EMPLOYMENT TRIBUNALS

Claimant: Mr Olaoluwakiitan Oyekenu

Respondent: (1) BP Exploration Operating Company Limited
(2) BJSS Limited

Heard at: Watford Employment Tribunal
On: 16th,17th,22nd,23rd May, 25th July 2023

Before: Employment Judge Young
Members: Ms P Barratt
Ms S Boot

Representation
Claimant: In person (litigant in person)
Respondents: Mr N Roberts (Counsel for the First Respondent)
Mr E Nuttman (Solicitor for the Second Respondent)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal:

(1) The claim against the Second Respondent is dismissed upon withdrawal.

(2) The claim of direct discrimination on the grounds of race against the First Respondent is unfounded and is dismissed.

(3) The claim of harassment on the grounds of race against the First Respondent is unfounded and is dismissed.

(4) A costs hearing is to be listed. Parties to write to the Tribunal no later than 14 days after receipt of this judgment with dates to avoid.

REASONS

Introduction

1. By ET1 dated 22 May 2021, the Claimant brought claims for direct race discrimination & racial harassment and breach of contract against three Respondents. Early conciliation started 3 May 2021 against all three

Respondents and ended on 18 May for the Third Respondent, The Bridge (It Recruitment) Limited. Early conciliation ended on 20 May 2021 for both the First and Second Respondents. The claims outstanding by the close of the proceedings on 24 July 2023, were direct discrimination and harassment claims against the First Respondent.

Claims

2. By order dated 16 November 2022, Employment Judge Gordon Walker made deposit orders of £500 each in respect of the claims of direct race discrimination and racial harassment against the First Respondent, £500 for each in respect of the claim of direct discrimination and the claim for breach of contract against the Second Respondent. There was also a £500 deposit order made against the Third Respondent. However, by judgment of Employment Judge Welch dated 31 March 2023, the Third Respondent The Bridge (IT Recruitment) Limited was dismissed as a Respondent. The Claimant did not pay a deposit in respect of the claim for direct discrimination against the Second Respondent which we dismissed as part of these proceedings.

3. At the start of the hearing on 15 May 2023, the Second Respondent raised the issue identifying the claims that the Claimant paid the deposit to continue with. The Claimant paid £1500, when he was ordered to pay £2,000 if he wanted to pursue all his claims against both the First and Second Respondents. By email dated 29 April 2023, 00:23, the Claimant responded to the Tribunal's correspondence dated 22 April 2023 asking the Claimant what elements of his claim he paid the deposit for. The Claimant clarified in that email that he was pursuing the claims of direct race discrimination and harassment against the First Respondent and the breach of contract/ notice pay claim against the Second Respondent. The Claimant did not mention the outstanding claim of direct race discrimination against the Second Respondent. The Claimant explained that he was unable to afford to pay the deposit for the direct discrimination claim against the Second Respondent. The Second Respondent submitted that the direct race discrimination claim against them was automatically administratively dismissed.

4. The Tribunal adjourned to consider what had happened to the outstanding direct race discrimination against the Second Respondent for which the Claimant had failed to pay the £500 deposit. Investigations revealed that the race claim against the Second Respondent had not been dismissed administratively. After deliberation, considering both the Claimant's and Second Respondent submissions, the Tribunal decided as the claim had not been dismissed, under rule 39(4) Tribunal Rules of Procedure, the Tribunal dismissed the Claimant's claim of direct race discrimination against the Second Respondent.

5. Unfortunately, the hearing having been reduced in number of days, went part heard on 23 May 2023 and the matter was relisted to hear submissions on 24 July 2023 as all the evidence had been heard by close of the proceedings on 23 May 2023. At that point, the outstanding claims that the Tribunal had to consider were the direct race discrimination and harassment

claims against the First Respondent and the breach of contract claim against the Second Respondent.

6. However, by 6 June 2023, the Claimant wrote to the Employment Tribunal before the final day of the hearing on 24 July 2023 to withdraw all his complaints against the Second Respondent. We therefore dismissed the claim against the Second Respondent.

Issues

7. In the final analysis the issues that the Tribunal had to determine were:

Direct Race Discrimination (Section 13, Equality Act 2010)- Claim against the First Respondent

1.2 Did the First Respondent do the following things:

1.2.1 Between 9 and 23 March 2021 did Ms Jennie Long refuse to have meetings with the Claimant on the Project that he was working on?

1.2.2 On 17 or 18 March 2021 did Ms Jennie Long say to the Claimant in a Microsoft Teams meeting, "why have you joined the First Respondent"? No one else was present at this meeting.

1.2.3 On 22 March 2021 did Ms Jennie Long make the decision to terminate the Claimant's engagement? Did Ms Jennie Long fail, before making this decision, to?

(1) consult the Head of the Project; and/or
(2) (2) give the Claimant an opportunity to express his views, on the alleged defamatory information about the Claimant's performance provided by Mr Chris Flynn and Mr Chis Ottesen?

1.2.4 On 19 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask to see what work the Claimant had done? The Claimant says that this was not Mr Flynn's responsibility as he was not his line manager. Was this meeting part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract? No one else was present at this meeting.

1.2.5 On 22 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask the Claimant to save down (commit to GIT) an unapproved changed which the Claimant says was originally scheduled for Mr Chris Ottesen to do? During this meeting, did Mr Chris Flynn harass the Claimant to add him to the handover session between the Claimant and Mr Chris Ottesen? Was this meeting part of a plot to defame the professional and personal integrity of the Claimant with the

purpose of terminating the Claimant's contract? Mr Chris Ottesen was also present at this meeting.

1.2.6 Did the First Respondent refuse to investigate the Claimant's grievance of race discrimination dated 29 March 2021?

1.3 Was Mr Chris Flynn an employee or agent of the First Respondent?

1.4 Was that less favourable treatment? 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. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than Mr Chris Ottesen and Mr Chris Flynn, whose race he describes as White Caucasian.

1.5 If so, was it because of race?

1.6 Did the First Respondent's treatment amount to a detriment?

<u>Harassment related to Race (section 26, Equality Act 2010) -Claim against the First Respondent</u>

2.1 Did the First Respondent do the following things:

2.1.1 On 17 or 18 March 2021 did Ms Jennie Long say to the Claimant in a Microsoft Teams meeting, "why have you joined the First Respondent"? No one else was present at this meeting.

2.1.2 On 19 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask to see what work the Claimant had done? The Claimant says that this was not Mr Flynn's responsibility as he was not his line manager. No one else was present at this meeting.

2.1.3 On 22 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask the Claimant to save down (commit to GIT) an unapproved changed which the Claimant says was originally scheduled for Mr Chris Ottesen to do? Mr Chris Ottesen was also present at this meeting.

2.2 Was Mr Chris Flynn an employee or agent of the First Respondent?

2.3 If so, was that unwanted conduct?

2.4 Did it relate to race?

2.5 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?

2.6 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.

Hearing

8. We received typed witness statements from all the witnesses we heard from. We heard evidence over 4 days on 15th, 16th, 22nd, 23rd May 2023. We heard from the Claimant, Ms Jennifer (Jennie) Long a Product Manager employed by the First Respondent, Ben Cooper – employed by Second Respondent as the Client Principal acting as liaison between Second Respondent and First Respondent at the relevant time, Christopher (Chris) Flynn – Software Developer employed by ECS Digital Limited but contracted to work for the First Respondent, Christopher (Chris) Ottesen- Data Scientist employed by the Second Respondent contracted to work for the First Respondent at the relevant time.

9. We received a joint agreed bundle of 520 pages. The Employment Judge was provided with additional pages 168-172 as the equivalent pages in the electronic bundle copy were not clear. There was also a cast list and chronology produced by the First Respondent with the Claimant's track changes included which we were grateful for.

10. We were provided with an email dated 29 April 2023 00:43, which identified the claims that the Claimant paid the requisite deposit for, an email dated 30 January 2023, 16:44 explaining the reasons why the Claimant had not paid the deposit in relation to the direct race discrimination claim against the Second Respondent, an email dated 3 December 2022 07:41 of withdrawal against the Second Respondent in respect of the direct race discrimination claim against them, a disclosure disputes chronology from the Claimant, a bundle setting out the evidence of the Claimant's means and a costs bundle from the First Respondent.

11. We heard submissions on 24th July 2023. We received written closing submissions from the Claimant, the Claimant's response to the First Respondent's written submissions, written skeleton argument and written closing submissions from the First Respondent. We heard oral submissions from the Claimant and First Respondent that were consistent with their written submissions which we considered carefully.

Postponement application

12. On day one, the Claimant made an application for a postponement on the basis that he had not received specific disclosure requested from the First Respondent. The First Respondent's response was that it had, in the first instance asked the Claimant to wait until standard disclosure had taken place. However, although standard disclosure had taken place, the Claimant claimed that he still hadn't received the specific disclosure asked for. We enquired from the Claimant what documents remained undisclosed that he relied upon. The Claimant said that the actual documents had been disclosed but the entirety of the conversations between Mr Ottesen and Mr Flynn had not. The First Respondent denied this and said that they had used search terms to ensure that the chains of chat were complete. They

said that the Claimant alleged that the chain of chat conversations was materially incomplete without specifically identifying which chains of conversations were incomplete and that if the Claimant had provided specifics as to what was missing in the chat conversations the First Respondent may have been able to assist with providing those chats.

13. The Claimant said that the relevance of the missing chat conversations was because they were about his performance which was a key issue in the case. The Claimant also asserted in relation to the harassment claim against the First Respondent that there were missing logs in relation to an alleged discriminator. However, the First Respondent said they had not received a request for those logs. The Claimant was reminded that if the Tribunal considered that the First Respondent was unreasonably withholding relevant information, the Tribunal could draw adverse inference from that. The Claimant said in that case he was satisfied he could deal with the issue of the missing logs as part of this case. The Tribunal deliberated and considered the Claimant's application of postponement.

14. The Tribunal decided that the Claimant's application for a postponement was refused on the grounds having regard to the overriding objective that it was not in the interests of justice at this late stage to postpone the matter. The Tribunal accepted the First Respondent's explanation for why they had not provided the chats. In relation to the missing logs the Tribunal noted that the Claimant was satisfied that in the absence of any explanation, the Tribunal could draw adverse inferences from the absence of the disclosure.

Findings of Fact

15. The First Respondent is a company owned by BP PLC ("BP"). The First Respondent is an organisation of approximately 70,000 employees worldwide. The First Respondent has its own HR department and internal processes and disciplinary and grievance procedures which did not apply to contractors. The Second Respondent was an IT services management company, and the Third Respondent was an IT recruitment company.

16. In or around the beginning of February 2021, Mr Chris Ottesen who worked as a Data Scientist employed by the Second Respondent to work for the First Respondent was informed about a new project at BP by Mr Ben Cooper, the Client Principal at the time between the Second Respondent and First Respondent. **[165]** Mr Ottesen is white and ethnically Norwegian. In February 2021, Mr Ottesen was working as the lead software developer on a project called Bifrost for the First Respondent, which used the Python software language to build the KH Investigator ("KHI") which was a bespoke software product within the Bifrost Project. Mr Ottesen at the time was employed by the Second Respondent contracted to work for the First Respondent. Mr Ottesen was to move from the Bifrost Project over to the new project and there was a requirement to find a replacement as soon as possible as the Bifrost Project had not yet closed.

17. The First Respondent put out an advert for Mr Ottesen's role. On 15 February 2021, the Claimant was sent an email by the Third Respondent informing the Claimant about a contract opportunity with the First

Respondent for the role of Subsurface Ensemble Modelling lead (BP). The Claimant was invited to attend an interview on 19 February 2021 for this role.

18. The Claimant works as a software developer. The Claimant has a master's degree in mathematics and computing for finance and over 15 years experience in investment banking software development. The Claimant is Black and ethnically Nigerian.

19. The Claimant was supplied by a recruitment company called Champion. The Claimant was interviewed by Mr Ottesen of the Second Respondent first on 19 February 2021. Following the interview with the Claimant, Mr Ottesen formed the view that the Claimant interviewed well, and that the Claimant was an excellent candidate. By excellent, Mr Ottesen believed that the Claimant had the necessary technical background in Python. On 23 February 2021, Mr Ottesen recommended the Claimant to Ben Cooper of the Second Respondent for appointment. Mr Ottesen also recommended the Claimant to BP saying the Claimant "*seems like a solid Python developer*" [174]

20. On 25 February 2021, the Claimant was interviewed by Martin Wall (Principal Project Manager) who is white and Obiajulu Isebor aka Mr Obi (Reservoir Engineer) from the First Respondent for a role as a Python Developer Bifrost Project. Mr Obi was the KHI owner and a project manager on the Bifrost team who was based in Texas in the USA. Mr Obi is ethnically a Black African. The Claimant accepted, (as do we) that the Claimant was not required to demonstrate any coding skills at either interview.

21. Ms Jennie Long who was to be the Claimant's line manager was away on leave during the interview process and that is why Mr Obi and Mr Wall were asked to interview the Claimant. Ms Long's race is white and was a product manager at BP at the relevant time. Ms Long told us that she had some training on diversity and inclusion, although the training was not specifically on race discrimination. Ms Long accepted that the training she received would require her to apply her training to contractors like the Claimant as well as employees of the First Respondent. Ms Long said that the training she received would require her to treat the Claimant with respect and make decisions based upon merit and performance and nothing else.

22. On 1 March 2021 Ms Long returned to work. On 4 March 2021, following the ok from Mr Wall, Mr Obi informed Mr Ottesen that the Claimant was to be offered the role. Mr Cooper emailed Ms Long to ask her about the Claimant's start date, Ms Long said she wanted a start date of 15 March, but a start date of 10 March was finally agreed. Ms Long also said *"the most important thing is that we don't lose Kiitan"* [186]. We find that Ms Long was keen to ensure that the Claimant come and work for BP.

23. On 5 March 2021, the Claimant was offered the role with the Second Respondent through the Third Respondent at a daily rate of £530 for a period of 12 months. The Claimant's start date of 10 March meant Mr Ottesen was asked to stay on the Bifrost Project for another week in order to do a proper handover to the Claimant. Mr Ottesen was happy about this

development. [200].

24. On 8 March 2021, Ms Long set up an account for the Claimant [215]. On 9 March 2021, Ms Long emailed the Claimant twice. The first email said *"Welcome to the team! Looking forward to working with you."* [229]. She also told the Claimant in that email to reach out to her if the Claimant had any problems or questions. The second email said it would be good to say hi *"at some point when you're up and running with your account"* [234]. We find that Ms Long was of the view that she wouldn't meet the Claimant until the onboarding process was complete and the Claimant had to some extent bedded in. Ms Long told the Claimant she was busy on the morning of the Claimant's first day but offered her assistance to the Claimant on the afternoon of his first day. We find that Ms Long was responsible for the Claimant's IT onboarding and that Ms Long went about the IT onboarding process in the way she would have with any other contractor in her team.

25. The Claimant started working for the First Respondent on 10 March 2021. At this point in time everyone has been working from home and so all communications between the Claimant the Bifrost Team and Ms Long were through Teams, Chat, email, or telephone. It was clear that on the Claimant's first day his IT account was not online and so the Claimant could not access the First Respondent system as would be necessary to carry out any work. The Claimant had been given a laptop by the Second Respondent and had access to the Second Respondent work environment. Ms Long asked Mr Ottesen how the Claimant was getting along. Mr Ottesen agreed to set up a call with Ms Long once the Claimant's IT issues were resolved. The Claimant joined a group Teams meeting on 10 March 2021 where he met the Bifrost team including Mr Flynn.

26. The Claimant was told on his first day that Martin Wall was his sponsor/manager [243] not Ms Long. It was only on 11 March 2021, that the Claimant is told that Ms Long was the Bifrost project manager [243]. On 11 March 2021, on being asked who Ms Long was by the Claimant, Mr Ottesen sent a chat to the Claimant, saying *"I will arrange a call with her once you're online"* [247]. We accept the Claimant's evidence that when he received the "welcoming" emails from Ms Long, he did not know who she was, he thought she was HR. The Claimant said he did not know that Ms Long was his line manager when he asked to have a 5 minute chat with her.

27. The Claimant decided that the Second Respondent's laptop was not compatible with the First Respondent's work environment and so used his own personal laptop to gain access to the First Respondent's system, which he did on 12 March 2021. The Claimant, however, still did not have a BP account or access to the high performance computer ("HPC") which would give the Claimant the ability to make changes and input into the KHI code. However, the Claimant was able to join the Bifrost "dev chat" (Teams chat) that day and was welcomed by Mr Ottesen and Mr Flynn [299]. It was the Claimant's understanding at that point, that there were fundamental outstanding issues about the KHI software, and these would be handed over to him from Mr Ottesen.

28. On 15 March 2021, the Claimant asked Ms Long for details to enrol his laptop. Ms Long copied the Claimant in her actions [325]. The Claimant had not up to this point asked to meet Ms Long. However, based upon his communications with Mr Ottesen and emails from Ms Long, the Claimant had an expectation he would meet with Ms Long once he was online.

29. The Bifrost Project had daily stand up meetings where the team could present any problems with the software and offer solutions. On 16 March 2021 in the morning the Claimant and Ms Long joined the same daily stand up meeting [329]. However, the Claimant did not have his camera on when Ms Long was in the meeting and so she did not see the Claimant on 16 March 2021. [329]. At 10:29 the Claimant requests a 5 minute video chat to meet Ms Long [329]. Ms Long responded at 13:30 and said she can chat either that afternoon or the following day on 17 March 2021. The Claimant opted for chatting on 17 March 2021. The Claimant did not say this in the chat message, but the Claimant's evidence was this request as a request for a one to one where timelines and expectations would be discussed. We find that although this was the Claimant's intention, we accept Ms Long's evidence that she regarded this request as an introductory meeting not a one to one. We find that Ms Long did not refuse to attend the proposed meeting by the Claimant on 16 March, but gave him other options of her availability. There was no particular urgency for Ms Long to meet the Claimant at this point that could not wait until the following day.

30. By 11:52 on 16 March 2021, the Claimant finally gained access to the HPC and could start coding. [332]

31. When Ms Long spoke to the Claimant on 17 March 2021, the Claimant said that Ms Long was surprised to see the Claimant. Ms Long did not contest this in her evidence. We accept that Ms Long appeared to the Claimant surprised to see him. We do not accept that means that Ms Long was surprised to see the Claimant but that it appeared to the Claimant that she was. The Claimant did not provide any evidence as to what it was that led him to believe that Ms Long was surprised to see him. The Claimant said that Ms Long was impersonal and distant when she met him, that when she sent emails on 9 and 10 March 2021 that he was only a name then and she had not met him. We accepted Ms Long's evidence that whilst she had not line managed a Black African before, but she had managed a contractor of Indian background and she did not meet that contractor on her first day. She had worked with people from Black African background as she had worked with Mr Obi for a few months. We find it would have been unlikely that she was surprised that the Claimant was Black.

32. We heard evidence that Mr Flynn was not met by his line managers at BP on their first day, which we accepted.

33. In the conversation on 17 March 2021, which lasted 5 minutes, the Claimant said that Ms Long asked him why he wanted to join BP. Ms Long's evidence was that she does not recall asking the question, but said that if she did say those words, it would be because she wanted to know what the Claimant's interest was in the role. We find that Ms Long did ask the Claimant why he

had joined BP. The Claimant said he felt that the question was unreasonable and was about him having to justify himself. The Claimant said in evidence that Ms Long did not ask him about his plans in BP. Ms Long didn't say she did ask the Claimant about his interest in the role. Ms Long said that she would have made the comment because she wanted to know what the Claimant's interests in working for BP were, so that she could look at what other projects in BP the Claimant could undertake when Project Bifrost was completed. We accept Ms Long's explanation for why she would have made the comment, Project Bifrost was coming to an end and the Claimant's contract was for 12 months, it was anticipated that he would be doing something else once Project Bifrost was completed. The Claimant accepted in evidence that this comment was an acceptable comment in isolation when a person joined an organisation. Although we accept the Claimant's evidence that he told his partner about how indignant he felt about the comment at the time, we find that the Claimant couldn't have been as indignant as he expressed as he did not raise an issue about the comment at the time with any of the Respondents.

34. Mr Flynn gave evidence that he only had a couple of hours introduction when he started on Project Bifrost with BP. Mr Flynn was in March 2021 employed by ECS Digital Limited but contracted to work for the First Respondent. Mr Flynn was not an employee of the First Respondent. There was no evidence available to us to suggest that Mr Flynn ever acted as an agent for the First Respondent or have authority to do so on behalf of the First Respondent. Mr Flynn who is also a software developer explained that Mr Ottesen and other software developers on the Project gave him tasks to do as soon as he started. Mr Flynn's handover was being talked through the job. Following the talk through, Mr Flynn said he was expected to get on with the role and to demonstrate some value. Mr Flynn said he did not know who his line manager was when he started on the Project. Mr Flynn worked on the back end of the KHI which Mr Ottesen described as the brain of the Project.

35. Mr Ottesen's evidence about his introduction to the Project was similar, he said he had a couple of introductions and had to hit the ground running so to speak. We accepted Mr Flynn and Mr Ottesen's evidence. We find it appears that in many respects the Claimant was treated more advantageously than Mr Ottesen and Mr Flynn when the Claimant started the role. We accept Ms Long's evidence that the normal onboarding process for contractors was to be handled by the lead on the Project regardless of whether that lead was a contractor or not. We find that there was nothing unusual about Mr Ottesen carrying out the Claimant's onboarding process rather than Ms Long according to BP practices.

36. The Claimant was unable to identify what meetings he said that Ms Long refused to have with him. We find that Ms Long did not refuse to have a meeting with the Claimant at any time between 9 -23 March 2021.

37. Once the Claimant had access to the HPC on 17 March 2021, Mr Ottesen walked the Claimant through the code, this walk through happened via Microsoft Teams. Mr Flynn was unclear when Mr Ottesen first approached him to speak about the Claimant, but they had a meeting about the progress

of the Claimant at 11:00 on 18 March 2021. Mr Flynn agreed to join Mr Ottesen's handover sessions with the Claimant, so that Mr Flynn could form a view about the Claimant's capability. Mr Flynn said that he was not assessing the Claimant, but we find that Mr Flynn was assessing the Claimant. Having attended a walkthrough the code with Mr Ottesen and the Claimant, Mr Flynn's view was that the Claimant was making very little progress despite what he described as sound instruction. Mr Ottesen accepted that he had an indirect communication style.

38. On 18 March 2021, Mr Ottesen invited Mr Flynn to the Claimant's walk through. The Claimant is not told why Mr Flynn is there. Mr Flynn also attends a debugging session with the Claimant and Mr Ottesen on 19 March 2021 at 1:30 in the afternoon. **[278]** On 19 March 2021, Mr Ottesen tells Mr Flynn that the Claimant did not carry out the task that he asked the Claimant to do. The Claimant contests this and says that he was not told to complete the task by himself. We accept Mr Ottesen's evidence that he was not experienced in supplying feedback. We find that there was a breakdown in communication, we find Mr Ottesen's indirect style of communication meant that he did not make it clear to the Claimant what he was being asked to do. So, the Claimant did not do the task.

39. We find that Mr Flynn did ask the Claimant on 19 March 2021 to show him what code he had written. We can understand why the Claimant found this objectionable. Mr Flynn was not his manager, Mr Flynn was not doing the handover, the Claimant was not given the real reason why Mr Flynn was asking to see his work or was in the meetings with him and Mr Ottesen. Anyone in the Claimant's position would have found this request objectionable. We do not accept Mr Flynn's evidence that he wanted to see the Claimant's work because he wanted to provide assistance to the Claimant. However, we do not find that it was part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract.

40. We find that it was part of the Agile working culture, where there were weekly standup meetings and where peer review was common when software developers were working on the same code. It was an enquiry made by Mr Flynn in order to assess the Claimant's work so that he could give a view to Mr Ottesen. We do not find that Mr Flynn had any particular interest in seeing the Claimant's contract terminated. The Claimant did not complain or raise any issue about Mr Flynn being asked to join the handover meetings with himself and Mr Ottesen at the time.

41. Mr Ottesen had suggested that Mr Flynn was invited as a backup in case he was busy **[309]** Whilst the Claimant questioned what work he was supposed to have shown Mr Flynn as he was not assigned any work, we did not take this to mean that the Claimant did not think he was supposed to do any work. The Claimant at that point didn't believe he had been assigned any work. This was not entirely the case as the Claimant had been asked to carry out some debugging **[309]** which the Claimant acknowledged in evidence. The Claimant believed that he was at that stage, learning the

ropes and gaining an understanding of what was required of the role. We accept that this was the Claimant's understanding.

42. It is clear that the following week, 22 March 2021 onwards that the Claimant was undertaking work **[309]**. The Claimant says on 22 March 2021 Mr Flynn asked him to save his work to GIT. Mr Flynn accepts that he did ask the Claimant to do this. The area of conflict arises from the Claimant's position that it was not his role to save an unapproved change to GIT but Mr Ottesen's and to ask him to do so amounted to harassment or direct discrimination. Mr Ottesen and Mr Flynn are clear that saving to GIT is standard practice to enable other software developers to view and use work that has been added. We find that the work the Claimant was asked to do was not an unapproved change and that to save it to GIT was standard practice as Mr Ottesen and Mr Flynn asserted. The meeting was not part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract. We find at no time when he was assessing the Claimant did Mr Flynn put himself out as anything other than a contractor for the Second Respondent.

43. By 22 March 2021, the Claimant was doing work and so if the Claimant did any work that would be useable it would have to be saved to GIT and the Claimant must have known this.

44. On 22 March 2021, the Claimant had a meeting with Mr Flynn. Mr Ottesen asked Mr Flynn if the Claimant had *"progressed with the GUI" [***354]** between the meetings on 19 and 22 March, Mr Flynn replied *"no progress, says he's waiting to do it with you"* **[354-355]**; Mr Ottesen replies *"#facepalm"*; *"oh man, this is not good. He was deliberately tasked to this himself"*.**[355]**

45. Mr Ottesen and Mr Flynn agree that Mr Flynn would meet with the Claimant as Mr Flynn does not want to take up Mr Ottesen's time on so small a task. Mr Ottesen agreed but says that Mr Flynn could form an uninfluenced view of the Claimant's work. **[355]**. Mr Flynn sets up a meeting with the Claimant for 10am. However, at 10 am, Mr Flynn tried to call the Claimant for the meeting, however the Claimant did not answer. Mr Ottesen had by now formed the view that the Claimant was always late to meetings and told Mr Flynn that the Claimant was late to calls he set up too. **[358]**. After Mr Flynn's meeting with the Claimant, Mr Ottesen asked Mr Flynn whether his opinion of the Claimant had changed. Mr Flynn confirmed that it had not.

46. Mr Ottesen had already set up a meeting with Ben Cooper of Second Respondent for 11am that day to discuss the Claimant [168]. Prior to Mr Flynn's meeting with the Claimant at 10:30am, Mr Ottesen wrote to Ben Cooper explaining his concerns about the Claimant [169]. Mr Cooper had asked Mr Ottesen how the Claimant was getting on, on 17 March 2021 and Mr Ottesen was now updating him on 22 March 2021. Mr Ottesen wrote to Mr Cooper "*it is very bad indeed. Basically, he is not doing anything, and while he seems to have a good understanding of algorithms and python concepts, he is incapable of writing software. Despite having 15 years of software engineering experience, he can barely write code and use an IDE (I've never had to tell a developer where he can find his files in the file*

browser or how to copy and paste before). We have given him several simple tasks, and he has failed all of them." [169] We find that Mr Ottesen's assessment of the Claimant's competence was based upon Mr Ottesen's experience and assessment of the Claimant's coding and technical knowledge, through the walk-throughs in the previous 2 weeks. Mr Ottesen also mentioned that Mr Flynn agreed with his assessment of the Claimant. Mr Cooper asked to be invited to a meeting with Ms Long and Mr Ottesen, which Mr Ottesen set up for 5pm on 22 March 2021 and also included Mr Flynn to attend. [367- 368]. Before the meeting at 5pm, Mr Ottesen and Mr Cooper had a telephone call where Mr Cooper took the view that he would recommend to BP that the Claimant's contract be terminated, and Mr Ottesen conveyed this view to Mr Flynn later that day but before the 5pm meeting [358].

47. The Claimant's position was that he had noticed what he considered fundamental issues about the software that Mr Ottesen was trying to hand over to him. The Claimant said that he noticed major errors with the software and consistent complaints from the users as early as 15 March 2021. It was the Claimant's view that all the error fixing was the responsibility of Mr Ottesen. We find that this was an unrealistic view. Whilst in an ideal world it would have been preferable for Mr Ottesen to fix all the errors before handing the code over to the Claimant, we find that this was not realistic, and the Claimant knew as a contractor that it was his job to pick up the code where it was once he started.

48. The Claimant's view was that none of the code was his responsibility until the handover was complete and the Claimant said he didn't know what the timelines were for the handover as no one had told him. He said that no one had specifically said that the handover was a week. We find that no one did tell the Claimant that the handover was a week and that he would have responsibility for the code after a week. There were no clear and specific expectations given to the Claimant.

49. In the meeting on 22 March 2021 which was delayed to 6pm, Mr Cooper recommended to Ms Long representing BP that the Claimant's contract should be terminated. Mr Ottesen explained to Ms Long that the Claimant did not have the required skills for the role that he was engaged to do. Mr Ottesen confirmed to Ms Long that the handover of his duties to the Claimant and the new work that the Claimant was asked to perform had not been going well. Ms Long said that she recalled that Mr Ottesen said that he did not think that the Claimant had the suitable skills to carry out the role, and he was having to provide a significant amount of support to the Claimant on basic tasks. Ms Long asked for Mr Flynn's view, and in that meeting, Mr Flynn agreed with Mr Ottesen's assessment of the Claimant's technical performance. Ms Long asked for examples of what the Claimant could not do. Ms Long said that she remembered being surprised at some of the examples provided by Mr Ottesen, as she believed that she would have been able to do them as they were tasks that you would expect to learn in the early stages of a Python training course. Ms Long did not provide in evidence any of the examples that she said was provided to her. Ms Long did not ask for written evidence of the Claimant's performance. But Ms Long

did say that she did ask in the meeting whether the Claimant had been given an opportunity to prove himself.

50. Ms Long said that she remembered feeling shocked because she did not expect that given the Claimant's previous technical experience on his CV. Ms Long said that the meeting was the first time she was aware of the Claimant's performance issues as she had no visibility over the Claimant's work product. She said that from the discussion in the meeting, she got the impression that Mr Ottesen, Mr Flynn, and Mr Cooper had been concerned for some time. Ms Long said that she trusted Mr Ottesen's and Mr Flynn's judgment completely as she had worked with them for years. She accepted that the view formed of the Claimant was a subjective view and because she was not a software developer, she had to rely on Mr Ottesen's and Mr Flynn's technical expertise. Ms Long decided to terminate the Claimant's employment. There are no notes of the meeting.

51. We did read the examples provided by Mr Ottesen to Mr Cooper of the Claimant's performance [170], however we acknowledge that this was not a document provided to Ms Long before she made the decision to terminate the Claimant's contract. We find that the document containing examples at page 170 did not have an impact on Ms Long's decision to terminate.

52. We find that the meeting happened as Ms Long relayed it. However, we also find that Ms Long did not ask if the assessment of the Claimant's performance had been verified with the Claimant. We find that the Claimant was not consulted with at all by Mr Ottesen or Mr Flynn about his technical ability before they fed back to Ms Long about his ability. This was unfair and unreasonable. Most if not all contractors, including Mr Ottesen would want to have been consulted about their performance before a decision about their employment was going to be made. We find also that it was not fair for Ms Long to make a decision to terminate the Claimant without the Claimant being consulted about his alleged incompetence. Ms Long did not adhere to her training to treat all contractors with respect. It made little sense to get rid of the Claimant so quickly having regard to the costs of recruitment.

53. Ms Long didn't ask the views of Mr Obi or Mr Bilal Rashid, (who was ethnically Asian) of the Claimant's competence. The Claimant said that he considered that it was Mr Obi who was head of the Project. It was Mr Obi that the Claimant believed the First Respondent should have consulted on the decision to terminate him. We accept Ms Long's explanation that she did not feel it was appropriate to ask as Mr Obi and Mr Rashid were not involved in the full workings of the Claimant's handover. But we find that Ms Long did not ask Mr Obi and or Mr Rashid because she believed Mr Ottesen and Mr Flynn entirely and trusted their judgment regarding the Claimant's performance as they were the software developers and she had worked with them for years and Mr Obi and Mr Rashid were not software developers. We also find that Ms Long did not ask Mr Wall about the Claimant. But it would make no sense to ask him as he was not a software developer but more importantly there was no evidence that he had any interaction with the Claimant's code or performance. When Mr Flynn gave his view about the Claimant, he was not doing that as an agent of the First

Respondent. The decision to terminate the Claimant was Ms Long on behalf of the First Respondent.

54. We accept Ms Long's evidence that she could recall a similar scenario with a white contractor who was terminated for poor performance. We accept Mr Cooper's evidence that the Claimant was replaced with Ellie Turner, a junior developer, who was interviewed by BP and eventually started on 1 May 2021. Ms Turner had to successfully complete a coding test before she could be given the contract. We were not provided with any evidence as to the replacement contractor's race. We find that the Claimant was replaced with a female contractor on the Project, although the circumstances were not the same as the Claimant's as she was required to do a coding test and the Claimant was not. We accept that Ms Turner was recruited because she passed the coding test and as a junior member of staff cost less.

55. The Claimant's employment was terminated on the morning 23 March 2021[374]. The Claimant says that at that stage he was told that the reason for his termination was he was not completing the tasks given to him and he barely understood the code written by someone else and that he was waiting on Mr Ottesen [377]. The Claimant was sent an email dated 23 March 2021 at 09:19 telling him that his contract with the Second Respondent was being terminated for poor performance. [378]

56. The Claimant sought an explanation of Mr Flynn's involvement in his termination. He contacted Mr Ottesen who pretended that he didn't know anything about why the Claimant had been terminated, calling it "*odd"* and "one of the *"quirks of contracting*" [425]. We find that the behaviour of Mr Ottesen extremely poor behaviour but was motivated by cowardice. We also accept Mr Ottesen's evidence that had he been in the Claimant's situation he would have wanted to be spoken to about this performance before the decision to terminate his employment was made.

57. Ms Long also explained in evidence of Mr Obi's reaction to the news that the Claimant had been terminated was that Mr Obi accepted the decision. She said that Mr Obi did make a comment along the lines of that explained why it was taking a long time to show small bits of code. Ms Long said there was no record of the conversation.

58. The Claimant also wrote to Mr Obi immediately after been told he was being let go to let him know his contract had been terminated. All Mr Obi said was that he was caught a bit by surprise [377]. The Claimant explained that someone had decided that he was not completing work and could barely understand the code. We find that Mr Obi whilst surprised, was not told of the Claimant's view that he had been terminated because of his race. The Claimant did not mention the issue of race discrimination until his grievance on 29 March 2021. However, we find that Mr Obi having had some involvement in the code the Claimant wrote could have given a view about the allegations against the Claimant but did not. We find that Mr Obi did not act as if there was a problem with the Claimant being terminated as there is no evidence that he challenged the Claimant's termination even when he heard of it from the Claimant.

59. The Claimant raised a letter of grievance dated 29 March 2021 which was sent by email to the First Respondent and Second Respondent [433, 434-438]. The Claimant asked for his grievance of racist bullying and harassment by Mr Flynn and Ms Long and the termination of his contract in breach of company procedure be investigated under the First Respondent's grievance process and the Second Respondent's grievance process. The Claimant's grievance letter was acknowledged by the First Respondent HR on 29 March 2021 [439]. By email dated 30 March, the First Respondent said that as the Claimant was a contractor, he should take up his grievance with the agency that he was employed by, and the agency would contact the First Respondent.[430] The Claimant responded the same day and explained that he had taken up his grievance with the Second Respondent. The Claimant said that the acts of discrimination were carried out by a BP employee. [430] The First Respondent HR responded on 31 March 2021, that they had looked into the matter and that the Claimant's grievance should be handled by the Claimant's employer not BP. The Claimant responded on 31 March 2021, clarifying that he considered himself a consultant employee of BP [429]. On 1 April 2021, the First Respondent HR emailed the Claimant sympathising with the Claimant by acknowledging his frustration. The HR complex inquiry specialist writing the email on behalf of the First Respondent's HR asked the Claimant for the Second Respondent's details. The Claimant provided Lara Ramsay as a point of contact for the Second Respondent.

60. On 13 April 2021, the HR complex inquiry specialist emailed the Claimant to explain that they had not received a response from the contact details of the Second Respondent provided by the Claimant and asked for confirmation that the Second Respondent had received the Claimant's grievance. The HR complex inquiry specialist sent a follow up email the same day and concluded that no further action would be taken, and the case would be closed because the grievance should be dealt with by the Claimant's own employer. By email dated 13 April 2021, the Claimant protested at the case being closed [427]. However, by email dated 21 April 2021, The HR complex inquiry specialist confirmed that there was nothing further that they could assist the Claimant with, and the case was closed. We find that the First Respondent did refuse to deal with the Claimant's grievance, and this was because the Claimant was not an employee of the First Respondent. We find the HR complex inquiry specialist made the decision not to proceed with the grievance because the grievance should be dealt with by the Claimant's own employer. We note that the Claimant was told that as he was not an employee of Bridge IT, but that the HR provision of the Third Respondent were unable to treat his concerns as a grievance, but they could look into it as a complaint and advise the Claimant of the outcome. [453] The Claimant did not take them up on their offer.

Relevant Law

Burden of Proof in Discrimination

61. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a

certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

62. The burden of proof is set out at Section 136 Equality Act 2010 ("EQA 2010"). Section 136 EQA 201 says: -

> *"(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."*

63. In discrimination cases, there is a two stage burden of proof (see Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 the test recognises that the fact that discrimination is often covert and rarely admitted to.

64. In Igen v Wong the Court of Appeal endorsed guidelines set down by the EAT in Barton v Investec. In the first stage of the test, the Claimant has to prove facts from which the Tribunal could decide, in the absence of an adequate explanation by the Respondent, that discrimination has taken place. If the Claimant fails this stage, the claim cannot succeed. If the Claimant overcomes this hurdle, then the second stage of the burden of proof comes into play and the burden shifts and the Respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

65. This two stage burden applies to all of the types of discrimination complaints made by the Claimant. In Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913 the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

66. The Supreme Court has more recently confirmed, in Royal Mail Group Ltd v Efobi [2021] ICR 1263, that a Claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a Claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Employment Tribunal could infer an unlawful act of discrimination.

67. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination or harassment is not enough.

68. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence".

69. As set out above at the first stage the Claimant must prove "a prima facie case". "However, the bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that there has been discrimination. Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted it is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

70. It is, however, not necessary in every case for the Tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the Tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal ("EAT") pointed out in Laing v Manchester City Council [2006] IRLR 748 "*If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever"*.

71. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another 2017 EWCA Civ 1913.

Harassment

72. Section 26, EQA 2010 sets out the legislative framework for harassment.

"(1) A person (A) harasses another (B) if—

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

(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;"

73. Section 41(2) EA 2010 2010 states *"A principal must not in relation to contract work harass a contract worker."*

74. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find and employer liable for harassment: a. Did the employer engage in unwanted conduct, b. Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, c. Was that conduct on the grounds of the employee's protected characteristic?

75. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant himself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

76. Not every comment that is slanted towards a person's race constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase (Richmond Pharmacology v Dhaliwal).

77. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

78. Although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so.

79. An action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. (Section 212 EQA 2010). This is because the definition of detriment excludes conduct which amounts to harassment.

80. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

Direct Discrimination

81. Section 13 EQA 2010 sets out the statutory position in respect of claims for direct discrimination because of race.

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

83. Section 23 EQA 2010 deals with comparators and states that:

"there must be no material difference between the circumstances relating to each case."

84. Section 41 (1) (d) EQA 2010 states "(1) *A principal must not discriminate against a contract worker by [….] (d) subjecting the worker to any other detriment"*

85. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the House of Lords held that the relevant circumstances must not be materially different between the Claimant and the comparators, so the comparator must be in the same position as the Claimant save in relation to the protected characteristic.

86. Lord Hope's judgment in Shamoon clarifies that a sense of grievance which is not justified will not be sufficient to constitute a detriment.

87. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider: a. Was there less favourable treatment? b. The comparator question; and c. Was the treatment 'because of 'a protected characteristic?

88. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination claims. Mummery LJ giving judgment says at paragraph 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."*

89. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was.

90. In Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276, Lord Justice Sedley adopted the approach set out in Madarassy v Nomura that 'something more' than a mere finding of less

favourable treatment is required before the burden of proof shifts from the Claimant to the Respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal.

91. In Glasgow City Council v Zafar [1998] ICR 120, a pre 2010 race discrimination case, Lord Browne-Wilkinson recognised that "*discriminators do not in general advertise their prejudices: indeed, they may not even be aware of them*". It is unusual to find direct evidence of discrimination. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the Claimant's evidence but also from the full factual background to the case.

92. A Tribunal is not required to infer from evidence that an employer has behaved unreasonably, that there has been less favourable treatment because of race. It was established in the House of Lord authority of Glasgow City Council v Zafar, that it cannot be inferred, nor presumed, from the fact an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.

93. Unreasonable behaviour is not, in itself, evidence of discrimination (Bahl v The Law Society [2004] IRLR 799) although, in the absence of an alternative explanation, could support an inference of discrimination (Anya v University of Oxford & anor [2001] ICR 847). If the burden shifts to the alleged discriminator, then it must prove, on the balance of probabilities, that race was not a ground for the less favourable treatment.

94. In London Borough of Islington v Ladele [2009] ICR 387 the EAT gave the following guidance to Tribunals dealing with claims of direct discrimination: a. The crucial question for the Tribunal is to determine the reason why the claimant was treated as s/he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. b. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, discrimination is made out. It need not be the main or only reason but must be more than trivial. c. Direct evidence of discrimination is rare, and Tribunals often have to infer discrimination from all the material facts. The two stage burden of proof applies. d. The explanation for the less favourable treatment does not have to be a reasonable one and may indeed be that the employer has treated the claimant unreasonably. Unreasonable treatment is not sufficient to justify an inference of unlawful discrimination. e. It is not necessary for a Tribunal to go through the two stage burden of proof in every case. In some cases, it may be appropriate for the Tribunal just to focus on the reason given by the employer and, if it is satisfied that it is a non-discriminatory reason, to go no further. If a Tribunal decides or decides not to infer discrimination from the surrounding facts, it should set out in some detail its reasons for doing so. g. It is implicit in the concept of direct discrimination that the claimant is treated differently than the statutory comparator is or would be treated.

Liability of employers and principals & employees and agents

95. Section 109 EQA 2010 provides that:

"(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.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A – (a) from doing that thing, or (b) from doing anything of that description..."

96. In order to fall within s109 EA 2010 2010, to find the First Respondent liable for any alleged race discrimination of Mr Flynn, the Claimant must show that Mr Flynn as a contractor was an employee or agent of the First Respondent this falls under section 110 EQA 2010.

97. Section 110 states *"(1) a person (A) contravenes this section if:*

a. A is an employee or agent,
b. A does something which, by virtue of section 109 (1) or (2) is treated as having been done by A's employer or principal (as the case may be), and
c. the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings the employer is found not to have contravened this act by virtue of section 109(4)"

98. In the Court of Appeal decision of Ministry of Defence v Kemeh [2014] ICR 625 it was held that the employer was not liable for a contract worker who had engaged in overtly racist treatment of the Claimant. As s109 (2) EA 2010 2010 required that the contractor in the course of carrying out their functions as authorised to do as an agent for the principal. Elias LJ comments that *"In my view, 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"*

99. CLFIS v Reynolds [2015] IRLR 562 is an age discrimination case where the question of whether discriminatory information taken into account by the decision maker tainted the decision to terminate the contract of a contractor. Underhill LJ in the Court of Appeal held when referring to the legislative infra structure of the Equality Act 2010 *"I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where*

an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory on the basis of someone else's motivation".

Analysis and Conclusions

Adverse inferences

100. The Claimant invited us to draw adverse inferences from the absence of disclosure of the First Respondent in respect of chains of chat and missing logs. However, at no point did the Claimant draw our attention to any chains of chat or missing logs he said existed or chats that were not complete. There was nothing in the documents we received that suggested to us that there was missing disclosure. In those circumstances we did not draw any adverse inferences.

Inferences drawn from primary facts.

101. We considered both individually and standing back the conduct of the First Respondent in making appraisal of the whole factual matrix to see whether we could draw inferences of conscious or subconscious racial motivation for any of the First Respondent's actions. The Claimant did not rely upon his replacement as a comparator in respect of his case. We did not have evidence of the replacement contractor's race and so there were no primary facts which we could draw from the race of the Claimant's replacement. Even if it were the case that the replacement contractor was a different race to the Claimant, we found the circumstances of the replacement differed from the Claimant so, she would not be an appropriate comparator and accepted why she replaced the Claimant because she passed the coding test and was cheaper, which had nothing to do with the Claimant's race.

102. We can understand that the Claimant felt harshly treated and aggrieved that he was not approached with the Second Respondent's concerns about his competence. It was clear to us that he was denied the courtesy of being told what he had done wrong and given an opportunity to explain and indeed defend himself.

Allegation 1.2.1: Between 9 and 23 March 2021 did Ms Jennie Long refuse to have meetings with the Claimant on the project that he was working on?

103. We conclude that that there was nothing racially discriminatory about the fact that between 9 and 16 March 2021 Ms Jennie Long did not have meetings with the Claimant on the project that he was working on. We have found that the Claimant clearly did have a meeting with Ms Long on 17 March 2023. We have found there was no refusal of Ms Long to have a meeting with the Claimant. Ms Long was not able to meet with the Claimant on the morning of 16 March, but she did say she was available to meet in the afternoon. On 10 March 2021 when the Claimant started, it was expected that Martin Wall would be the Claimant's manager. In the circumstances there was no reason for the Claimant to have messaged Ms

Long to have a 5 minute chat on 16 March 2021 as his line manager. We conclude that prior to 16 March 2021 there would have been no urgency for Ms Long to have met with the Claimant. Ms Long had met the Claimant in a group setting earlier that morning but the Claimant did not have his video on. The Claimant did not have access to the BP system until 12 March 2021 and in any event Ms Long met with the Claimant next day after his request. We considered that sufficiently responsive and was not a detriment to the Claimant.

104. In any event we do not consider that it was less favourable treatment in respect of the Claimant's comparators as neither had meetings with BP line managers when they started.

Allegation 1.2.2 & 2.1.1: On 17 or 18 March 2021 did Ms Jennie Long say to the Claimant in a Microsoft Teams meeting, "why have you joined the First Respondent"? No one else was present at this meeting.

105. We found that the comment was said by Ms Long on 17 March 2021. We considered in the context of a first meeting with the Claimant, it was a perfectly legitimate comment to make. This is especially true where the Claimant had been recruited with a view to finishing up the KHI project and moving on to another one. We consider that the comment was not unfavourable treatment and did not amount to a detriment. We accept Ms Long's explanation for making the comment and conclude that the comment was not made because of the Claimant's race.

106. The comment was unwanted conduct as the Claimant made it clear that he was not happy to receive the question. However, we considered that the purpose of the comment was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, but that it was a genuine enquiry unrelated in any way to the Claimant's race. We considered the guidance in Grant v Land Registry and that this was a case where the Claimant put his case as feeling uncomfortable when the comment was made which is not sufficient to amount to an intimidating, hostile, degrading, humiliating or offensive environment. Coupled with our finding that on the Claimant's own view that the comment was an acceptable comment, we conclude that objectively the comment did not have the effect either of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegation 1.2.3: On 22 March 2021 did Ms Jennie Long make the decision to terminate the Claimant's engagement? Did Ms Jennie Long fail, before making this decision, to (1) consult the Head of the Project; and/or (2) give the Claimant an opportunity to express his views, on the alleged defamatory information about the Claimant's performance provided by Mr Chris Flynn and Mr Chris Ottesen?

107. We conclude the decision to terminate the Claimant's employment was undoubtably unfavourable treatment and amounted to a detriment. However, we do not consider the failure of Ms Long to consult Mr Obi was

unfavourable treatment. There was no evidence to suggest that the consultation of Mr Obi would have made any difference to Ms Long's decision to terminate the Claimant's employment. Mr Obi did not challenge the Claimant's termination at all when he discovered it.

108. We found that some decisions and actions of the First Respondent were unfair and unreasonable. However, there was no evidence to support the conclusion that Ms Long was motivated by the Claimant's race to terminate the Claimant and would have treated another contractor who was white or of a different race more favourably. In fact, we found that Ms Long did terminate another contractor who was white in similar circumstances to the Claimant.

109. We therefore conclude there was nothing inherently discriminatory in the decision taken to terminate the Claimant's contract.

110. We have found that Mr Obi was not consulted about the Claimant's termination. We conclude the only primary fact upon which we may draw an inference of discrimination is the fact that Mr Obi as a Black African was excluded from the decision to terminate the Claimant although he was included in the decision to recruit the Claimant. However, we do not draw an inference from this that he was not involved because he was the only Black African. It is clear from the email 19 February 2021, that Mr Ottesen was offering a number of people to be involved in the recruitment of the Claimant, Mr Obi was just one of those people. Mr Wall was also involved in the recruitment, but he was also not consulted in respect of the termination decision. Mr Obi was therefore not the only person who was excluded. The reason for Mr Obi's involvement in the recruitment was because he was the product owner, there was no evidence provided that Mr Obi was being asked because of his understanding of Python or coding in general. We accepted Ms Long's evidence that Mr Obi was not a coder and therefore where concerns about the Claimant's coding skills were raised, it would therefore make sense he was not asked or consulted about the Claimant's coding performance.

111. The Claimant was not consulted about his views on the information provided about his alleged incompetence. The First Respondent does not dispute that. We think it was unfair, disrespectful and lacking in civility, so as to amount to unfavourable treatment. When Ms Long was presented with the recommendation to terminate the Claimant, she did challenge it and asked for examples. Mr Ottesen's assessment of the Claimant's work required better communication as it resulted in gaps which resulted in the Claimant not doing the work Mr Ottesen wanted him to do. Mr Ottesen was not experienced in giving feedback, but he assessed the Claimant's competence of coding specifically on his experience and knowledge of the Claimant's technical ability not because of the Claimant's race.

112. We accepted Mr Ottesen's evidence that if he had been in the same situation as the Claimant, he would have expected to be spoken to. However, it was Ms Long whose mental processes we needed to consider. We considered that Ms Long believed Mr Ottesen and Mr Flynn had given the Claimant sufficient opportunity to demonstrate his competence. She trusted what Mr Ottesen and Mr Flynn were saying as she had a past

relationship with both and relied upon their experience in respect of Project Bifrost. There was nothing upon which we could infer that Ms Long was motivated to terminate the Claimant by anything other than what she had been told about the Claimant's performance.

113. All the evidence we saw was that Ms Long was content with the Claimant's appointment there was nothing presented us that would lead us to believe that the Ms Long wanted to get rid of the Claimant.

Allegations 1.2.4 & 2.1.2: On 19 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask to see what work the Claimant had done? The Claimant says that this was not Mr Flynn's responsibility as he was not his line manager. Was this meeting part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract? No one else was present at this meeting

114. We have found that Mr Flynn did attend the Microsoft teams meeting on the 19 March 2021 and request to see the Claimant's work. We conclude that request by Mr Flynn to see the Claimant's work was unfavourable treatment and amounts to a detriment.

115. Mr Flynn asked this of the Claimant because Mr Ottesen asked him. Mr Ottesen and Mr Flynn had a good working relationship, and it was in Mr Flynn's interest to ensure that the Claimant was competent because it would affect his responsibilities for the back end of the Project.

116. The meeting was not a plot to defame the professional and personal integrity of the Claimant. Mr Ottesen was seeking a second opinion on the Claimant, to get that second opinion, Mr Flynn needed to see the Claimant's understanding of the coding and the extent of his coding ability and that is why he was invited to the meeting. The purpose of the meeting was not to terminate the Claimant's contract, but it was not done with the intent of mutually resolving concerns, it was to test the Claimant and for Mr Ottesen's assessment to be validated.

117. We conclude that Mr Flynn's request was undoubtedly unwanted conduct. No one in the Claimant's position would want a peer to ask to see his work. We accepted that Mr Flynn was not the Claimant's line manager. However, the purpose of the request to see the Claimant's work was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was the custom and practice to have peer review, and Mr Flynn was a peer. Whilst the Claimant said that the effect of the request was to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, we considered that objectively in the context of the culture of the peer review and the fact that the Claimant was a contractor coming into a Project, the effect of the request did not have the effect of violating the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegations 1.2.5 & 2.1.3- On 22 March 2021 did Mr Chris Flynn in a Microsoft Teams meeting, ask the Claimant to save down (commit to GIT)

an unapproved change which the Claimant says was originally scheduled for Mr Chris Ottesen to do? During this meeting, did Mr Chris Flynn harass the Claimant to add him to the handover session between the Claimant and Mr Chris Ottesen? Was this meeting part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract? Mr Chris Ottesen was also present at this meeting?

118. We have found that Mr Flynn in the Microsoft teams meeting on the 22 March 2021 did ask the Claimant to save down (commit to GIT) an unapproved change. This was neither unfavourable treatment nor did it amount to a detriment. We conclude that there was no harassment by Mr Flynn adding himself to the handover meeting between Mr Ottesen and the Claimant. Mr Flynn was just doing what Mr Ottesen had asked him to do. Mr Ottesen and Mr Flynn had a good working relationship, and it was in Mr Flynn's interest to be able to give a second opinion and ensure that the Claimant was competent because it would affect his responsibilities for the back end of the Project. Attending the Claimant's handover meeting was just a means to achieve this. The request of the Claimant to save his work to GIT was not made because of the Claimant's race, but because it was standard practice, and everyone was expected to save their work to GIT. It was not part of a plot to defame the professional and personal integrity of the Claimant with the purpose of terminating the Claimant's contract.

119. It is clear that direct discrimination cannot amount to harassment and so the allegation that during the meeting on 22 March, Mr Chris Flynn harassed the Claimant to add him to the handover session between the Claimant and Mr Chris Ottesen was direct discrimination cannot possibly succeed.

120. We conclude that although this request was unwanted conduct, it was not harassment. By 22 March, the Claimant was doing work and the Claimant knew this work had to be saved to be usable. GIT was a means by which to save work.

121. There was nothing about this request that objectively violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The request was not made because of the Claimant's race. It was standard practice to save to GIT.

122. By adding himself to the handover meeting between Mr Ottesen and the Claimant, Mr Flynn was just doing what Mr Ottesen had asked him to do. The meeting was not a plot to defame the professional and personal integrity of the Claimant. It was not because of the Claimant's race. Mr Ottesen was seeking a second opinion on the Claimant to do that Mr Flynn needed to see the coding of the Claimant and that is why he was invited to the meeting. The purpose of the meeting was not to terminate the Claimant's contract, and it certainly was not to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, but neither was it done with the intent of mutually resolving concerns. The purpose of the meeting was to test the Claimant and for Mr Ottesen's assessment to be validated. The meeting was not set up nor did Mr Flynn invite himself to it because of the Claimant's

race. In the context of the peer review culture as already mentioned above, the effect of Mr Flynn adding himself to the meeting did not objectively have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Allegation 1.2.6: did the First Respondent refuse to investigate the Claimant's grievance of race discrimination dated 29 March 2021?

123. We have found that the First Respondent did refuse to investigate the Claimant's grievance. The refusal was unfavourable treatment and did amount to a detriment, but we consider it was not because of the Claimant's race. We accept the First Respondent's explanation that the Claimant was not their responsibility as he was not their employee and so it was not appropriate for them to deal with the Claimant's grievance.

Allegation 1.3 Was Mr Chris Flynn an employee or agent of the First Respondent?

124. As we have concluded that there was no discrimination on the grounds of race by Mr Flynn, there is no need to consider whether the First Respondent was liable for the acts of Mr Flynn as a contractor. We have found as a fact that Mr Flynn when attending meetings and reviewing the Claimant's work was acting in his capacity as a contractor. At no time did Mr Flynn make any decisions for the First Respondent or have authority to act as an agent for the First Respondent. We conclude that Mr Flynn was not an agent of the First Respondent. The Claimant's written submissions suggest for the first time that the missing disclosure would have disclosed that Mr Flynn was acting as an agent. However, that was not what the Claimant argued about the missing disclosure when he was asked during the hearing and so we are not convinced. We have not, in any event drawn any adverse inferences from the alleged missing disclosure.

125. However, had we found there was race discrimination by Mr Flynn and that Ms Long relied upon Mr Flynn's discriminatory view, we would have concluded that Ms Long would not have known that Mr Flynn's view was racially discriminatory. At no point prior to Ms Long making her decision to terminate the Claimant did she know about the Claimant's allegations of race discrimination against Mr Flynn. The Claimant's allegations did not come until after his termination. We took into consideration the guidance of CLFIS v Reynolds that it is the state of mind of the decision maker in respect of the act of race discrimination that we must consider. There was nothing to alert Ms Long that Mr Flynn's judgment of the Claimant's coding could be motivated by the Claimant's race. It could not and did not therefore have an effect on her decision to terminate the Claimant's contract.

126. In the circumstances all the Claimant's claims for direct discrimination and racial harassment against the First Respondent fail and are dismissed.

Dismissal of complaints against the First Respondent

127. As the complaints have been dismissed against the First Respondent and the First Respondent have disclosed their intention to make a costs

application, a hearing will be listed to hear the First Respondent's costs application.

Employment Judge Young

Date 29 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
12 September 2023
.....

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FOR EMPLOYMENT TRIBUNALS

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.