety of backgrounds for about 2.5 years without any such problem arising.

Return to work on 13 April 2021

65. On Friday 9 April 2021 at 1.17pm, the Claimant sent a text message to Ms Ludlow to let her know she was fit to return to work. Ms Ludlow replied at 1.20pm,

'Due to your allegations as well as going sick we can't just plan you back in so what you need to do is call the sick line to arrange return to say you are fit and then we can arrange your you return from Tuesday but you must call to say you are fit thanks'.

66. By that time, Ms Ludlow had already completed the rota commencing on Sunday 11 April 2021, without rostering in the Claimant (as she had been on sick leave). The Claimant replied at 1.21pm asking for the number for the sick line, and Ms Ludlow responded at 1.31pm,

'I have spoken to shift on your behalf and we are planning you on Tuesday at 8am as you need to have a meeting with me thanks Becky'.

67. The Claimant replied on Monday 12 April 2021 at 12.49pm,

'Ok. See you tomorrow'.

68. At shortly after 8am on Tuesday 13 April 2021, the Claimant attended a return-to-work meeting with Ms Ludlow. Ms Ludlow told her that Mr Girbea denied being racist towards her and also that he said his actions were because of her performance. At the meeting, it was agreed that there should be a mediation meeting between the Claimant and Mr Girbea to address the matters raised in the Claimant's 11 March 2021 email.

69. The Claimant was scheduled to work on the following day, Wednesday 14 April 2021. She expected to have a mediation meeting before she returned to the shopfloor, but when she arrived at the office there was no one there, so she went to start work in the milk section. There had been a miscommunication. Ms Ludlow did not start work until 8am so had expected another manager to conduct the mediation meeting. That manager (we were not told who) had not received the message. As a result, the planned meeting did not take place and was thereafter forgotten. The Claimant says and we accept that when she went back to work Mr Girbea ignored her.

Impact of the TUPE transfer on 18 April 2023

70. In the period leading up to the TUPE transfer, Ms Ludlow found it difficult to get HR support from the Blue Arrow Agency. At the time of the TUPE transfer, she lost not only her assistant but also her computer and telephone line. She was single-handedly responsible for supporting the transferring agency workers in the depot through an unsettling period of change. It took some time for her to be set up on the Second Respondent's systems and receive induction training on their processes. At this time, she was heavily pregnant (she commenced maternity leave at the end of May 2021). Ms Ludlow explained in evidence, and we accept, that this background context impeded her ability to respond to the Claimant's concerns about Mr Girbea as promptly or thoroughly as she might have wished.

Events of 24 April 2021

71. On Saturday 24 April 2021, Mr Girbea again stood close to the Claimant when she was picking, looked annoyed with her and sighed when she asked him a question.
72. Ms Ludlow was not there as it was a weekend and she worked Monday to Friday. The Claimant approached Mr Day, the Team Manager, to complain about

Mr Girbea's conduct towards her. Mr Day understood that she was unhappy that Mr Girbea had been rude to her but did not fully understand what she was trying to say. He invited the Claimant and the Second Associate's Lead Associate Mr Johnson to discuss the matter in the office.

73. In the office, Mr Johnson took minutes of the conversation he and Mr Day had with the Claimant. It is recorded that Mr Johnson asked the Claimant what happened, and she replied that she had been picking and Mr Girbea had been standing near her, shaking his head, moving his cage in an aggressive manner, and giving her dirty looks. The Claimant said,

"He treats me differently from how he treats the other females. He's pissing me off. He is racist towards me."

74. Mr Day replied, *'Was anything said racial?'* to which the Claimant answered, *'No. He said to me, do my job'*. Mr Day said that making the allegation was very serious and asked what the Claimant wanted to happen. The notes record that the Claimant said she wanted to *"challenge"* Mr Girbea, which accords with Mr Day's recollection of the conversation. The Claimant told us that the notes were inaccurate at this point and she had merely said she wanted to *"speak"* to him. She did not say this was inaccurate at the time when she signed the notes. We prefer Mr Day's clearer recollection on this point.

75. At this point, Mr Day left the room. He went to speak to Mr Girbea on the shopfloor. According to Mr Day, whose account in this regard we accept, Mr Girbea, *"shrugged his shoulders said didn't do anything wrong he wasn't racist he just wanted to get on with his work"*.

76. After speaking to Mr Girbea, Mr Day went to speak to the other members of staff on the milk section that day. Without naming either the Claimant or Mr Girbea, he asked generally whether anyone had seen anything untoward happen that day. Nobody said that they had.

77. When he returned to the office, Mr Day told the Claimant,

"The colleague has been spoken to and has stated that nothing has been said. You can go back to work now, or go home? Up to you. It's your word against his. Being in a confined area will lead to miscommunication."

78. The Claimant chose to go home.

79. Mr Day reported the situation to his Shift Manager Mr Radley. Mr Radley notified Ms Ludlow by an email sent at 1.01pm under the subject line *'Colleague Complaint'*:

"Hi Becky,

We have received another complaint from Jessica in Milk regarding Racism and unfortunately again its against Adrian. She has complained in her own words that "he looks at her or stares in an aggressive manner", "he holds the cages aggressively", that "he stands near her and makes tutting noises" and that "he treats her differently to other female colleagues?". Kelvin will update you but from what has been said and the feedback from the other colleagues on Milk, was that Adrian has done nothing wrong. The area where this was alleged, is a pick location that is a tight location and to maintain social distance, the colleagues wait for each other to pick and move on and it would appear that Adrian was frustrated in her

pace of work and may have tutted because of that. She has admitted that he has not said anything to her. She stated that she doesn't believe the previous incident has been resolved and that she no longer wants to work with him. We asked her to if she would finish her shift and she said no, so we asked her to take the rest of the day off and return to work tomorrow, Adrian is off. She said she would return to work but would like a meeting with you asap.

Just for information Adrian has been spoken too by Tony P and he has made it clear to Adrian, not to make any comments. Noises or gestures towards Jessica.

Regards

Steve Radley".

Sick leave from 25 April 2021 and return to work

80. On the morning of Sunday 25 April 2021, the Claimant called the First Respondent's sick line to notify that she would be absent from work that day due to stress. Mr Radley answered the call. During their conversation, he asked her whether her stress was related to the incident the previous day and she said yes. He asked whether she was suffering from a mental health condition and whether she had seen her GP about it. The Claimant found it offensive that he linked experiencing stress with suffering from a mental health condition. Mr Radley also commented to the Claimant that what she had complained about the day before had not been racist in nature.

81. At 08.58am, Mr Radley emailed Ms Ludlow to let her know that the Claimant had called in sick. As a reply on the '*Colleague Complaint*' message chain, he wrote,

"Good Morning Becky,

Further to this, the colleague phoned in reporting absence at 6am this morning claiming she was stressed. I asked if this was related to the incident in milk and she replied "Yes", I did challenge the fact that I did not feel that what she had reported was "Racist" in nature but she felt it was and that I didn't understand. I asked if she had seen a GP for that diagnosis and she replied "No", I asked how she knew it was stress and she responded "I know how I feel". I advised that she speak with her GP and arrange an appointment asap, so that she can receive the appropriate medical attention and she agreed. I also made her aware that you would be in contact this week to resolve this issue.

She then called back about 5 minutes later and asked if she could have a copy of the notes from the meeting with Kelvin and Steve, to which I advised that you could arrange this.

Regards".

82. On Wednesday 28 April 2021, the Claimant obtained a GP fit note certifying her a not fit to work from 25 to 27 April 2021 due to stress related to work.

83. On Thursday 29 April 2021, the Claimant attended a return-to-work meeting with Ms Ludlow. During the meeting, Ms Ludlow told the Claimant that she had not found any evidence that Mr Girbea had been bullying her because of her race, although he had admitted becoming frustrated with the Claimant due to her performance. Ms Ludlow told us in her oral evidence that she had also spoken to other members of the team who told her that there had been some frustration

with the Claimant's performance impacting on the rest of the team but did not think that Mr Girbea had any other issue with the Claimant. This evidence was not documented at the time or contained in Ms Ludlow's witness statement. However, we accept that she did genuinely recollect this when asked about it.

84. During the meeting, Ms Ludlow said to the Claimant that using the word 'racist' to describe Adrian was inappropriate. The Claimant alleges and Ms Ludlow denies that she told the Claimant that it was a '*misunderstanding*' and '*just two people competing against each other*'. We find that these words were not used but the Claimant genuinely formed the impression that this was Ms Ludlow's meaning. They agreed that there should be a mediation meeting between the Claimant and Mr Girbea.

85. The next day, Friday 30 April 2021, at 1.14pm, the Claimant texted Ms Ludlow saying,

"Hi Becky I called to confirm I am fit to work and I am on the rota for tomorrow. Can you please confirm? Thanks".

86. At 1.40pm she followed with another message:

"I am still waiting for your phone call since yesterday because I am ready to work. I look forward to hearing from you. Jessica Amadou".

87. At 2.18pm, Ms Ludlow replied,

"I have been in induction all day give me .10mins and ill [sic] phone you".

88. During the telephone conversation, Ms Ludlow told the Claimant that she would make arrangements for a mediation meeting with Mr Girbea.

89. At 3.30pm, Ms Ludlow sent an email to Mr Radley and Mr Fry under the subject line '*mediation*', which said:

"Hi all

So after a meeting with Jessica going round in circles we have said that the next steps need to be mediation. As the last time there was a miscommunication and it looks like it wasn't completed.

I wasn't comfortable to arrange this immediately as she was very irate and didn't think it was fair for Adrian.

I want to try and arrange this for Tuesday morning before they start picking. I want to ask if it would be possible to bring them both in for 7am instead of 6am. I will get here for 7am to be present.

I also wanted to ask if a TM or one of yourselves could be present in this meeting as at the moment I don't think we are getting anywhere in regards to making progress.

I would really appreciate your support with this one

Please let me know your thoughts

Kind regards

Rebecca Ludlow".

90. As Ms Ludlow was planning to schedule the mediation meeting on Tuesday 4 May 2021, the Claimant was not scheduled onto the rota over the weekend of 1 and 2 May 2021 or Monday 3 May 2021. We find on the balance of probabilities that the Claimant came in to work on either Saturday 1 or Sunday 2 May 2021, and was told by Team Manager Mr Parker that she was not on the rota and should go home. The Claimant says this happened on Friday 30 April 2021, but that would not be consistent with the text message exchange on the afternoon of that day to which we have referred above.

Mediation meeting 4 May 2021

91. On Tuesday 4 May 2021, the Claimant attended a mediation meeting at 7am with Ms Ludlow, Mr Radley and Mr Girbea. No notes were taken at the meeting. The atmosphere was awkward and at times the Claimant and Mr Girbea spoke over each other. At one point, Mr Radley said to Mr Girbea that he needed to calm down as his body language was coming across as confrontational. Mr Girbea explained that he was frustrated by his own difficulty in communicating in English. Mr Girbea also said that he got frustrated with other pickers when they were going slowly and slowing him down, not just the Claimant. Mr Radley and Ms Ludlow told Mr Girbea that he should not be concerning himself with the Claimant's performance. The Claimant says that Mr Girbea, "*confessed the bullying and harassment he was doing to me he recalled events that happened and reasons why he did that*". We find that the only reasons Mr Girbea referred to were related to the Claimant's performance. When asked, the Claimant could not explain what 'reasons' he otherwise gave. At the end of the meeting, the Claimant and Mr Girbea shook hands.
92. After the meeting concluded, the Claimant and Mr Girbea left and walked towards the warehouse together. At the bottom of a set of stairs leading down from the office, Mr Girbea briefly held the Claimant's wrist to get her attention. He then pantomimed boxing and said words to the effect, '*Come on, let's fight it out*'. The Claimant, wholly understandably, was shocked and upset by this. On the balance of probabilities we find that Mr Girbea did not intend to threaten physical violence, but it was a wholly inappropriate and poorly timed interaction.
93. The Claimant returned to the meeting room and told Ms Ludlow and Mr Radley what had happened and asked them to check the CCTV overlooking the bottom of the stairs. Mr Radley went to check the CCTV. He formed the impression that the body language shown on the CCTV demonstrated that Mr Girbea was joking. Ms Ludlow called Mr Girbea back into the office to ask for his account of what had happened. Mr Girbea said that he had tried to break the ice and make the Claimant laugh by suggesting fighting but was not serious. Ms Ludlow told Mr Girbea that this was unacceptable and if it happened again he would be asked to leave. Mr Girbea apologised to Ms Ludlow, but not to the Claimant. Mr Radley took the view that any further steps would be the responsibility of the Second Respondent. Ms Ludlow accepted Mr Girbea's account and took no further steps to investigate or act upon the situation.
94. Following these events, neither Mr Radley nor Ms Ludlow fed back to the Claimant what their response to her allegation concerning Mr Girbea's actions following the meeting had been. This left the Claimant, who genuinely understood herself to have been threatened with physical violence, in a situation of

uncertainty. She was waiting to be told what the outcome was, and the lack of feedback made her feel isolated and vulnerable.

Events in the milk section during May 2021

95. As a result of this feeling of vulnerability, the Claimant began to suspect that colleagues around her were motivated to gang up against her and to support Mr Girbea. She believed that all the managers and all her colleagues were well aware that she had made a complaint of racism against him.
96. Mr Radley, Mr Fry, and Mr Day of the First Respondent, and Mr Johnson and Ms Ludlow of the Second Respondent, did know this. Mr Puwalski, a Team Manager, says in his written statement that he was not aware until after she brought her tribunal claim. We consider it possible that the other Team Managers might have known, for example, if they were told to keep an eye on the situation, but we do not have an evidential basis to find on the balance of probabilities that they did know.
97. When it comes to other Warehouse Operatives, we accept that Mr Girbea may have spoken to other colleagues in the milk section about the Claimant's allegations. However, we do not have an evidential basis to find on the balance of probabilities that he did do so. Both Mr Day and Ms Ludlow at different times asked the team if they had seen anything untoward, but we consider it unlikely they would have shared with the Warehouse Operatives that the Claimant had made a complaint of racism.
98. On 9 May 2021, the Claimant took the initiative to lay out the grid into which the milk could be put away. This task was normally done by the night shift before the Claimant arrived. Mr Girbea took the view that the Claimant had arranged the grid wrongly, and along with another colleague whose identity we not know, rearranged it. The Claimant went to Mr Radley to complain.
99. On receipt of the Claimant's complaint, Mr Radley stated that it was the job of the night shift to lay out the grid and the day shift staff were not budgeted to undertake this task. Mr Radley also offered the Claimant training so she could be rotated to work elsewhere in the chill area as well as in the milk department.
100. The Claimant says that on 10 May 2021, Mr Johnson told her that Mr Day and Mr Conroy were "*watching her*". Mr Day and Mr Conroy firmly deny watching the Claimant, other than as part of their general oversight of all the staff in the chill area. We consider it likely that Mr Johnson told the Claimant her grace period had come to an end and her performance against target was being monitored. Any comment to the effect that the Team Managers were keeping an eye on her was made in that context. Mr Johnson spoke to the Claimant in the course of his responsibility for managing performance, and was not making a threat.
101. On the same day, Mr Johnson spoke to the Claimant about her timekeeping because she had taken an extra break. The Claimant says she was asked to sign a form about this. We have not been provided with any evidence as to what this form might have been but as the Claimant was not challenged on this specific point we are prepared to accept that he did so. We find again that Mr Johnson was acting in the course of his responsibility to manage the Claimant's performance.

102. The Claimant says that on 10 May 2021, Mr Puwalski and an unidentified colleague gossiped about her and made face gestures and movements relating to her. The Claimant originally said the unidentified colleague was ‘*Steve from ambient*’. In evidence she suggested for the first time that it might have been Mr Conroy, saying that as she approached, “*Ryan told Artur to shush*” when they saw her coming. She changed her mind about that when Mr Conroy gave evidence and said it was not him after all. Mr Puwalski denies the allegation. We accept that the Claimant, who was feeling vulnerable at this point, understood a conversation between two colleagues as relating to her. However, we have insufficient evidence to conclude that this was the case.
103. The Claimant says that on the same day, as she was waiting by the table with the printer on it for a label to print, Mr Girbea banged a box on the table 4 or 5 times. When she was later asked about this allegation in a grievance interview, she said that Mr Girbea banged the box 5cm away from her face. On further questioning, she confirmed that it was more like a foot away from her. We accept that Mr Girbea did bang a box on the table but find that the Claimant’s perception of this was coloured by her fear of Mr Girbea. We do not find that he banged the box repeatedly or threateningly.
104. On 11 May 2021, the Claimant spoke to a Team Manager and a union representative and asked them both to pass a message to Mr Radley that she wanted to speak to him. She intended to raise concerns about the events of the previous day. She also believed that Mr Radley was still investigating the incident of 4 May 2021 following the mediation meeting. The next day, on 12 May 2021, Mr Radley passed the Claimant in a corridor. The Claimant was disappointed that he did not stop to talk to her and felt she had been ignored. We find that Mr Radley was simply focussing on something else and did not deliberately ignore the Claimant.
105. On 13 May 2021 at 4.39pm, the Claimant called the First Respondent’s HR department to raise a concern that she was being racially discriminated against in the workplace. The call handler provided her with the details of the First Respondent’s whistleblowing helpline.
106. The Claimant says that on Sunday 16 May 2021, Mr Mead made a gesture and sounds to imitate beating her back with a ‘rod’ and when the Claimant challenged him, he smiled at her. She further says that on the same day, Mr Mead, with Mr Girbea and another agency worker identified only as ‘Alpha’ blocked her in and Mr Mead said to her, “*you are going to have a problem working here*”. Mr Mead in his written statement denies these allegations entirely and produces shift records showing that he was absent from the depot on that day. Mr Fry explained the provenance of the records in evidence, and we accept that they were printed from the First Respondent’s HR system. The Claimant when asked was adamant that these events could only have happened on 16 May 2021, and she had not mistaken the date. She alleged that the First Respondent had fabricated the records.
107. In light of the documentary evidence, which we accept shows that Mr Mead was not present, we find that these events did not occur on the date alleged by the Claimant. We further find that Mr Mead’s denial of the allegations, even though not tested in cross-examination, was more credible than the Claimant’s evidence. We note she did not make these allegations in a whistleblowing report she made

the next day (described below). We find that Mr Mead did not make a whipping gesture towards the Claimant, block her in, or say she would have a problem working in the depot. Given that Alpha has not been satisfactorily identified, we do not consider we have sufficient basis for making a finding against him either. It follows that we do not find that Mr Girbea acted in concert with the other two to block the Claimant in.

108. The Claimant makes two further, undated, allegations against 'Alpha'. We accept that both Respondents have made significant efforts to identify who Alpha could be and that no one of that name was employed by either. The Claimant has not provided us with sufficient information to make a finding of fact on the balance of probabilities against any individual.
109. The Claimant says that on 17 May 2021, a colleague named Mr Igor Bysikiewicz, a fast worker, came out of nowhere, did not check if it was safe to move his cage and bumped into her. She alleges that he did this deliberately. However, her own description of the incident is consistent with a worker going at speed and carelessly causing a collision. Mr Bysikiewicz was later interviewed on 20 September 2021 as part of the grievance investigation and could not remember any incident where their cages had bumped. A minor collision between cages would not have been an unusual occurrence in the milk section and he may well have simply forgotten about it. We find that the Claimant's experience of not being listened to in relation to her complaint of racism made her feel vulnerable and more sensitive to the incident and therefore led her to mistakenly believe it was deliberate. On the balance of probabilities, we conclude that there was accidental contact between the cages. Mr Bysikiewicz called out the number of the location he was trying to get to in a raised voice. For the rest of the day, the Claimant was jumpy around him and misperceived his ordinary actions when working close to her to be aggressive.
110. On Monday 17 May 2021, there was a conversation between the Claimant and Ms Ludlow. The Claimant asked to be moved from the milk section as she did not feel comfortable or safe there. Ms Ludlow noted that she had recently been trained to work in the chill receiving area, but work was only required there until 11am, not for the full day shift. The Claimant asked to be included in the next available LLOP training, which Ms Ludlow agreed.
111. At 2.50pm, the Claimant called the First Respondent's 'Safecall' whistleblowing line, and made a complaint about the actions of Mr Girbea, a failure by management to respond to her earlier complaints, and that '*other workers are starting to behave in a racist manner*'. She did not describe any of the allegations made in this litigation against other colleagues.
112. At 6.28pm, the Claimant wrote an email to the Second Respondent's HR email address under the subject line '*URGENT Complain*', making a complaint that Ms Ludlow had covered up Mr Girbea's wrongdoing leaving the Claimant unsafe at work. She did not mention allegations against any staff other than Mr Girbea.
113. The Claimant says that on 18 May 2021 there were further incidents with Ms Ola Bysikiewicz and Mr Krysstof Bysikiewicz, sister and brother of Mr Igor Bysikiewicz. The incidents described are that Ms Bysikiewicz was cold towards her, gave her a "*dirty look*", did not respond to a greeting, spoke in an unpleasant tone and shouted at her. Mr Krysstof Bysikiewicz is alleged to have moved his

cage into the Claimant's path and shouted at her to stop with his hand raised. In both cases, we find on the balance of probabilities that the Claimant's feeling of vulnerability at this time caused her to be sensitive to inconsequential interactions and perceive as hostile ordinary communications. The milk section was a noisy environment and using raised voices, especially to communicate urgent instructions, would not normally be perceived as shouting. When giving her evidence, the Claimant said that their actions were "*because of what happened with their brother the day before I never had any problems with them before*". She did not suggest that they were because of or related to her race.

Events of 19 May 2021

114. On Wednesday 19 May 2021, the Claimant had not arrived by the time the list was ticked off at 6.07am. She started her first task at 6.16am. She went for her break at 10.13am and resumed work at 11.11am. During her break the Claimant went to the canteen. She attempted to leave without clearing her tray, and the Canteen Manager, Ms Caroline Weeston, called her back and instructed her to remove it. Ms Weeston was an employee of a third company, Gather & Gather, which ran the canteen.
115. The canteen was a self-clean area. There were signs up on the wall to that effect and it was well-known by all users. As a matter of general practice, Ms Weeston called back other people who left trays behind, not just the Claimant. Mr Day told us and we accept that many workers had been challenged for the same thing. In a later disciplinary investigation interview, the Claimant attributed Ms Weeston's actions to a previous incident when the Claimant had complained about a hair on her plate which she felt had annoyed the Canteen Manager.
116. At just past 12.30pm, Lead Associate Mr Johnson went to speak to the Claimant about her performance figures. Part of his usual duties was to undertake a daily 'performance walk-round' during which he would speak to any staff who were underperforming. Mr Johnson told the Claimant that her performance was low and also raised that she was late back from her break.
117. During this conversation, Mr Day joined the Claimant and Mr Johnson. The Claimant alleged in her oral evidence that this was preplanned and in effect an ambush orchestrated between Mr Day and Mr Johnson. Mr Day said he heard the Claimant's voice was raised and so came over to join the conversation. We prefer Mr Day's evidence on this point as there was no need for a planned ambush; Mr Day as the Claimant's Team Manager could have required her to discuss her performance with him at any time and he could not have predicted that the Claimant would have a longer break on that day.
118. When he joined the conversation, Mr Day challenged the Claimant for taking a longer break. The Claimant sought to explain that she had been delayed by the Canteen Manager calling her back to clear her tray. The Claimant alleges that Mr Day replied, "*I don't care*". We find he did not use those words but did make a comment to the effect that it was her responsibility to clear her tray and to get back from her break on time.
119. The Claimant then said that her performance had been affected by the headsets being faulty. She alleges that Mr Day replied, "*you are a liar*". We find he did not say that but did say that no one had reported any problems with the headsets.

The Claimant misinterpreted this as being called a liar. We find that by this time the Claimant was likely to misperceive her colleagues' statements and actions to be more hostile than in fact they were.

120. Similarly, the Claimant says that Mr Day called her "*lazy*" and her performance at work "*disgusting*". We find he did not use those words, which would not be consistent with the way he normally expressed himself. Mr Johnson had raised with the Claimant that her performance had been poor.
121. The Claimant said to Mr Day that he was speaking to her like he would his daughter. She was speaking hypothetically, in effect saying that he was talking down to her. In fact, the Claimant did not even know whether he had a daughter. She might equally have said "*don't speak to me like my dad*". However, Mr Day genuinely misinterpreted this as a reference to his actual daughter and got very upset that the Claimant was making a reference to his family and suggesting that he spoke to his daughter negatively. He held up his hand and asked her to stop, telling her that he would report her to a manager. The Claimant took this to be a threat and became upset. Mr Day walked away because he was worried about the situation escalating.
122. Mr Day reported the matter to Mr Radley. Mr Radley spoke to Ms Ludlow and requested that the Claimant be removed from the site. Ms Ludlow asked for the Claimant to be called to the office.
123. When she arrived, the Claimant initially said she was not willing to speak with Ms Ludlow without a companion, but then agreed to the meeting. Another member of staff from the Second Respondent, Mr Krystian Kliber, was present initially but then left during the conversation to fetch a water bottle the Claimant had left on the shopfloor.
124. Ms Ludlow said that the First Respondent had asked for the Claimant to leave the site and began to explain that a complaint had been made about the way she had spoken to Mr Day. The Claimant alleges that Ms Ludlow told her that she was suspended because Mr Day had said she swore to his daughter, her performance was "*disgusting*" and she had taken an extra break. We find that the Claimant again misinterpreted what was said, and while Ms Ludlow did mention her remark to Mr Day, her break time and her performance, she never used the word "*disgusting*".
125. The Claimant became very upset and said that Ms Ludlow was racist and had failed to protect her from Mr Girbea. Ms Ludlow says, and the Claimant denies, that she shouted at her aggressively. We find that the Claimant was not aggressive but was distressed, animated and loud. Ms Ludlow went to the door and called for a Shift Manager to come into the office because she felt unsafe. The Claimant said she would leave instead and, after waiting outside the office for Mr Kliber to return with her water bottle, she left the depot.
126. Ms Ludlow called the Second Respondent's HR department for advice, and it was decided that the Claimant should be placed on paid disciplinary suspension. Ms Ludlow tried to call the Claimant to inform her of this, but her phone was switched off.
127. At 1.36pm, Mr Hazar Bamford, HR Officer in the Second Respondent's HR department, forwarded Ms Ludlow the Claimant's complaint about her of 17 May

2022 (described at paragraph 112 above). At 3.22pm, Ms Ludlow replied by email with a statement in response. Ms Ludlow told the Tribunal this statement had in fact been written over a longer period between 4 and 19 May 2021; she had been working on the draft in order to handover the situation between the Claimant and Mr Girbea to the Second Respondent's HR department before she herself was due to go on maternity leave at the end of the month.

128. Ms Ludlow asked Mr Day and Mr Johnson to write statements about what had happened.

129. Mr Day wrote a statement at 3.25pm, in which he said that the Claimant had not started work until 6.16am that morning but he had not challenged her about it at the time. He saw her walk towards the canteen for her break at 10.19am. Mr Johnson had asked him whether there was anyone he should speak to on his performance walk-round that morning, and Mr Day had asked him to speak to the milk pickers. At 12.20pm, Mr Johnson had asked Mr Day to run the performance figures, and Mr Day had notes that they were not very good and "*certain colleagues were under achieving a lot more than others*". The Claimant was one of those colleagues. Mr Johnson had gone over to speak to the team at 12.30pm. Meanwhile, Mr Day ran a report to check nobody had exceeded their break times that day. He noted that the Claimant had taken a long break that day (58 minutes instead of the permitted 38 minutes). He went over to where Mr Johnson was already speaking to the Claimant in order to raise the issue. He recorded the remainder of the conversation as follows:

"She replied she had 38 minutes in the canteen and then she was challenged by a member of the canteen staff to clear up after herself as she had left her dinner tray on the table, at this I responded simply this is your responsibility and you need to be back and working after 38 minutes at this point Jessica started to argue and respond with a comment and quote, "you talk to me like you talk to your daughter". On this remark I held my hand up to stop her speaking and I said to her she has no right to start mentioning my family when I am talking to her with her own problems around work. She then quoted about system and kit issues but again until she was being challenged there had been no issues mentioned..."

130. After discussing that other colleagues had not experienced any issues, Mr Day went on,

"I then mentioned to Jessica I had seen her moaping [*sic*] around and this was not right as it would not help and the fact her figures needed to be a minimum of 220 cases an hour and that is wasn't fair on her colleagues to have to pick up her downfall in performance. Then again she said I was talking to her like I would my daughter. At this point I walked away..."

131. In Mr Johnson's statement, he wrote that,

"On 19.05.21 I approached Jessica in the milk section to challenge her about her performance and timekeeping. I [*was*] joined by Steve day who then took over the conversation. He wasn't rude, racist or nasty in any way. He had ask [*sic*] various question regarding Jessica's times on break and why her performance was so low. She didn't like the fact that she was being challenge [*sic*] on this and started becoming very rude towards Steve Day. She said he was talking to her the same way he does towards his daughter. She also stated that her performance was ok and that managers should be focussing on other members of staff and not her. Steve then said he can get paper evidence of her daily performance and showing

her break times. She didn't agree with having low performance. Jessica again became very rude and returned to the milk pick. Myself and Steve then when [sic] to report to Steve Radley..."

132. At 3.44pm, the Claimant made a second call to the Safecall line to add the events of the day to her existing complaint.
133. At 9pm, the Claimant emailed Ms Ludlow asking for "*the outcome of the 3 meeting [sic] we had regarding the grievance I made*", the reason for suspension and a copy of the grievance policy for agency workers.
134. The following day, Thursday 20 May 2021 at 1.29pm, Mr Fry wrote an email to Ms Ludlow saying,

"Hi Becky,

After speaking to Steve Radley and other members of the Days Management Team, we are all willing to put in statements regarding the very destructive behaviour of Jessica, This after a number of occasions where we have spent time trying to deal with her issues that she raised, and also time in coaching her performance.

I have also a Team Manager that has a witness where he only was trying to highlight the issues around her constant underperformance and also time wasting and going over breaktimes to end up being insulted by her, also the canteen manager had a run in with her over her manners and attitude towards the canteen team.

I fully understand that all the TM's that have had dealings with Jessica and also Steve and yourself have done everything possible to resolve issues-in which some serious allegations were made and that upon investigation unfounded, and even from a mediation between her and another colleague she was happy with the resolve from the meeting - as highlighted to Steve Radley.

I also fully understand that you have tried everything possible to resolve this and at all times you have been professional towards her when having to deal with some very challenging conversations

Regards,

Steve".

Disciplinary and grievance investigations

135. On the same day, 20 May 2021, Mr Bamford from Second Respondent's HR department emailed the Claimant to acknowledge receipt of her complaint against Ms Ludlow. They had a follow-up call during which the Claimant said she would provide further information. The Claimant notified ACAS and entered into early conciliation.
136. On 28 May 2021, the First Respondent's HR department raised the Claimant's Safecall complaint with the Second Respondent's HR department and was told the matter was being investigated.
137. On 30 May 2021, the Claimant submitted a formal grievance letter. The grievance letter set out the same allegations that the Claimant subsequently raised in these

- proceedings. She reproduced the same text as an attachment to her ET1 claim form on 7 June 2021.
138. The Second Respondent's HR department investigated a disciplinary allegation that the Claimant's behaviour on 19 May 2021 amounted to misconduct. The Claimant provided a statement for the purposes of the disciplinary investigation on 9 July 2021. Mr Bamford said he intended to investigate the Claimant's grievance once the disciplinary investigation had been completed.
 139. After some practical difficulties in finding a time to meet with the Claimant, the disciplinary investigation meeting took place on Wednesday 11 August 2021. The investigation was conducted by Ms Michelle Charlotte, HR Officer with the Second Respondent. During the meeting, the Claimant reiterated that the treatment she had experienced had been racist.
 140. Ms Charlotte concluded that the suspension had been appropriate but could now be lifted. She decided that the Claimant had a case to answer, and a disciplinary hearing should be conducted. Investigation commenced into the Claimant's grievance.
 141. On 13 August 2021, Ms Lala Check, People Advisor in the First Respondent's HR department, emailed Ms Trish Robinson, Divisional Director at the Second Respondent, asking a number of queries regarding the Claimant's case. Ms Charlotte replied to those queries by email of 20 August 2021, attaching a timeline of events.
 142. After some further practical difficulties in arranging a time to meet with the Claimant, a grievance hearing took place on 1 September 2021. The grievance manager was Mr James Davies, Group Director of HR at the Second Respondent.
 143. In the course of the grievance investigation, statements were taken by Mr Charlie Wallace, Site Manager, from Mr Puwalski (who was asked about and denied the 'Alpha' allegations) and Mr Joseph Hayford. Mr Hayford was a Black colleague whom the Claimant had confided in regarding the events of May 2021. He said,
"It was hard because all the things she told me I didn't witness anything whatsoever. That's why I said to her she need to do something about it herself."
 144. He went on to say, specifically regarding the Claimant's allegation about being spoken to *"like a child"*, that he had experienced this previously with one of the managers but this had been dealt with one-to-one with no issues.
 145. Mr Fry remembers taking statements from Mr Igor Bysikiewicz, Mr Krzysztof Bysikiewicz and Ms Ola Bysikiewicz, in which they denied the factual allegations made against them. He says he gave the handwritten statements to the Second Respondent for the purpose of the grievance investigation. The Second Respondent has been unable to locate them.
 146. Mr Davies rejected the Claimant's grievance by letter dated 15 September 2021. He listed the information and evidence he had looked at, which did not include any statements from Mr Igor Bysikiewicz, Mr Krzysztof Bysikiewicz or Ms Ola Bysikiewicz. For some reason, on 20 September 2021, 5 days after the grievance outcome letter, Mr Wallace interviewed Mr Igor Bysikiewicz. He denied the

allegations against him, said that he had got on well with the Claimant and did not know where the allegations had come from.

147. On 6 October 2021, the Claimant was notified that with the end of the grievance process her paid suspension was ended and she should return to work. However, thereafter there were difficulties in finding work duties and hours that could accommodate the Claimant's back problem.

Submissions

148. The parties made oral submissions at the close of the evidence. Ms Williams also provided written submissions.
149. Ms Williams' written submissions on behalf of the First Respondent helpfully set out the law and dealt with those allegations against employees of the First Respondent in the order set out in the list of issues. She also dealt with the allegation against Ms Weeston, submitting that she was not an employee or agent of the First Respondent. In her oral submissions, she argued, with examples, that the Claimant's evidence had been evasive, prone to embellishment, inconsistent, focussed on her subjective beliefs untethered to primary facts, resistant to making appropriate concessions and overall lacking in credibility. She invited us to prefer the evidence of the First Respondent's witnesses in relation to factual disputes. She accepted that the Claimant had done protected acts but contended that there was no evidence to support a causative link between the protected acts and the alleged detriments. She submitted that the Claimant had failed to discharge her burden of proof in relation to all of her claims.
150. On behalf of the Second Respondent, Mr Brill dealt in turn with those factual allegations set out in the list of issues which concerned his client's employees. He made an overarching submission that the Claimant had from the outset held a subjectively genuine but objectively unfounded belief that both Respondents were institutionally racist. He noted that the Blue Arrow Agency and Second Respondent's grievance procedures both provided for an initial informal stage and submitted that while the Claimant felt more ought to have been done, there was no failure to follow the policies. He accepted that the 11 March 2021 complaint email amounted to a protected act but disputed that the Claimant did a protected act in the meeting on 24 April 2021. He said that in any event, neither of the alleged protected acts caused any of the alleged victimisation detriments.
151. On behalf of the Claimant, Mr Ijaola argued that the Claimant's perception was very important. He said the Tribunal should look at the ACAS Code of Practice as well as the internal grievance procedures when considering allegations relating to lack of investigation. He reminded the Tribunal of the cases of *King v Great Britain China Centre* [1992] ICR 516 and *Igen Ltd v Wong* [2005] IRLR 258, in support of the proposition that discrimination is rarely overt, and the Tribunal should be willing to draw inferences. He suggested that an inference could be drawn from the Respondents withholding available evidence and documents, although he did not explain what evidence was alleged to have been withheld. He suggested that the Respondents' witnesses had chosen not to investigate the Claimant's complaints for fear of uncovering evidence of racism that would be presented in the tribunal claim; although, as he accepted, this was not an allegation that had been put to any of the witnesses. He submitted that the

Claimant had been looking for assurances because she did not feel safe at work but was instead regarded as a troublemaker.

The law

Liability under the Equality Act 2010

152. Section 41 of the Equality Act 2010 ('EqA') extends non-discrimination protection to contract workers as against a principal contracting for the worker's services:

- (1) A principal must not discriminate against a contract worker—**
 - (a) as to the terms on which the principal allows the worker to do the work;**
 - (b) by not allowing the worker to do, or to continue to do, the work;**
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;**
 - (d) by subjecting the worker to any other detriment.**
- (2) A principal must not, in relation to contract work, harass a contract worker.**
- (3) A principal must not victimise a contract worker—**
 - (a) as to the terms on which the principal allows the worker to do the work;**
 - (b) by not allowing the worker to do, or to continue to do, the work;**
 - (c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;**
 - (d) by subjecting the worker to any other detriment.**
- ...
- (5) A "principal" is a person who makes work available for an individual who is—**
 - (a) employed by another person, and**
 - (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).**
- (6) "Contract work" is work such as is mentioned in subsection (5).**
- (7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).**

153. S.109 EqA provides for the liability of employers for the acts of their employees and principals for the acts of their agents, as follows:

- (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
- (2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**

154. The possibility of an employer’s liability for the actions of a third party in the workplace under s.109(2) EqA was considered in *Ministry of Defence v Kemeh* [2014] ICR 625. In that case, the claimant was an employee of the Ministry of Defence and the alleged perpetrator of race discrimination, who worked with the claimant in the same workplace, was an employee of a subcontractor company. The claimant argued that his employer should be liable as a principal for the actions of the subcontractor’s employee. The argument failed on appeal because there was held to be no relationship of agency between the Ministry of Defence and the subcontractor’s employee. In order for a relationship of agency to arise, the agent must be acting on the principal’s behalf and with the principal’s authority [39]. Per Elias LJ at [40]:

“it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents.”

Burden of proof

155. The burden of proof provisions are contained in s.136(1)-(3) EqA:

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

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

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

156. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

“It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.¹ He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):

“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

¹ *Madarassy v Nomura International plc* [2007] ICR 867, CA

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

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

“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”

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

157. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.
158. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a ‘fragmentary approach’ and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.
159. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.
160. It is well-established that unfair treatment is not to be equated, as such, with discriminatory treatment (*Glasgow City Council v Zafar* [1998] ICR 12). Discrimination may, however, be inferred if there is no explanation for unreasonable behaviour (see the discussion in *The Law Society v Bahl* [2003] IRLR 640 (EAT) at [93] – [98], upheld by the Court of Appeal [2004] IRLR 799 at [100] – [101]).
161. A mere difference of treatment is not enough to shift the burden of proof, something more is required: *Madarassy* per Mummery LJ at [56]:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the

balance of probabilities, the Respondent had committed an unlawful act of discrimination.”

162. However, as Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at [19]:

“the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.”

163. Evidence showing that discriminatory conduct or attitudes are widespread in an organisation may be relied on to argue that it is more likely a specific allegation of discrimination occurred. However, any such material must be used with care and tribunals must identify with specificity the particular reason why the material in question has probative value as regards the motivation of the alleged discriminator in any particular case (*Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425 per Underhill LJ at [99]).

Direct discrimination

164. S.13(1) EqA provides:

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.

165. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

166. It is also permissible for tribunals to address both stages by considering a single question: the ‘reason why’ the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

167. The First Respondent cited *Ahmed v Amnesty International* [2009] ICR 1450, in which Underhill P held at [33]-[37] that while in some cases the reason for the treatment complained of is inherent in the act itself, in others the act complaints of is not in itself discriminatory but is rendered so by a discriminatory motivation. In such cases, tribunals must examine ‘*the “mental processes” (whether conscious or unconscious) which led the putative discriminator to do the act*’.

168. It is sufficient that the protected characteristic had a ‘significant influence’ on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at 886).

169. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a ‘composite approach’ to an allegation of discrimination is

unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

170. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, *per* Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

“Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the “operative” cause, or the “effective” cause. Sometimes it may apply a “but for” approach...The phrases “on racial grounds” and “by reason that” denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question Ahmed v Amnesty International [2009] ICR of fact.”

171. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant. In a case where an employee who raises a grievance about discrimination which is then, for reasons unrelated to the protected characteristic, mishandled, the mishandling is not discriminatory simply because the grievance concerned discrimination. It is not a 'but for' test; the Tribunal must scrutinise the motivation of the alleged discriminator (*Dunn v Secretary of State for Justice* [2019] IRLR 298 CA, *per* Underhill LJ at [44]).
172. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

Harassment

173. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

(1) A person (A) harasses another (B) if-

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and**
(b) the conduct has the purpose or effect of—
- (i) violating B's dignity, or**
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;**
- (b) the other circumstances of the case;**
- (c) whether it is reasonable for the conduct to have that effect.**

(5) The relevant protected characteristics are—

...

race

...

174. Guidance as to the construction of the wording ‘*related to* a relevant protected characteristic’ was given by the Court of Appeal in *UNITE the Union v Nailard* [2019] ICR 28. It imports a broader test than that which applies in a claim of direct discrimination. It was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it [92]. However, there are limits. The Tribunal in that case had allowed that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex ‘because of the background of harassment related to sex’ [69]. That, the Court of Appeal held, went too far. The Tribunal had not made any findings as to whether the claimant’s sex formed part of the motivation of the alleged discriminator.
175. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, an authority cited by the First Respondent, HHJ Auerbach held at [24]-[25] that:
- “...the broad nature of the "related to" concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question... Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.”**
176. Whether conduct is related to a protected characteristic is a question to be judged by the Tribunal by reference to all of the evidence, not simply the perception of the claimant (*Aslam* at [21] and *Hartley v FCO Services* [2016] UKEAT/0033/15/LA [23-25]).
177. The context in which a comment is made will be relevant to determining whether it is related to a protected characteristic, and the Tribunal must contextualise the comment appropriately (*Warby v Wunda Ground Plc* [2012] EqLR 536 at [21-24]).

As observed by Underhill J in *Amnesty International v Ahmed* [2009] ICR 1450 at [37] (cited in *Warby* in the context of harassment):

“The fact that a claimant’s sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.”

178. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

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

179. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms ‘violation of dignity’ and ‘intimidating, hostile, degrading, humiliating or offensive environment’.

“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.”

180. He further held (at [13]):

“When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.”

181. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ’s observations in *Grant*, stated:

“We wholeheartedly agree. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.”

182. S.212(1) EqA provides that the concept of ‘detriment’ does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination, or harassment and victimisation, in respect of the same conduct, since a finding of direct discrimination and victimisation necessarily involve findings of detriment. However, there is nothing in the

statutory language to prevent him from advancing claims in the alternative by reference to these causes of action in respect of the same conduct.

Victimisation

183. S.27 EqA provides:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

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

184. As noted above, a “detriment” exists if a reasonable employee would or might take the view that the treatment was in all the circumstances to his or her disadvantage: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [34].

185. The causal test is the same as for direct discrimination, in that it is sufficient for the protected act to be a “significant influence” on the outcome: *Nagarajan v London Regional Transport* [2000] 1 AC 501, 513 HL. The question of whether the alleged perpetrator acted ‘because’ of a protected act is subjective: see *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29], cited above. It is (self-evidently) necessary to consider whether the alleged perpetrator was aware of the protected act.

186. An employer’s failure to investigate a complaint of discrimination or harassment will not constitute victimisation under s.27 unless there is a link between the fact of the employee making the complaint and the failure to investigate it: *A v Chief Constable of West Midlands Police* EAT 0313/14. In that case, Langstaff J held at [22]:

“...in some cases — and I emphasise that the context will be highly significant — a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought,

asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the most careful of evidential bases.”

Conclusions

Conclusions on the factual allegations

187. The allegations in this claim concerning Mr Girbea were not put to him as part of the internal grievance process and neither did he provide witness evidence. Ms Ludlow, Mr Radley and Mr Day all broadly concurred that Mr Girbea had taken an inappropriate, micromanaging approach towards the Claimant, although his motivation for doing so was contended to be her work performance and not because of or related to her race. Therefore, where the Claimant made specific allegations about Mr Girbea’s conduct, as opposed to his motivation for that conduct, she was not challenged in cross-examination, and we had no evidence before us to the contrary. However, we have made an overarching finding that, particularly as time went on, the Claimant’s feeling of vulnerability caused her to misperceive the actions of her colleagues as more aggressive than they in fact were. Our conclusions on her factual allegations are reached in that context.
188. Our conclusions on the 32 factual allegations, drawn from the findings of fact set out above, are as follow:
- 1) On 10 March 2021, Mr Girbea did put milk in the Claimant's cage without speaking to her and walked away when she challenged him. He later refused to give the Claimant milk when she asked.
 - 2) On 10 March 2021, Ms Ludlow did not tell the Claimant that she was suspended while her complaint against Mr Girbea was investigated. Rather, the Claimant and Ms Ludlow agreed that she would come in at 1pm the following day to discuss her complaint.
 - 3) On 9 April 2021, Ms Ludlow did text the Claimant to tell her that she could not attend work until she had attended a meeting. The Claimant was not suspended from 10 to 13 April 2021 but she was not put on the rota during that period, meaning she lost an opportunity to be allocated shifts. We do not know whether shifts would have been allocated.
 - 4) On 14 April 2021, Mr Girbea did ignore the Claimant after she returned to work.
 - 5) On 24 April 2021, Mr Girbea did stand close to the Claimant when she was picking, looked annoyed with her and sighed when she asked him a question.
 - 6) On 24 April 2021, Mr Day partially failed to address the Claimant’s complaint about Mr Girbea. Mr Day did take some steps, as outlined at paragraphs 75 and 76 above, but his investigation was brief, superficial and overall failed to address the substance of the complaint. He acted on the basis that as no explicitly race-related comment had been made and it was one person’s word against another, no further steps were required.

- 7) On 25 April 2021, Mr Radley did not make an adverse comment about the Claimant's mental health. Rather, he made a neutral comment to inquire as to the nature of her stress-related illness which the Claimant misinterpreted. We did consider that his decision to challenge the Claimant about her race discrimination complaint in the course of her absence reporting call was inappropriate, but that was not raised as an allegation against him in the claim.
- 8) On 29 April 2021, Ms Ludlow did say she had investigated the Claimant's grievance. The Claimant's allegation that Ms Ludlow had in fact failed to investigate is partly well-founded. Ms Ludlow had taken some steps, as set out at paragraphs 58, 64 and 83 above, but had not conducted a formal or documented investigation, because she viewed the matter as falling within the informal stage of the grievance policy. Given the serious nature of the Claimant's allegations, we considered that while there was no breach of the policy, the extent of the investigation was insufficient. Ms Ludlow did not say to the Claimant that there was no evidence that Mr Girbea was bullying her, that she should stop using the word racist because it was offending him, or that it was a misunderstanding and just two people competing against each other. She did say that she had not found any evidence that Mr Girbea was bullying the Claimant because of her race, and that it was inappropriate to use the word racist to describe him. Ms Ludlow did not fail to call the Claimant about a mediation; she called the following day.
- 9) The Claimant was not suspended between 30 April and 3 May 2021. However, she was not put on the rota and lost the opportunity to be allocated shifts during this period. We do not know if she would otherwise have been allocated shifts.
- 10) On 4 May 2021 at a conciliation meeting, Mr Girbea spoke over the Claimant and at one point his body language appeared confrontational.
- 11) On 4 May 2021, Mr Radley did not fail to take action against Mr Girbea. Mr Radley was not Mr Girbea's employer and was not in a position to take action (in the sense of instigating a disciplinary investigation or sanction) against him. However, we conclude that Mr Radley did fail to take the allegations against Mr Girbea seriously. We consider that is a fair inference to be drawn from his emails of 24 and 25 April 2021 (see paragraphs 79 and 81 above) in that he did not consider as a serious possibility that the Claimant's allegations could be true.
- 12) On 4 May 2021 after the conciliation meeting, Mr Girbea briefly held the Claimant's wrist, pantomimed boxing and said words to the effect, "*Come on, let's fight it out*".
- 13) Following the Claimant making an allegation on 4 May 2021 that Mr Girbea had assaulted and made threats of violence against her, Mr Radley and Ms Ludlow took some steps to investigate by Mr Radley viewing the CCTV and Ms Ludlow speaking to Mr Girbea. Ms Ludlow took action to the extent that she warned Mr Girbea that his conduct had been unacceptable. However, we do not consider the investigation or action taken were sufficient in the circumstances and a formal investigation was warranted.

- 14) Following the 4 May 2021 conciliation meeting, Mr Radley and Ms Ludlow failed to give feedback to the Claimant on the outcome of her allegation against Mr Girbea.
- 15) On 9 May 2021, Mr Girbea (together with an unidentified colleague) did re-do the Claimant's work.
- 16) Following the Claimant on 9 May 2021 reporting that Mr Girbea had re-done her work, Mr Radley did not change the Claimant's role so she was no longer allowed to arrange the milk. Rather, he reiterated that none of the day shift staff should set up the grid.
- 17) On 10 May 2021, Mr Day and Mr Conroy were not watching the Claimant.
- 18) On 10 May 2021, Mr Johnson did require the Claimant to sign a form saying she agreed to take an extra break.
- 19) On 10 May 2021, Mr Puwalski and an unidentified colleague (first name Steve, from ambient) did not gossip about the Claimant or make face gestures and movements relating to her.
- 20) On 10 May 2021, Mr Girbea did not bang a box on a table 4 to 5 times beside the Claimant.
- 21) On 12 May 2021, Mr Radley did not ignore the Claimant and fail to make eye contact with her.
- 22) On 16 May 2021, Mr Mead did not make a gesture and sounds of beating the Claimant's back with a 'rod' and smile when the Claimant challenged him.
- 23) On 16 May 2021, Mr Girbea, another agency worker named 'Alpha' and Mr Mead did not block the Claimant in and Mr Mead did not say "*You are going to have a problem working here*".
- 24) On an unknown date, 'Alpha' did not call the Claimant a snitch and make an offensive and racist comment towards her about her surname.
- 25) On an unknown date, 'Alpha' did not reference a white employee next to the Claimant and ask her, "*is that your sister*".
- 26) On 17 May 2021, Mr Igor Bysikiewicz did not deliberately drive his cage into the Claimant's cage, shout in the Claimant's ear, or when the Claimant was bent down, start banging the cage with his legs near her face. Neither did he bang a piece of metal on a table close to her.
- 27) On 18 May 2021, Ms Ola Bysikiewicz did not ignore the Claimant and shout at her when she asked for help.
- 28) On 18 May 2021, Mr Krzysztof Bysikiewicz did not stand in front of the Claimant's cage, shout stop and put his hand in front of her face.
- 29) On 19 May 2021, the Canteen Manager Ms Weeston did tell the Claimant off for not removing her tray. However, it is not the case that white staff were not asked to do this and the Claimant was treated no differently from the way other staff were treated. The issue of vicarious liability for direct race

discrimination therefore does not arise. On application of *Kemeh*, we would have held that the First Respondent was not in an agency relationship with Ms Weeston.

- 30) On 19 May 2021, Mr Johnson did tell the Claimant that her performance was low and she was late back from her break.
- 31) On 19 May 2021, Mr Day was not rude and aggressive to the Claimant. He did not ask her why her handset was turned off, call her a liar or lazy or say her performance was disgusting.
- 32) On 19 May 2021 Ms Ludlow did not suspend the Claimant from work, but rather said that the First Respondent had requested that she leave the site because of her conduct towards Mr Day. The Claimant was subsequently suspended. Ms Ludlow did not say to the Claimant that her performance was disgusting or allege that she swore at Mr Day's daughter.

Direct discrimination

189. For each of the factual allegations found on the balance of probabilities to have occurred, we next go on to consider whether there are facts from which we can properly conclude that the conduct amounted to treatment less favourable than that which would have been accorded to a person of a different race in materially similar circumstances and that the treatment was because of race. If the evidence shows such facts, then the burden of proof will shift to the applicable Respondent to show that the treatment was not direct race discrimination (s.136 EqA).
190. In relation to allegation 1), the Claimant says that on 10 March 2021, Mr Girbea treated her worse than a white Romanian agency worker named Magdalena. We were not provided with any evidence or information about Mr Girbea's relationship with Magdalena. In her grievance interview, the Claimant said that Mr Girbea had treated other people in the same way, "*black and white, both*". We do not have sufficient evidential material from which we could form a conclusion that Mr Girbea treated the Claimant worse than Magdalena, or that he treated her worse than an agency worker of a different race in otherwise similar circumstances would have been treated. Nor do we have evidence from which we could infer on the balance of probabilities that the reason for Mr Girbea's conduct was the Claimant's race. The Claimant herself could not adequately explain to the Tribunal why she believed his conduct was because of her race, although we accept it was her genuine belief.
191. Regarding allegation 3), the Claimant says that by not putting her on the rota between 10 and 13 April 2021, Ms Ludlow treated her worse than Mr Girbea, who is white and Romanian. The First Respondent had requested that neither colleague be scheduled in the immediate period following the Claimant raising concerns (see paragraph 57 above). Ms Ludlow spoke to Mr Girbea when he returned from holiday, and he was then allowed to return to work. The delay in the Claimant's return to work was because Ms Ludlow wanted to also meet with her before she did so. We conclude that Ms Ludlow did this to mitigate the risk of conflict in the workplace and not because of the Claimant's race.
192. Allegation 4) was that on 14 April 2021, Mr Girbea ignored the Claimant. We do not have a sufficient basis to find on the balance of probabilities that he would

- have treated a colleague of a different race differently to the Claimant or that the reason he ignored her was her race. Indeed, Ms Ludlow had warned him to leave the Claimant alone and concentrate on his own work (see paragraph 64 above).
193. In relation to allegation 5) we have found that on 24 April 2021, Mr Girbea stood closely behind the Claimant when she was picking, looked annoyed with her and sighed when she asked him a question. We do not have a sufficient basis to find on the balance of probabilities that Mr Girbea would have treated a colleague of a different race in otherwise similar circumstances more favourably, or that the reason for his actions was the Claimant's race. The evidence we have heard about Mr Girbea supports a conclusion on the balance of probabilities that he had become impatient with the Claimant because he thought she was working slowly.
 194. On allegation 6) we concluded that on 24 April 2024, Mr Day took some steps but failed to properly address the substance of the Claimant's complaint about Mr Girbea. While we considered that Mr Day's investigation was insufficient in light of the gravity of the Claimant's complaint, we do not have evidence from which we could infer that Mr Day would have treated a similar complaint from a worker of a different race more seriously, or that the reason why he acted as he did was the Claimant's race.
 195. In relation to allegation 8) we found that Ms Ludlow's investigation into the Claimant's earlier complaint about Mr Girbea was also insufficient. She said to the Claimant that she had found no evidence that Mr Girbea was bullying the Claimant because of her race, and that it was inappropriate to use the word racist to describe him. We do not have an evidential basis from which we could infer that she would have acted any differently had an agency worker of a different race complained about Mr Girbea or conclude that her reason for acting as she did was the Claimant's race. We accept that the sufficiency of her investigation was affected by the TUPE transfer and the matters set out at paragraph 70 above. We have found that Ms Ludlow believed Mr Girbea's denial of the Claimant's complaint. This was for the reasons she gave (recorded at paragraph 64 above) and not because of the Claimant's race.
 196. Under allegation 9) we found that the Claimant was not put on the rota between 30 April and 3 May 2021 and lost the chance that she may otherwise have been allocated shifts in this period. We conclude that the reason for this was that Ms Ludlow wanted to speak with the Claimant before integrating her back into the workplace and was not because of the Claimant's race.
 197. Allegation 10) was well-founded to the extent that Mr Girbea spoke over the Claimant in the 4 May 2021 mediation meeting and at one point his body language appeared confrontational. He explained during the meeting that he was frustrated by his own difficulty in communicating in English (see paragraph 91 above). We conclude that the reason why Mr Girbea acted as he did was because he was frustrated by his inability to express himself in English and he was trying to defend himself. The reason was not the Claimant's race.
 198. We have concluded in relation to allegation 11) that Mr Radley did not take seriously the possibility that the Claimant's allegations against Mr Girbea could be true. However, we do not have evidence from which we could infer that Mr Radley would have treated allegations made by a worker of a different race

more seriously or that the reason why he did not take the allegations seriously was because of the Claimant's race.

199. In relation to allegation 12), we found that on 4 May 2021, Mr Girbea held the Claimant's wrist, pantomimed boxing and said words to the effect, '*Come on, let's fight it out*'. When asked about his actions soon afterwards by Ms Ludlow, he said he had been trying to break the ice with humour (see paragraph 93 above). We do not have evidence on the basis of which we could conclude that Mr Girbea would have acted differently towards someone of a different race with whom he had come out of a similarly tense meeting, nor do we have evidence from which we could infer that the reason for his actions was the Claimant's race.
200. Going on to allegation 13), we concluded that the investigation into Mr Girbea's actions after the mediation meeting was insufficient. However, we did not hear evidence that could support a conclusion that a more thorough investigation would have been followed had someone of a different race raised the same complaint or that the reason for the treatment was the Claimant's race. Although the Tribunal viewed the situation more seriously, we accept that both Mr Radley and Ms Ludlow genuinely concluded Mr Girbea had been joking and therefore a formal investigation was not warranted.
201. Allegation 14) was that Mr Radley and Ms Ludlow subsequently failed to feedback to the Claimant what the outcome of the complaint she made on 4 May 2021 had been. The Tribunal considers this was very poor practice on their part, and unfortunately led to the Claimant feeling more vulnerable in the workplace. However, we do not have an evidential basis from which we conclude that a complainant of a different race would have been given feedback or that the reason for the failure was the Claimant's race. Rather, Mr Radley assumed it would be Ms Ludlow's role to liaise with the Claimant, while Ms Ludlow's capacity to do so was adversely affected by the matters detailed at paragraph 70 above.
202. In relation to allegation 15) we conclude that the reason why Mr Girbea redid the Claimant's work on 9 May 2021 was because she had arranged the milk grid in a different way to that he was used to, and not because of her race.
203. As for allegation 18), Mr Johnson asked the Claimant to sign a form on 10 May 2021 saying she had taken an extra break in the course of discharging his supervisory responsibilities for the Claimant, and not because of her race. The Claimant's grace period had elapsed, and her performance and timekeeping were being monitored, in the same way as all the workers in the depot.
204. Similarly, in relation to allegation 30), we conclude that Mr Johnson told the Claimant on 19 May 2021 that her performance was low, and she had come back late from her break because those things were true, and it was part of Mr Johnson's Lead Associate role to raise them with her. It was not because of the Claimant's race.
205. On 19 May 2021, Ms Ludlow told the Claimant that she had been requested to leave the site. We conclude that Ms Ludlow did so at Mr Radley's request, which in turn was because Mr Day had complained the Claimant had been rude to him. This was because of Mr Day's genuine misunderstanding of the Claimant's comment about treating her like his daughter. The Claimant's race was no part of the reason for the treatment.

Harassment

206. The factual allegations which are included in the harassment claim which we have found on the balance of probabilities to have occurred are those numbered 1), 4), 5), 6), 10), 12), 15), 18) and 30). There is no dispute that the conduct found in relation to each of these allegations was unwanted by the Claimant. In relation to each, we therefore go on to consider whether there are facts from which we could conclude that the conduct was related to race, in the sense described in *Nailard* and *Aslam*.
207. We conclude that Mr Girbea's conduct as found to have occurred in relation to allegations 1), 4), 5), 10), 12) and 15) was not related to the Claimant's race. We refer back to our conclusions at paragraphs 190, 192, 193, 197, 199, and 202 above. We do not have a sufficient evidential basis from which we could infer a causal link between Mr Girbea's actions and the Claimant's race, even on the broader test "*related to*" rather than "*because of*".
208. In relation to allegation 6) we found that on 24 April 2024, Mr Day took some steps but failed to properly address the substance of the Claimant's complaint about Mr Girbea. At paragraph 194 above we concluded that there was an insufficient evidential basis to find that the reason for the treatment was race. Was the treatment nonetheless "*related to*" race? Race was part of the background context because it was a complaint of racial discrimination, made by the Claimant, which Mr Day failed to adequately address. However, on considering the guidance in *Nailard* and *Aslam* set out at paragraphs 174 and 175 above, we noted that we cannot point to any specific feature of the evidence which shows that Mr Day's conduct was related to race. The fact that race was part of the background context does not provide a sufficient nexus to satisfy the test in s.26 EqA.
209. In relation to allegations 18) and 30) we are satisfied that Mr Johnson's conduct in asking the Claimant to sign a form to say she had taken an extra break on 10 May 2021 and raising performance and timekeeping issues on 19 May 2021 was not related to race. The reasoning set out in paragraphs 203 and 204 above applies.
210. Given that we have concluded that none of the factual allegations found to be proven which the Claimant contends amounted to harassment were related to race, there is no need for us to go on to consider whether the conduct had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Victimisation

211. We conclude that the Claimant's email to Ms Ludlow of 11 March 2021 titled "my complain" was a protected act for the purposes of s. 27(2)(d) EqA. The statement regarding Mr Girbea that "*this man is racist! And he does not like me. This is why He [sic] acts rudely and aggressive towards me!*" amounted to an allegation that another person (Mr Girbea) had contravened the EqA. This was not disputed by either of the Respondents.
212. We further conclude that the Claimant did a protected act for the purposes of s. 27(2)(d) EqA when she said to Mr Day and Mr Johnson on 24 April 2021 that

Mr Girbea, “*treats me differently from how he treats the other females... He is racist towards me.*” Again, this amounted to an allegation of an EqA contravention.

Mr Brill submitted that the Claimant saying in the same conversation that Mr Girbea had not said anything “*racial*” and had (only) told her to do her job, undermined her initial statement such that the conversation overall did not qualify as a protected act. However, the Tribunal’s view is that there is no contradiction between the Claimant accepting that there had been no explicitly racist comment made and yet still alleging that the conduct complained about was because of race.

213. The factual allegations which are included as allegations of detriment in the victimisation claim and which we have found on the balance of probabilities to have occurred are those numbered 8), 9), 30) and 32). There is no dispute that these matters amounted to detriments for the purposes of s.27(1) EqA. We therefore go on to consider whether there are facts from which we could conclude that the detriments were done because the Claimant did the protected acts. (We note that there was no alternative argument advanced before us that the detriments were done because of a belief that the Claimant may do a protected act.)
214. In relation to allegation 8) we found that Ms Ludlow’s investigation into the Claimant’s earlier complaint about Mr Girbea was insufficient. She said to the Claimant on 29 April 2021 that she had found no evidence that Mr Girbea was bullying the Claimant because of her race, and that it was inappropriate to use the word racist to describe him. Our discussion of this allegation in the context of the direct race discrimination complaint is contained at paragraph 195 above.
215. In relation to deficiency in the investigation, there is a causal link between the first protected act and the detriment; had the Claimant not made her complaint of 11 March 2021, Ms Ludlow would not have undertaken an investigation into it. However, that is not a sufficient causal link in the sense described in *A v Chief Constable of West Midlands Police* as cited at paragraph 186 above. We do not have an evidential basis to conclude that Ms Ludlow conducted a less thorough investigation because the Claimant’s complaint related to an alleged contravention of the EqA. Rather, we have accepted that Ms Ludlow genuinely believed that an informal investigation was appropriate (see paragraph 188(8) above) and was hampered by the matters set out at paragraph 70 above.
216. In relation to Ms Ludlow’s comments about Mr Girbea’s motivation, we have accepted that she believed his account for the reasons recorded at paragraph 64 above. We accept that the reason why Ms Ludlow said to the Claimant that she had found no evidence that Mr Girbea was bullying her because of her race, was simply to update the Claimant on the outcome of her investigation. However, we have given careful consideration to whether Ms Ludlow’s comment that it would be inappropriate to use the word racist, amounted to a detriment done because the Claimant did a protected act. When asked about this allegation in the course of giving her evidence, Ms Ludlow refuted the allegation that she told the Claimant to stop using the word racist because it was offending Mr Girbea. She went on to say that she had made a comment along the lines that it was not appropriate (i.e., to use that word to describe Mr Girbea). We are prepared to accept that there is a sufficient link between the nature of the Claimant’s complaint and this comment

to shift the burden of proof to the Second Respondent to show that the reason for the comment was not that the Claimant had done a protected act. However, we further conclude that the Second Respondent did discharge that burden of proof by Ms Ludlow's evidence. We accept that Ms Ludlow's motivation for her comment was to explain to the Claimant that, on the basis of her investigation, she thought it was wrong to say that Mr Girbea was racist. We know that Ms Ludlow had personally concluded Mr Girbea was not motivated by race. We do not consider that she was trying to prevent the Claimant from making future complaints or shut down her ability to express her own belief to the contrary. We therefore conclude that this comment did not amount to a victimisation detriment.

217. In relation to allegation 9), the Claimant not being put on the rota during the period 30 April to 3 May 2021 was detrimental because she lost the chance of being allocated to shifts in this period. If the Claimant had not made a complaint, her return to work would not have been delayed until the mediation meeting could be scheduled on 4 May 2021. To that extent, there is a causal link. However, the delay pending the meeting was not imposed because the Claimant had done protected acts, but rather in an attempt to resolve the issue between the Claimant and Mr Girbea before they worked together again. If the Claimant had made another type of complaint about Mr Girbea, unrelated to race, we consider that Ms Ludlow would have taken the same approach. Therefore, causation in the sense described in *A v Chief Constable of West Midlands Police* is not made out.
218. Coming to allegation 30), we do not consider that Mr Johnson on 19 May 2021 telling the Claimant that her performance was low, and she was late back from her break, had anything to do with the Claimant's complaints. Mr Johnson did daily performance walk-rounds as part of his Lead Associate role. The Claimant's performance data did show that she was below target, and she had taken a long break that day. There is no evidential basis for us to conclude that Mr Johnson's actions were because the Claimant had done protected acts.
219. Lastly, in relation to allegation 32), we conclude that Ms Ludlow asked the Claimant to leave the depot on 19 May 2021 for the reasons discussed at paragraph 205 above. It was not because the Claimant had done the protected acts.

**Employment Judge Barrett
Dated: 31 August 2023**