EMPLOYMENT TRIBUNALS

Claimant: Mr J Logo

Respondent: (1) PayOne GmbH
(2) Mr S Schrader
(3) Mr A Boyens

Heard at: Watford (by C.V.P.) **On:** 23 to 27, 30 & 31 January and 1 & 3 February 2023; 24 April 2023 (submissions), 25 & 26 April (discussion in chambers)

Before: Employment Judge George; Mrs G Bhatt; Mr S Holford

Representation
Claimant: in person
Respondents: Ms D Masters, counsel

RESERVED JUDGMENT

1. The Employment Tribunal does not have jurisdiction to consider the complaints of race related harassment set out in List of Issues 4.a. and 4.m. Those complaints are dismissed.

2. All other complaints of race related harassment are not well founded and are dismissed.

3. All complaints of direct race discrimination are not well founded and are dismissed.

4. The claimant was not dismissed. The complaint of constructive unfair dismissal is not well founded and is dismissed.

REASONS

This has been a remote hearing, at the request of the parties.

1. The claimant's claim was originally presented against 10 respondents on 16 March 2021. Of those 10 respondents, three remain parties to the proceedings following the judgement of Employment Judge Maxwell at the preliminary hearing, which was conducted on 21 & 22 June and 18 & 19 July 2022. The claim was presented following statutory early conciliation: in respect of the remaining respondents ACAS was contacted between 6 February 2021 and 16 February 2021, and the certificates were issued on 18 February 2021 (for first and second respondents) and on 24 February 2021 (for third respondent). For ease of reference, the remaining individual respondents are referred to by their initials as are all of the witnesses called to give evidence on behalf of the respondent.

2. In hearing this case, the Tribunal had the benefit of a five volume joint bundle of documents which runs to 2715 pages. It contained the documents set out in the 32 page hyperlinked index. Page numbers in these reasons adopt the numbering used by the parties of the volume letter followed by the page number from 1 to 2715. The claimant had prepared a supplementary bundle of 117 pages. Page numbers in that bundle are referred to in these reasons as SB page 1 to 117. The claimant had prepared a skeleton argument for the first day of the hearing which is referred to as CSA paras.1 to 20 in these reasons. The respondent had prepared a (not agreed) chronology and an (agreed) cast list as well as an opening note. The note is referred to as RON paras.1 to 54 in these reasons.

3. The claim arose out of the claimant's employment by the first respondent, PayOne, most recently as a key account manager or KAM, although he had originally been employed on a contract stating that his title was that of new account manager UK for medium and large accounts. The employment started on either the 15 or 16 November 2016 and ended on 3 March 2021 following his resignation on notice on 4 February 2021. The respondent apparently states that the effective date of termination is 4 March 2021 but nothing turns on that. PayOne is a payment provider headquartered in Germany with offices in Frankfurt, Ratingen, Kiel and Austria.

4. The respondents defended the claim with the grounds of response entered on behalf of all 10 respondents on 16 April 2021. By the claim, the claimant complained of direct race discrimination and race-related harassment in respect of treatment he alleges he experienced throughout his employment, face-to-face, through a division WhatsApp group and in MS Teams meetings. He also complains of direct race discrimination in relation to pay and promotion. As originally pleaded, the claimant complained of indirect race discrimination. All race discrimination and harassment claims were and are argued on the basis that the claimant is Black British.

5. The three indirect race discrimination claims were based on the following alleged PCPs.

a. That the respondent's website was only available in German between January 2020 and mid 2021

b. That an advertisement for maternity cover of the role as associate director fashion and lifestyle was only in German and there was a job requirement that the post holder speak German.

c. That German was spoken in meetings.

6. The respondent defended the claims and applied for orders that parts of the claims be struck out or be the subject of deposit orders. The claim was case managed at a preliminary hearing on 9 December 2021 conducted by Employment Judge Alliott sitting alone by CVP (A131). He listed the claims for final hearing with a time estimate of 10 days and for an open preliminary hearing to determine the applications for strike out and/or deposit orders. In the end that open preliminary hearing conducted by Judge Maxwell took four days and also considered a detailed clarification of the substantive issues in the case and an application for disclosure and further information by the claimant against the respondents and against a Third Party. Judge Maxwell also ruled on some disputes about admissibility of evidence.

7. By a judgement sent to the parties on 5 August 2022, Judge Maxwell struck out the claim against all bar two individual named respondents, struck out the claims of indirect race discrimination on the basis that they had no reasonable prospects of success and limited the claim of race-related harassment and direct race discrimination with respect to pay so that they are limited to these comparators: the claimant's predecessor in the UK and his co-worker and contemporary in the UK.

8. The claimant appealed against the judgement of Judge Maxwell. On Friday, 20 January 2023, one working day before the start of the final hearing, the EAT granted leave to appeal in respect of the judgement to strike out the indirect race discrimination claim; those grounds have passed the sift at rule 3(10) of the EAT rules. Grounds of appeal were finalised during the course of the final hearing before us, but we have not seen them.

9. On the first day of the final hearing, the parties addressed us on whether the fact that the claimant's appeal against the dismissal of his indirect race discrimination claim has been permitted to proceed impacts on the viability of the trial starting. Judge Maxwell had dismissed that head of claim, but made clear that, to the extent that the claimant relied on the factual allegations as individually or cumulatively amounting to a breach of the implied term of trust and confidence in response to which he claims to have resigned, they would be considered. So, in paragraph 101 of Judge Maxwell's orders (A:172), he said

> "I have not struck out any of the factual allegations as being matters the claimant can rely on upon in connection with his constructive unfair dismissal claim. His complaints about the website, the job advertisement and meetings all being in German, may be relevant in this regard, even if they do not amount to unlawful

> discrimination. For the avoidance of doubt, however, the relevance will be in their impact upon him, how they had made his job more difficult, the way in which meetings in German were uncomfortable without any benefit for him and suchlike. The evidence on this will almost certainly come from the claimant himself."

10. The respondents were extremely keen that the final hearing should go ahead before us, but considered that the leave to appeal caused practical difficulties and proposed that we start the trial, hear the evidence in relation to the claims as they are not on the final list of issues at A101 but go part heard until the parties had the decision on the appeal from the EAT. If the EAT were to uphold the judgement striking out the indirect race discrimination claim, then the parties could return to close their cases and make submissions. If the EAT were to overturn the judgement striking out the indirect race discrimination claims, then the parties could come back for limited further evidence, close their cases and make submissions.

11. The claimant was also keen to start the hearing and supported the respondent's position. He was willing to do whatever necessary to seek to expedite any EAT decision. However, he also said that he wanted to make sure that any witness statement he provided would contain evidence regarding the issues for the indirect discrimination hearing.

12. Other housekeeping matters that needed to be dealt with before the start of evidence were the claimant's application to add some page number references to his witness statement, which was not objected to and the question of which remedy arguments it was convenient and appropriate for the Tribunal to hear evidence and argument about prior to making a judgement on liability. The respondent was calling a number of witnesses who needed to travel from Germany to the United Kingdom to give evidence because the Republic of Germany has refused consent for witnesses to give evidence by telephone or video from its territory in the employment tribunals of England and Wales.

13. The claimant expressed surprise that the arguments listed in RON para.48.a of the respondents opening note were to be or might be litigated at this hearing. Those were

> "Whether the Claimant would have been dismissed in any event by reason for redundancy and/or conduct and/or would have resigned anyway because of his mistaken belief that his privacy was being infringed during his employment."

14. The parties had entered into extensive correspondence about the list of issues, notwithstanding Judge Maxwell's careful and reasoned determination of what it should contain. It is not necessary in these reasons to go through all of the correspondence between the parties and the Tribunal following Judge Maxwell's order. But he made certain directions on 9 October 2022 about additions that should be made to the list of issues (A205). On 16 December 2022. Judge Maxwell ruled on further applications for disclosure and declined to make a witness order.

15. He also considered and rejected an application by the respondent to amend their grounds of response which they had made on 16 November 2022. The proposed grounds amended grounds of response are at A:82. Among the reasons Judge Maxwell gave (see the letter of 16 December at E2567 at 2568) were that

    > "to the extent that the Respondent asserts, should the Tribunal find in the Claimant's favour, that he would have been dismissed in any event, this is something which can be argued without an express pleading and the Tribunal would be expected to consider in any event, if there was evidence to that effect."

16. The claimant was on notice, through the draft amended grounds of response, of the nature of the allegations that the respondent wish to make in this regard. Those are set out in proposed paragraph 4.19 on A:99 which reads

    > "if which is denied the claimant succeeds in any of his claims, the First Respondent will contend that he would have been dismissed in any event had been known, prior to his resignation, that had committed confidentiality breaches with potential data protection issues (under German law) and/or covertly recorded people without their consent in relation to work matters (which is considered exceptionally serious in Germany)."

17. This is the conduct relied on by the Respondent in support of their argument that there should be a deduction from compensation to take account of the chance that the Claimant would have been dismissed in any event, or his employment would have ended by resignation in any event.

18. We agreed that questions of whether compensation should be reduced because of the contingencies relied on by the respondent could conveniently be covered by evidence and submissions in the first instance. Those contingencies were that the employment would have ended by reason of redundancy, that the claimant would have been dismissed for reasons connected with misconduct, as set out in para.13 above and that the claimant would have resigned in any event because of his mistaken belief that his privacy was being infringed during his employment. Although we accept that the claimant, as a litigant in person, may not have understood that the ruling of Judge Maxwell set out in para 15 above referred to such an argument, we were satisfied that he was in fact on notice of the factual basis on which the respondent made that argument and was not disadvantaged by having to respond. He may not have been aware of the caselaw which is the basis of this argument (<u>Polkey v A E Dayton Services Ltd</u> [1988] ICR 142) but he ought reasonably to have been aware that the respondents were going to be able to argue that the claimant would have been dismissed in any event, notwithstanding the fact that Judge Maxwell had dismissed their application to amend the response, and it is reasonably clear from para 4.19 what the factual basis of that allegation would be.

19. We have appended to this reserved judgment the list of issues at page A:101, which was created by the respondents based on Judge Maxwell's list of issues at page A:142, incorporating the correspondence of 9 October 2022. This are subject to the clarification above that, at the initial liability stage it was decided to be convenient to decide the arguments raised by the respondent that the claimant's employment would have ended in any event. The second remedy point that we agreed could conveniently be considered in the first instance was whether there had been an unreasonable failure to comply with the ACAS code of conduct in relation to grievances and if so, whether there should be an uplift on any compensation awarded.

20. Although we understood the parties desire to seek to structure the final hearing in a way that took account of the uncertainty of a prospective ruling on the claimant's appeal to the EAT, we decided that it was in accordance with the overriding objective that we simply hear the issues set out in the final list of issues including the remedy issues we have set out above, in the ordinary way. At the time we made that decision a timetable had been agreed which anticipated us reserving judgement, but hearing from all of the oral witnesses and all submissions as well as having at least two days for deliberation within the 9 days available for the hearing.

21. The time available had been reduced because, due to competing judicial commitments with another part-heard matter, as we had explained to the parties on Day 1, the Tribunal was likely to be unavailable to sit on one day of the second week of the hearing. Sometimes the availability of judicial resource means that it is necessary to book a multi-day hearing when the Tribunal is unavailable to sit on one of those days. Nevertheless, at the time we made the decision on whether or not to adjourn part heard pending the EAT judgment there was no reason to anticipate that the reduced time allocation of 9 days would be insufficient. Although the parties were confident that the EAT might be persuaded to expedite the appeal, it seemed to the Tribunal that there was a risk that we would be in the position of delaying our decision for many months after hearing the evidence. Furthermore, it seemed highly undesirable that evidence should be heard on the understanding that something as technical as an indirect race discrimination case might be added at a later stage. The Tribunal was concerned that the impact on the quality of decision-making of this uncertainty and delay was not in the interests of justice.

22. We did indicate to the parties that if, subsequent to the promulgation of the reserved judgement in this case of the issues before us, the EAT were to uphold the claimant's appeal and remit some or all of the indirect race discrimination claim to the Employment Tribunal, then it would be open to either party to apply for a reconsideration of the reserved judgement on the basis that there had been an intervening change in circumstances. If such an application was made promptly after an EAT ruling, then an application for the reconsideration to be considered out of time on the basis that it could

not previously have been known that it was necessary was likely to be considered sympathetically.

23. It is important to note the clarification provided by the Respondent about the conduct that they said would have led to disciplinary action against the claimant had it been discovered during his employment. It was specified to be taking covert recordings of meetings and conversations with colleagues and taking company material and saving it on his personal devices during employment. However, it became clear during cross-examination that this second point focused on taking company material and saving it on personal devices for personal purposes and not the use of personal devices for business purposes even though the respondent's witnesses did give evidence that such use of personal devices was impermissible and contrary to policy. The focus of Ms Masters' cross-examination was on the downloading of company material for personal purposes.

24. This is relevant because after cross-examination and on Day 6 of the hearing after the intervening weekend the claimant applied for additional documentation to be adduced in evidence which he had provided in an expanded supplementary bundle or amended supplementary bundle.

<u>The claimant's application to rely on additional documentary evidence: 30 January 2023</u>

25. The claimant's application to amend that supplementary bundle to add an additional 40 pages on 30 January 2023 was rejected for reasons which were given orally at the time. The claimant requested written reasons limited to the reasons for rejecting additional documents, relevant to the use of personal devices by him during his employment. Full written reasons are produced within this reserved judgement here.

26. We were mindful that, as we note above, we considered that the claimant might reasonably not have understood prior to the hearing that what Judge Maxwell meant by his communication (para.15 above) was that the respondents were able to run all of the arguments that they wish to run about the circumstances in which employment might come to an end in any event. This would potentially explain the timing of the claimant's application. However, we decided that, notwithstanding that, it was not necessary or proportionate to adduce these additional documents in evidence at this stage

27. They fell into broadly three different categories.

    a. There was an extract of what was described to us by Mr Logo as a download from a Microsoft website setting out information about the virtual meeting software Microsoft Teams. He stated that it contained information about the functionality of somebody who was joining a MS Teams meeting as a guest.

b. At SB page 118 was a document apparently dated 28 July 2022 which the claimant described as being a whistleblowing disclosure. He took us, in particular, to paragraph 10 which seemed, in broad terms to be an account of alleged events, some of which the claimant has referred to in oral evidence.

c. Finally, there were documents which the claimant described as being contemporaneous documents relied on to indicate that the company were well aware that he and, indeed, his UK-based contemporary and, potentially, others were using their personal phones for business use, notwithstanding the policy. In that regard, he argued that these are documents that show that the use of the phone for work purposes was well known in the company and support an inference that the respondent would not have taken action about such conduct during his employment (at least not without that action being unfair). He argues that this is directly relevant to one of the reasons relied on as grounds for reducing any compensation which is awarded.

28. To deal first with the MS Teams information. Essentially, it seemed that the reason why this MS Teams information was not disclosed, and put in the original bundle earlier was oversight of the part of the claimant. He relied on his litigant in person status which was a reasonable point for him to make. However, it was clear that he has engaged with the disclosure process thoroughly and throughout. In general, there seems to us to be no good reason why this could have been could not be disclosed before.

29. We think that there is potential prejudice to the respondent if it is introduced now because they have already cross-examined the claimant about these matters. In the light of the other case management problems that there have been in this hearing which have caused delays, there would have to be weighty grounds to admit a document if that was to the lead to a witness needed to be recalled because, at this point in the proceedings, there is more that the usual risk that this could not be accommodated without the hearing going part heard in the middle of evidence. Indeed, this point can be made in respect of the application to adduce all categories of documents at this late stage.

30. However, in any event, we are doubtful of the relevance of this particular document because the real issue it seems to us is not whether being a guest limited functionality of the claimant's use of MS Teams and but how he became a guest. He alleges that he was deliberately designated to be a guest in order that his functionality be limited so that his privacy might be infringed. Our decision on that point does not seem to be something that would be likely to be influenced by this particular document.

31. The next matter is the whistleblowing document at SB page 118. We did not think that this document was likely to help us assess the question of the likelihood of the respondent taking disciplinary action back in 2021, including up to dismissal, had they been aware, as they say they were not,

that the claimant was using confidential information in the way that they now say was impermissible at the time. This is a document that appears to be dated from July 2022 and therefore it is in the nature of a prior consistent statement; that is to say consistent with the oral evidence which we have now heard the claimant give. We do not think that this statement from July 2022 it is likely to affect our findings in any way so it is not necessary for us to admit it in evidence now.

32. The final point is the question of the alleged contemporaneous documents and emails addressing the question of the claimant's use of his personal phone. There are a number of documents of that kind, one of them refers to the claimant’s UK based contemporary emailing on his retirement to say that his mobile phone number will remain the same – the inference being that he was and was known to be using his personal mobile phone for work purposes without apparent objection by PayOne. There are also emails with the claimant's signature which show a UK mobile phone number.

33. We have looked carefully at the way that the respondent's case is put on this now that the claimant has been cross-examined. It did not seem to be put to Mr Logo that he would have been disciplined or indeed dismissed for using his personal phone for work purposes. Therefore we did not think that evidence that he and others used their personal phones at work in general is something that is likely significantly to affect our decision making one way or another. That does not appear to have been put in cross-examination as a likely reason for dismissal. What was put in cross-examination was that PayOne would have taken action in respect of the specific use of the personal mobile phone for the allegedly unauthorised purpose of harvesting documents. This turns more on the claimant's explanation that it was necessary for him to act in the way that he did in order to carry out his job because he needed to translate documents and had to download them, take screenshots and so on.

34. The claimant clearly feels that this particular remedy argument was not one which he had anticipated – otherwise he would have included these documents in the original supplemental bundle. However, we have concluded that it is not necessary or proportionate to adduce those documents in evidence at this stage, in order for us fairly to be able to deal with the issues that the respondent wishes to rely on as tending to show that they would have dismissed the claimant in any event, had the events not turned out as they did.

Evidence given in German through an interpreter

35. In addition to hearing from the claimant who gave evidence in English with reference to a witness statement signed and dated 19 December 2022, the tribunal heard from 14 witnesses called to give oral evidence by the respondent with reference to witness statements that were in the witness statement bundle. Page numbers in the witness statement bundle are referred to in these reasons, as WB page 1 to 228. The claimant also made

available to us an earlier witness statement of Rebekka Fischer dated 7 June 2022, which had been prepared for the preliminary hearing, which was inserted into the updated witness statement bundle at WB pages 229 to 245.

36. A number of the respondent's witnesses gave evidence in German through an interpreter. The language in which they gave evidence was as follows, **Rebekka Fischer** (in English after initially starting in German with the interpreter available to assist if necessary, although that was rarely necessary if at all), **Laura Woellner** (in German through an interpreter), **Sandra Daniel** (in German through an interpreter), Carolin Gustmann (in English), **Axel Moritz** (in German through an interpreter), **Joerg Mertens** (in German through an interpreter), **Sven-Mortiz Becker** (in German through an interpreter), **Axel Boyens** (in German through an interpreter), **Stefan Schrader** (in German through an interpreter), **Sabine Niedenthal** (in German through an interpreter), Florian Risch (in English), Dennis Tehas (in English), **Thomas Rusch** (in German through an interpreter), **Agnes Ganswindt** (in German through an interpreter). Those witnesses in bold had signed witness statement written in the German language and certified English language translations of those statements were provided by the respondents.

37. Mr Tehas had the misfortune to suffer a bereavement during the hearing, and we are grateful to the claimant for accommodating the respondent's application that his evidence be interposed so that he could be released to go on bereavement leave as soon as possible. We thank Mr Tehas for carrying out his public duty to give evidence in those circumstances. The respondent also relied upon a signed witness statement written in English of Ebru Wetzel dated 7 December 2022 (WB page 174). Ebru Wetzel is no longer in the employment of the respondent and did not agree to give evidence on their behalf. They made no application for a witness order. We admit that statement into evidence and give it such weight as we think appropriate.

38. The tribunal took the remainder of the first day of the hearing to read, having ruled on the above preliminary matters. The claimant then started to give oral evidence on Day 2. The first interpreter gave the interpreter’s oath at the outset of Day 2 because she was called upon to provide some translation: initially of one piece of written German which was sent to her in advance. Then she was asked additionally to provide translation of another one or two documents during the course of the claimant's oral evidence. The claimant gave oral evidence for two full days and his evidence finished at about 12.20 on Day 4 of the hearing.

39. Rebekka Fischer, the first of the respondent's witnesses who wished to give evidence in German then started to give oral evidence. Within 20 minutes of her starting to give evidence, the respondent’s counsel reported concerns that were being expressed to her by her lay client, who is fluent in German and English, about the quality of the interpretation. As soon as questions

were raised by the respondents about the accuracy of the interpretation, the witness concerned (first Ms Fischer and then Ms Woellner) was asked to leave the hearing before there was any further explanation since their evidence was to be discussed.

40. The initial concern was resolved because Ms Fischer was content that she felt no disadvantage if she completed her evidence in English and this was done. Our response to the respondents' initial concerns was that the Tribunal is not in a position to agree or disagree with the interpretation given by the official Tribunal interpreter. We stated that we had confidence in the Tribunal appointed interpreter and stood by her interpretation. The claimant took the view that, as a non-German speaker himself, he was neutral and unable to comment on their concerns. We suggested that, perhaps, re-examination of the witness might be a method to check with the witness whether they meant what had been rendered in English.

41. Ms Woeller was the next witness to give evidence in German through the first interpreter. As time went on, the latter became less and less confident interpreting oral evidence. She went back to correct the words she was using or to ask the witness to repeat her answer. Eventually oral evidence was suspended as the first interpreter appeared to be finding it difficult to continue. She appeared to be unable to complete the interpretation of a particular answer that she had asked the witness to repeat twice.

42. The first interpreter appeared to us to be conscious that she was not providing an adequate interpretation service.

    a. She asked for background information on the case and the gist of what she stated was that she felt at a disadvantage compared with the participants who had had weeks and years to become well versed in the subject matter of the case. This is not a request that any of the members of the panel can recall having received before in reasonably extensive experience of hearings involving evidence given through interpreters.

    b. She referred to experiencing difficulty with many business terms and business names "*with your mind clogged you can't hear the pronunciation*."

    c. On another occasion she accepted that her interpretation "*had not been her finest hour*".

43. The respondents wrote to the Tribunal and the claimant setting out specific points in the interpretation which they disagreed with and asked whether an agreed correction could be made. The claimant, quite understandably in our view, was uncomfortable with that and we were not willing to be in a position of having to adjudicate on something outside our expertise or role. While accepting that it must have been a challenge to the first interpreter's confidence to know that the respondent disagreed with aspects of her

interpretation, our own observations meant that, in principle, their concerns did not seem to be obviously wrong or baseless.

44. Ultimately, when the respondents indicated that they intended to make an application for the first interpreter to be discharged, she asked to speak to the Tribunal privately. We responded that any comments about the conduct of the hearing had to be made in the hearing but that, as it involved case management, we could go into a case management hearing in private with only the claimant and respondents' representatives present. In that private hearing, the first interpreter withdrew. She said that she found it untenable to continue, that she did not think it would be right for her to continue and she didn't think that she could do justice to the case.

45. In that private hearing she also made a comment on whether a piece of German text, evidence in the case, was capable of supporting one of the allegations and accused the respondent of criticizing her interpretation in general because her interpretation of that piece of German text was capable of that interpretation. That comment should not have been made and we disregarded it. We accepted her decision to withdraw.

46. Over the course of the weekend, the parties wrote to the Tribunal expressing concerns about the events of Day 5, the withdrawal of the first interpreter. At the start of Day 6, the next day after the first interpreter withdrew, we asked the parties to address us on whether or not they thought that a fair trial of the case was still possible in the above circumstances. If so, what were their views on how we should deal with the fact that LW was part way through her evidence but there had been challenges to the accuracy of the interpretation of her evidence.

47. They both agreed that it was possible to have a fair hearing of the case with this Tribunal. Ms Masters argued that LW's evidence should start again. The claimant argued that her existing evidence should stand and that he should be able to make submissions upon it.

48. Ms Masters was asked what status the evidence already given should have and she accepted that it was evidence in the case that the Tribunal had heard and the parties should be able to make submissions on it.

49. We agree with that. It was open to the claimant to argue that any inconsistency goes to LW's credibility and for the respondent to argue that any inconsistency can be explained by the fact that the evidence was given in German through an interpreter. We decided that, in the circumstances, it was necessary for the evidence of LW to be given against from the start although the corrections she had made to her statement in evidence-in-chief did not need to be repeated and her statement was adopted in evidence as originally corrected. The second interpreter had not heard the original German and that would make it difficult for evidence to be picked up part way through.

50. The respondents' witnesses called on Day 6 all gave evidence in English although that did not take up an entire Tribunal day. A second interpreter was secured to start on Day 7.

51. As we say in paragraph 21 above, the tribunal had indicated to the parties that due to conflicting judicial commitments the Tribunal was likely to be unable to sit for one day of the second week. We further apologise to the parties on Day 2 of the hearing because it had become aware of another previously unnoticed conflict with a part heard remedy hearing on other days of the second week. Happily for administrative reasons unconnected with this claim, in the end, the tribunal was only unable to sit on Thursday 2 February 2023, but nevertheless we apologise to the parties for this situation. We are grateful to the parties for the cooperation they have shown each other and the tribunal to reorder witnesses and restructure the timetable in order to make sure that the witnesses evidence was completed within the available time.

52. Although the loss of that one day in the second week would have had an impact on the prospects of the Tribunal concluding their deliberations and being able to send a reserved judgement to the parties, we feel quite certain that the challenges posed to the expeditious progress of the hearing by the quality of the interpretation, the reasonable challenges to that case management of the same, the first interpreter's withdrawal and dealing with the understandable anxiety caused to both parties by the comments made at the time of her withdrawal are what has led to the case going part heard to the extent that an additional three day allocation was made. This provided time for the Tribunal to read back into the case, including reading the claimant's closing statement (CSUB1), respondent's closing submissions (RSUB) and the claimant's response to RSUB (CSUB2), exchanged in accordance with case management orders made at the conclusion of evidence and sent to the parties on 8 February 2023. The claimant had asked for a short extension of time for production of his submissions due to ill health which was granted. Where the claimant's submissions were more properly directed towards a claim of indirect discrimination (e.g. CSUB2 para.46 & 47) we informed him that he would be at liberty to raise them at the EAT in due course if relevant to the appeal.

53. The respondent wrote to the Tribunal on 30 March 2023 correcting what they described as an error in their referencing of a document at B: 735 to 748. They accepted that that was an English translation prepared for the purpose of the litigation as opposed to contemporaneously and stated that they had informed the claimant of that in correspondence date 26 May 2022. The extent to which there were English language policies available was an area of factual dispute in the case and they wished to correct the potentially misleading position taken by the respondents' counsel in her questions during evidence. They described that as something that can happen particularly in a lengthy, complicated cases with a large volume of documents. They also provided a Code of Ethics which they stated had been provided contemporaneously in English.

54. The claimant expressed concerns about this document and submitted a witness statement explaining his position that the Code of Ethics had been created after 5 January 2021, the date of his grievance letter. He also made what were, in effect, submissions about the authenticity of various documents and inferences which could be drawn in a statement in which he alleged that the respondents had set out to mislead the Tribunal with the inclusion of documents referred to in that statement. The respondent objected to the claimant relying upon the statement. We understood that statement to be focused submissions on whether particular documents were reliable such that weight should be given to them and whether we should accept or reject other documents relied on by the respondent that the claimant denies being aware of during his employment. We took it into account as such but it was not an opportunity to put in evidence after the parties had closed their respective cases.

55. An application was made for the time allocated to oral submissions to be extended from 1.5 hours each to 2 hours each and that was granted; the hearing start time was moved to 1.00 pm to accommodate that. Before hearing oral submissions, the Tribunal needed to consider matters arising out of the correspondence referred to in paras.53 and 54 above. Because the MED3 certificate of fitness for work provided by the claimant to explain why his submissions were later than directed was dated to include the adjourned hearing date for submissions, the Tribunal checked whether the claimant needed any particular assistance and none was asked for. The parties made oral submissions by CVP on the afternoon of 24 April 2023 and the Tribunal deliberated on 25 and 26 April 2023.

56. This has been a complicated case with a large number of witnesses and documents. That, and the need to record the events of the hearing and the preliminary decisions has added to the length of time it has taken to write the reserved judgment. Competing judicial obligations and some periods of leave have contributed to the delay in this being finalized for which Judge George apologises.

57. An issue was raised during cross-examination about the appropriateness of a line of questioning and whether it touched on matters of privilege but the parties were able to reach agreement on what was appropriate for the claimant to ask and the Tribunal were not asked to rule on that. On occasion it was necessary for the Employment Judge to rephrase questions both of Ms Masters and Mr Logo to ensure that they were relevant to the issues and clear to the witness. A timetable for the witnesses having been agreed and then adjusted by further agreement in order to ensure the evidence was heard in the time allocated, it was necessary for the Employment Judge to manage the hearing and curtail some lines of questioning to ensure that the claimant kept to the allocated time.

The issues which it is necessary for the Tribunal to decide

58. The issues are found in the Appendix to this reserved judgment.

59. Due to the dates on which early conciliation took place and the claim form was presented, any act which predates 7 November 2020 is potentially out of time, subject to arguments that they were part of a continuing act or that it would be just & equitable to extend time.

The Law applicable to the issues

60. The claimant complains of a number of breaches of the EQA. Sections of that Act which are relevant to the issues in this case include:

61. Section 13 (1) of the EQA, which reads:

> "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."

62. Section 26 which, so far as relevant, provides as follows:

> "(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.
> (2) …
> (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."

63. Section 39(2), on the rights of employees and application which, so far as material, provides that an employer must not discrimination against an employee

> "(a) as to B's terms of employment;
> (b) in the way A affords B access, or b not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
> (c) by dismissing B;
> (b) by subjecting B to any other detriment."

64. Section 109 on the liability of employers and principals provides 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.

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

65. Section 110 provides for the individual liability of employees for whose acts towards the complainant the employer is liable under section 109.

"(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)."

66. The jurisdiction of the employment tribunal for claims under Part 5 and ss.109 and 110 in so far as they relate to work is provided for in section 120 EQA.

"(1) An employment tribunal has, subject to section 121 [which concerns armed forces cases], jurisdiction to determine a complaint relating to— (a) a contravention of Part 5 (work); (b) a contravention of section 108, 111 or 112 that relates to Part 5."

67. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

"(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."

68. In the present case, it is argued by PayOne that there is no territorial jurisdiction under s.110 of the EQA for the claim against the individual named respondents who are German nationals, based in Germany. They rely upon the whistleblowing case of Foreign & Commonwealth Office v Bamieh [2019] IRLR 736 CA where the Court of Appeal held that the fact that there is a common employer is necessary but not sufficient to mean that the employment tribunal has jurisdiction under s.48 ERA in respect of a claim against a co-worker: the point of focus needed should be on the relationship between the claimant and the co-

workers. The question was whether there was sufficient connection between the relationship between the claimant and the co-workers on the one hand and the UK on the other to mean that the UK employment tribunal had jurisdiction to consider claims against them individually. On the facts of Bamieh there was no such connection.

69. In order for an employer to be liable for the acts of a wrongdoer, the latter must either be in employment with them or their agent as that is understood within s.109(4) EQA.

70. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "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 (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

71. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "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."

72. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
>
> ...
>
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

73. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) 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, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

74. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

75. Although the law anticipates a two-stage test to the issue of direct discrimination, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

76. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was

less favourable than an appropriate comparator would have been subjected to.

77. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

78. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race. Section 136 of the EQA applies to discrimination cases, as we say. If we find facts proved that are sufficient that the tribunal could decide, in the absence of any other explanation, that the respondents acted as alleged by the claimant and did so because he had done a protected act then we must hold that the contravention occurred.

79. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination victimization can be unconscious but that for us to be able to infer that the alleged wrongdoer's actions were subconsciously motivated by race or by the protected act we must have a sound evidential basis for that inference.

80. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race or a protected act. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

81. That said, if the Tribunal considers that there is evidence that could realistically suggest that there was discrimination it would risk failing to give the claimant to benefit of the burden of proof provisions, which are designed to address the difficulties of proving discrimination, were that evidence merely to be added into the balance and weighed against other evidence in the case on the balance of probabilities. If the Tribunal does in that situation move directly to the second stage of the s.136 analysis, it should do so on the basis that it has presumed that the burden of disproving discrimination has passed to the respondent. Where the respondent bears that burden it can only be discharged with cogent evidence. The standard of proof necessary to discharge the burden is the balance of probabilities. The fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence to satisfy any burden on the respondent cannot be provided but there needs, in that situation, to be a reasoned analysis of any documentary or other evidence.

82. As Sedley LJ said in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 33 at para.56,

> "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."

83. The Employment Tribunal has no jurisdiction to consider an EQA claim unless it is presented within the time specified in s.123 EQA. For present purposes, that section provides that, subject to the effect on time limits of early conciliation, proceedings on a complaint within Part 5 of the EQA (which relates to employment) may not be brought after the end of,

> "(a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable."

84. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done.

85. The discretion in s.123(2) to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. The burden is on the claimant to persuade the Tribunal that the discretion should be extended in his favour: Robertson v Bexley Community Services: [2003] I.R.L.R. 434 CA. There is no restriction on the matters which may be taken into account by the Tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The

tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

86. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:

    a. the length of and reasons for the delay;

    b. the extent to which the cogency of the evidence is likely to be affected by the delay;

    c. the extent to which the party sued had cooperated with any requests for information;

    d. the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and

    e. the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

87. The Tribunal's approach should not too rigidly follow those factors as though they are a checklist. As a matter of law, a just and equitable extension does not have to be refused in every case where there is no evidence why the claim form had not been submitted sooner, for example. As to forensic prejudice, if there are a number of incidents, the forensic prejudice may not be the same in relation to all of them.

Constructive Dismissal

88. Section 95(1)(c) of the Employment Rights Act 1996 (and s.39(7) EQA) makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

89. In the present case the claimant argues that he was unfairly dismissed because he resigned because of a breach of the implied term of mutual

trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

90. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then he was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

91. Once he has notice of the breach the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. In the case of Cockram v Air Products plc [2014] ICR 1065, EAT paragraphs 11 to 25, Langstaff P discussed affirmation. Mere delay in resigning is unlikely to amount to affirmation by itself delay can be taken as evidence that the employee has affirmed the contract and decided to carry on working under notwithstanding the breach. Langstaff P also gave the example of a situation where an employee has called for further performance of the contract and that might lead to affirmation being implied from that conduct if it is consistent only with the continued existence of the contract.

92. An authoritative explanation of the last straw doctrine is found in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed. It cannot be entirely innocuous, however:

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is

that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

93. Failure to adhere to a grievance procedure is capable of amounting to or contributing to a breach of the implied term of trust and confidence. Whether in any particular case it does so is for the Tribunal to assess against the Malik test for a breach of the trust and confidence term: Blackburn v Aldi Stores Ltd [2013] IRLR 846 EAT.

94. If the tribunal finds that the claimant was dismissed then it needs to go onto consider whether that dismissal was unfair in the usual way.

95. If dismissal was unfair and the tribunal has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome. A similar approach may be taken in discrimination claims: Abbey National plc v Chagger [2010] ICR 397 CA.

Findings of Fact

96. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

Our view of the reliability of the claimants recalls of events.

97. It is alleged on the behalf of the respondent that the claimant was not in fact offended by things that he now claims offended him. This is relied on as one of the reasons why we should conclude he is an unreliable witness of fact.

98. We do accept that the claimant has his own threshold as to what is offensive and that is not at a level likely to be widely shared. His original particulars of his experience of alleged racist behaviour were first set out in the email of 5 February 2021 (C:1207) which is described as a follow up to his letter of resignation setting out further details of the reason for it. In section 2 of that he describes experiencing "a continual stream of 'jokes' and items being circulated around the WhatsApp group which "focus on/and belittle their subjects based on race". He details five items from the

WhatsApp group with are litigated under LOI:4.g & h, LOI:4.k , LOI:4.m, LOI:4.p, and LOI:4.u.

99. Our view is that the claimant may have done a trawl through the WhatsApp group messages to find out what he could add to the list, but the starting point was that he was looking for things that had offended him in the past. He may not contemporarily been offended by everything, but it seems to us likely that he went through the WhatsApp group because he knew he had been offended by something. The question is whether it affects the reliability of his recall of the core alleged facts underpinning his claim and his evidence about the effect events have had on him.

100. For reasons that we have set out in detail below at paras.144 - 175, we have concluded that no difference of treatment is shown by Miss Ganswindt's management of the claimants' contracts. There is an impact to the claimant if his contract does not progress because it is not onboarded. On balance, we find that the claimant did not think that this was race discrimination at the time; he did not think it serious enough to complain about at the time. In that instance, the claimant revisited events with the benefit of hindsight from the perspective of a person who had reached a conclusion that very serious misconduct had been directed towards him which had an impact on his personal life and the security of his child (see the concerns referred to in our findings in paras: 356 – 359 below). In our view, this experience has distorted his perspective. It means that, if an incident is capable of an innocent explanation and an unlawful explanation the claimant is more likely to conclude that the unlawful one is the correct one. In some instances, he has concluded there is an unlawful explanation only by distorting the meaning of comments to a wholly unreasonable degree. His perspective means that he has blind spots about some of the evidence and has lost objectivity.

101. We note, for example, his evidence at para.77.d about the conclusions from the 20 October 2017 meeting between Mrs Fischer, the claimant and customer care agents and their manager. He describes having a fear of reprisals (when absolutely no grounds have been provided for such a fear) and states

> "in my view 'the elephant in the room' was that given the history of my complaints the company and Ms Rebekka Fischer did not protect me from such distressing conduct. Ms Fischer sought a diplomatic approach in her post investigation comments, that sought to 'turn a blind eye' the obvious racial harassment and simply look to 'cover over the cracks.' In fear for my job and not being in direct opposition to my manager I simply agreed to move on from the matter."

102. If that is genuinely his present position, then it seems to us to be a completely unreasonable position to take based on the subject matter of the dispute. That was, in essence, that customer care - at worst - made errors and were a bit jobsworthy and - at best - had their own objectives which were to ensure strict compliance with regulatory procedure. Given that the

claimant accepts he did not complain about discrimination it does not seem to us that it would be reasonable to criticize Ms Fischer for 'not protecting him' and the underlying facts are far from 'obvious racial harassment.'

103. We do not consider the claimant to have been dishonest in the way he describes things to us, but we consider him to be someone who can convince himself of his own logic. The logicality of some of the accusations he raises about some of the WhatsApp messages (for example, that which appears to be an obvious coincidence that the photograph of himself was posted at the same time as a comment about a football teams' logo) causes us to need to take great care when assessing his reliability as a witness of fact. We need to look for objective evidence of what the claimant is saying before accepting his account of things that are disputed by the respondent. He has shown himself liable to misconstrue innocent language. There is an element of him looking for incidents to bolster his case after the event however there must have been some matters that he took offense at contemporaneously otherwise he would not have made any search.

Background

104. The claimant's employment with B & S Card Service GmbH, a forerunner of R1, started on 15 November 2016. His contract is at page B476. It is set out in both English and German and states that the claimant is employed in the capacity of "new accounts manager UK for medium and large accounts". B&S merged with R1 in 2017. The registered headquarters is in Germany.

105. According to RF, from around 2012 a project was established for R1 to enter the UK market (see RF para nine). This was shortly after she herself joined R1. There was the merger between B & S and R1 in 2017 and then, in early 2019, a joint venture was agreed in relation to Ingenico SA which was headquartered in France. R1 and Ingenico both operate payment services.

106. The consequences for the organisation are described in RF para.6. She explains that teams within R1 and Ingenico account management teams were merged and it was agreed that R1 would focus on the "DACH" region which is a commonly used abbreviation referring to Germany Austria and Switzerland. The claimant accepted that this was part of the focus but said there was an issue when trying to bring the United Kingdom into that structure. He accepted that the intended focus of Ingenico was outside his knowledge.

107. Sometime after the claimant's employment, the KAMs were organized into 'verticals' or teams. The claimant was in the Fashion & Lifestyle Team. An organization chart is at B:749 which illustrates the membership of the Fashion & Lifestyle team as at January 2021 including JM as the Associate Director and the claimant as key account manager or KAM. The claimant took issue with this chart because it included an individual who had never sat in the same structure as him at any time but, with that caveat, it is useful. In addition to AB (R3) other relevant members of the F&L vertical

were two KAMs (one, Ms Wertzel, has prepared a witness statement but has not given evidence) against whom allegations are made by the claimant in connection with his privacy concerns and Mr MacMahon, who by then was designated a Senior KAM as explained in para.183 below.

108. As Ms Fischer explains in her para.7, the KAM's (key account manager) are responsible for developing and expanding customer relationships. In addition to the teams which are referred to in the immediately forgoing paragraph there is a team for acquiring new customers which is titled the Business Development Team.

109. In April 2016, Ms Fischer was seconded to the UK. R1 had entered the UK market in 2012 (RF para 9). She explains in her para.8, and we accept, that in the Fashion & Lifestyle team approximately 90% of the R1's clients are head quartered in Germany or Austria and are German speaking. She moved to the UK because it had been decided that the UK market could not be developed properly from Germany, and she was seconded there as UK Country Manager where there were already two employees who had joined at the beginning of June 2014. One of these, the claimant's predecessor, left in August 2016. His contract of service is at D:1517.

<u>Pay on appointment</u>

110. One of the claimants' complaints concerns a difference in salary comparing himself with his predecessor and the other UK based employee whose employment had started in June 2014 and ended with his retirement in May 2018. Salary comparison information over the course of the three employees' employment appears in the bundle in the following places: the claimant - D:1503 to D:1508; his UK based colleague - D:1509 to D:1514 and his predecessor in role - D:1515 to D:1516. The claimant accepted in evidence that the analysis in those pages on the face of it appeared to be accurate compared with the payslips that had been disclosed.

111. The UK based colleague had started employment with R1 on £55,000 gross in 2014 and was earning £56,100 gross per annum at the time of his retirement. The outgoing KAM who left employment in 2016 was paid £50,000 gross per annum throughout his employment. Both of the two comparators had potential on target bonus earnings of £35,000. As is accepted in RSUB para 79 there was a difference in pay between them and the claimant who started employment in November 2016 on £40,000 gross basic with the potential of on target bonus earnings of £15,000.

112. We accept that it is relevant when considering the commercial decisions taken by R1 to note that the Brexit referendum by which the UK decided to leave the European Union took place on 23 June 2016.

113. A job advertisement was placed on LinkedIn in the summer of 2016 (E:2674). As advertised, the role offered a salary of £45,000 to £50,000 per year and £10,000 commission. The claimant was unwilling to accept that

this was the original advertisement. He stated that he had asked for the document to be disclosed throughout the disclosure process, but it had only been disclosed to him recently. His evidence was that he had been told that the respondent had belatedly found the document and sent him a mobile phone screenshot to which he had requested a URL or web screenshot which had led to the document at (E:2674). His evidence has been that the salary range of the role to which he responded was £45,000 to £55,000 but he had not made a note of the offered commission. He pointed to para.3 of his witness statement to that effect.

114. This was one of a number of occasions where, although the claimant was not putting forward a positive case that the respondent had fabricated or doctored the document, he simply stated that he was not comfortable with it although accepted that it was a possibility that he had misremembered the details.

115. It is entirely fair that the claimant should in effect put the respondent to proof on points such as these, as well as a number of others, where they put forward a positive case about the content of the advertisement. Taking into account the fact that he acknowledges he is unable to remember whether the advertisement referred to a commission or not we think the likely explanation is that the document at E:2674 genuinely is a recently extracted copy of the online advertisement which the respondent originally believed they were unable to trace, and it did originally include a salary (of £45,000 to £50,000) but the claimant has misremembered that detail.

116. The claimant was offered the role following interview and accepted it on 6 October 2016 (E:2280).

117. It follows from our finding that the original job advertisement is that at E:2674 that we accept that the job was advertised at a salary of £45,000 to £50,000 per annum plus a bonus of £10,000. The remuneration envelope was set prior to interview before Ms Fischer knew who the successful candidate would be or what their race was. The claimant alleges that he had a lengthy telephone call with Miss Fischer prior to the offer at (E:2281).

118. Ms Fischer states that the strategy for the UK was uncertain in the after math of the Brexit referendum so R1 was unable to build a longer- or medium-term strategy for the UK. She recruited through LinkedIn rather than using costly headhunters. We accept that a strategic decision was made, as she explains, to recruit someone who would focus on attracting new customers rather than what she describes as “farming” – nurturing the key accounts that R1 already had. This seems to have affected the decision to advertise a package with a larger element paid by variable remuneration to incentivize the successful candidate to seek to attract new business. The rationale behind trying something a little different when the impact of the UK decision to leave the European Union (in particular on a business which depends upon international financial transactions) seems reasonable and we accept that it was a genuine consideration of R1 at the time.

119. Two further specific matters are alleged by the claimant: that Ms Fischer referred to the claimant as being cheap and that there had been an attempt by him to negotiate because he considered that the basic offered was lower than advertised.

120. What was agreed between the claimant and Miss Fischer was a basic annual salary of £40,000 gross and a maximum potential commission of £15,000. We do not read much into the claimant's assertion that had he thought the offer suitable he would not have tried to negotiate it; as someone employed in sales it seems likely that he would have attempted to do so almost as second nature. He would probably have preferred that the guaranteed element of the remuneration was higher and the discretionary element lower. Both parties are correct in evidence about the differences between the advertised package and that agreed between the parties. The package agreed at a total possible annual remuneration of £55,000 gross and that is within the offer range but the basic is £5,000 p.a. less than the bottom end of the bracket on the advertisement.

121. The complaint of less favourable treatment brought by the claimant in relation to the figure at appointment is not that it was race discrimination to change the balance between the base salary and the variable element. Our acceptance that the advertisement predated the interview gives credibility to Miss Fischer's evidence that the decision to offer a lower package than had been paid to the predecessor was nothing to do with race. The external market uncertainty which had a basis in a political event outside the control of these parties makes it probable that Miss Fischer saw an opportunity to seek to incentivize new employee to seek new work at an uncertain time and we think it probable that her reasons for doing so are as she describes.

122. We will return to the question of pay differential during the course of the claimant's employment in more detail below.

123. The claimant's contract at B:476 states that he was employed in the capacity of New Accounts Manager UK for Medium and Large Accounts. The figure that he had agreed to was not out of line with that advertised and he was happy to accept it. The evidence suggests that the respondent was seeking to employ the incoming account manager at a lower rate in any event and that Ms Fischer had researched the market rate before the advertisement went out.

The 'black face' incident

124. It appears that the claimant travelled to the R1 office in Frankfurt to sign the contract. The claimant explains in his para.7 that he was told to refer to himself as a KAM despite what was on the face of the contract. Both of the two comparators job titles appear on the face of their contracts as New Accounts Manager. We find that the claimants' efforts were to be targeted

on acquiring new business but the title appears to have been common to all the UK KAM's and is not a piece of evidence we give much weight to.

125. R1's Christmas party took place on 18 November 2016. At that time Miss Ganswindt job was the Customer Service Agent for the UK & Republic of Ireland. Her role, together with the rest of the customer care team, was to ensure that contracts and on-boarding of clients were competed in line with legal and regulatory requirements. She had worked for R1 and its predecessors since 2008 and states that she was employed until December 2019 as a customer care senior agent. She seems therefore to have been an experienced member of the customer care team, probably a particularly experienced member (as recognized by her senior title) but not in a position of direct line management authority within it.

126. A number of the claimant's allegations concern interactions between him and Miss Ganswindt relating to the onboarding of particular contracts through the course of his employment. We deal with those allegations as a single topic which means that that part of the judgement does not follow strict chronological order.

127. Both the claimant and Miss Ganswindt accept that she was present when he visited the Frankfurt office for his induction training. Miss Ganswindt's recollection is that she remembered seeing him in the office but did not speak to him directly.

128. The claimant's recollection (set out in his paragraphs 15 and 16) is that there was a conversation during which Miss Ganswindt and another customer care colleague asked whether he was dressing up for the evening event. The claimant states that he confirmed his attendance and asked Miss Ganswindt if she was attending and whether she was following any theme. He states that she refused to confirm whether she would be dressed in any theme and burst into laughter (C - para.16).

129. According to Miss Ganswindt, the slogan of the event was Oscar Night (AG para.6) Miss Ganswindt, who is white, attended the event dressed as the character played by Whoopi Goldberg in the Sister Act films. A photograph of her at the event (C:1485) shows her together with a colleague dressed as Princess Fiona from Shrek.

130. The claimant describes his experience of attending this event in para 19 to 24 of his statement. He describes experiencing an immediate rush of anxiety when he saw the person he later realized to be Ms Ganswindt in black face paint. He observed some employees laughing at him and felt very isolated as the only person of black and minority ethnic background in his immediate verticity particularly when he was only a few days into his induction with a new employer in a foreign country. In his paragraph 22 he explains that the association he immediately felt between seeing Miss Ganswindt dressed in black face and the dehumanization of Black people caused him to suffer a panic attack. He went into a toilet cubical to recover.

131. He also describes having a conversation with the HR manager, Mr Laier, the same evening whom he observed looked uncomfortable at the sight of Miss Ganswindt and asked if the claimant was okay. It seems that the claimant was unable at the time to articulate the depths of his feeling which we accept he has genuinely described in the witness statement. He describes in his para.26 that at the time his partner had given birth to their son only 10 months previously and he did not feel able to simply leave a brand-new job, despite the insecurity about the culture of the company he was joining which was caused by this incident.

132. He seems to have expected that the respondent might have reached out to him voluntarily. Given the pictures of the event that circulated following it, the statement via R1 in their grounds of response that they were not aware of the incident until the claimant raised it in his particulars of claim cannot be correct. However, the claimant did not complain about it but internalized the feelings of anxiety that it provoked in him and we accept that the respondent was unaware of how the claimant felt about it until the proceedings.

133. We do not criticize him for not complaining.

134. We have to consider Miss Ganswindt's evidence that she had not known that there was potential for her to cause offence. On the one hand, it is difficult from our vantage point of an employment tribunal panel in 2023, familiar with and trained (for example through the Equal Treatment Bench Book) to understand the common experience of minority groups, to understand how, in 2016, someone would not realize that dressing in black face was liable to cause offence. On the other hand, Miss Ganswindt explains that her intention had been to achieve a true likeness of an actress whom she likes. She goes on to say this

> "I am aware that times have changed now and after Jerry's allegations I now would not dress up as a black actress or any black famous person; although in Germany this sort of dressing up is not considered offensive I do understand that elsewhere in Europe and round the world any material were white individuals have dressed up as a Black person have been removed and famous individuals have been reprimanded."

135. The claimant argues that this should be rejected as an explanation. He argues that, in 2016, Germany was a modern diverse country and that no reasonable person would have dressed like that unless they were totally careless of causing offense. As we have already said it is common ground that the claimant never made a complaint about Miss Ganswindt costume, and he did not mention it in his resignation letters.

136. Miss Ganswindt insisted in her oral evidence that she did not know that painting her face would be unacceptable and although she can image that the claimant did at the time suffer a panic attack, she had not realized that

at the time. She said that she had received no diversity training no inclusion training and that would have given her an awareness about how someone in the claimant's perspective might have felt. She explained that she did not recollect criticism of black face dressing ever being an issue in Germany and said that she had selected the costume carefully not merely two to three days before but a long time before she knew that the claimant was to be a colleague of hers. She said, "I really regret that if you were so hurt and never informed me that what I did was wrong."

137. We have found this a difficult question to decide because essentially we are assessing whether we accept Miss Ganswindt's evidence that she was simply unaware how likely it was that dressing in black face would cause offence. This requires us not only to think whether someone would be so unaware in 2016 but would be so unaware if they lived and worked in Germany. Miss Ganswindt was born in Poland but had lived in Germany for over half of her life.

138. We accept her evidence that she choice the costume before she met the claimant so she was not aware that he was Black or that he would be present. We therefore accept that she cannot have intended to upset him personally. The possible numbers of Black or minority ethnic attendees (or BAME) at that event seems likely to have been low; the evidence was that Black and minority ethnic attendees were in single figures. We need to make a judgment about whether Miss Ganswindt intended to cause the harassing effect, intended to create an intimidating hostile, degrading, humiliating or offensive environment for him.

139. We use the term Black and minority ethnic because that is the term adopted by the claimant. We are aware that many people from Black, Asian and minority ethnic communities dislike the term and do not use it to describe themselves which is why we explain our use of it in this reserved judgment.

140. One of the difficulties when an allegation is raised for the first-time years after the event is that one party or possibly both parties have not had cause to recall the details until relatively recently. The claimant bases his allegation that Miss Ganswindt deliberately sought to humiliate him or create an offensive environment for him on her having laughed and been unforthcoming when he asked about whether there was a theme for the event. These are details that Miss Ganswindt does not recall.

141. For the reasons that we set out in detail below, we accept that in her management of the contracts about which the claimant complains within these proceedings she did not treat him less favourably than she would have treated anyone else in a similar position. There is nothing from her subsequent interactions with the claimant that causes to think that she behaved less than professionally towards him as a whole. Her manner before us seemed to us to be one of genuine contrition.

142. We accept Miss Ganswindt's evidence that at the time of the event she was genuinely unaware that a black British person would be likely to associate a white women dressed as a black actress with minstrels or golly characters that have their origins in a time and place when there was systematic oppression of a group of people based on their race. We accept that she intended it as a tribute to a particular individual and did not intend to upset the claimant directly.

143. Miss Ganswindt moved into another role in December 2019. It is entirely logical that her interaction with the claimant played no part in his decision to resign at all and neither this incident nor any of the alleged actions of Miss Ganswindt are mentioned in the documents which set out his reasons for resignation (C:1207 and C:1210).

<u>Allegations relating to contracts.</u>

144. The claimant complains that Miss Ganswindt, in her role in customer care rejected a new contract submitted by him for Hair@22 Ltd. He emailed her on 12 October 2017 (C:865) and a chain of emails running backwards from there sets out a dispute about this contract and how the form should have been filled in. On 16 October she wrote to the claimant and said that "you didn't tick the field DHCP, so we need the IP addresses."

145. The way Miss Ganswindt always interpreted the contract is set out in her witness statement at para.13. She states that there was other missing information including the registered name of the company (as appears on the face of the correspondence).

146. A completion guide is at (C:815). To judge by the exchange of emails the claimant corrected some of the missing information, but Miss Ganswindt says that Mr Logo had still not either ticked the box for "DHCP" or indicated an alternative IP address. The guide (C:815 and C:823) states the following

> "no DHCP: please check the box if the device should be pre-configured without an IP address. If the IP addresses are available all date details (subnet and gateway) must be stated for each terminal."

147. The claimant accepted that this guide was circulated in late September or early October 2017, possibly after the correspondence with Miss Ganswindt on this topic started. However, that does not seem to us to affect the key question of whether she took the stance she did because she genuinely believed it to be correct or in order to impede the claimant.

148. The way we read this section appears to be consistent with Miss Ganswindt's understanding of how the form should be filled in. If the box labelled "without DHCP" is checked she does not need to be told an IP address but if the box isn't checked, she does need an IP address. The final contract in question is at C:866. And we see that ultimately, in the final signed version, (C:868) the box "without DHCP" has been checked. It seems clear from Mr Logo's email on 16 October 2017 that his

understanding was that the form needed to be filled in a different way and the same day he took the dispute to his in-country colleague. Miss Ganswindt interjected saying "Jerry it is not necessary, that I will do the 100 checks, because I work with this system eight years and I know exactly what it should be put in the contract!".

149. Reading through the emails this seems to have been a genuine misunderstanding. it appears from (E:2274) that the claimant's UK-based colleague took the same view as the claimant. The claimant relies on a statement made by him in his email on 18 October 2017 at the top of (D:2274) "this is how the system has worked since I have been here for three and a half years" as indicating that it is only towards him, the claimant, that Miss Ganswindt is causing problems which is delaying the on-boarding of his customers contract. That is not an inference that can reasonably be supported in the light of all the evidence. Indeed the following February the colleague wrote to Mrs Fischer asking her to get "very small but extremely irritating misunderstanding cleared up" (E: 2272). The claimant's statement evidence is that his colleague did this, despite having no issues personally with his own contracts successfully filing without needing to tick the DHCP, on the claimant's own urging. We find that a very surprising submission. It would mean that the UK-based colleague was consistently using the first person plural when he really meant third person singular. It seems surprising that he should do that because, if the claimant is right, it would only take a moment for Customer Care to find contracts submitted by the colleague which contained no tick in DHCP and no IPP address which would completely undermine his complaint. The submission also does not explain the natural reading of the guidance.

150. We do not have to decide who was right and who was wrong about how the contract should be filled in. However the guidelines do provide Miss Ganswindt with some support for her view and for that reason we accept that she took the stance she did because she genuinely believed that those were the guidelines that had to be followed. It is her job to approve a form and she explains the importance of this particular piece of information to ensure that the correct terminal is sent to the customer in avoiding delay in them getting the product that they want. It is possible that, as the claimant says in his mail of October 2017 (E:2273) that it meant a set up issue when delivered but the email from February 2018 suggests that his UK based colleague experienced the same frustration and it was not only directed to the claimant.

151. Miss Fischer talks about the relationship between the claimant, the in-country colleague and the customer care team in her para 42B. she explains that she arranged a discussion between herself, the two UK KAM's and the customer care team to discuss how they could best work together. There is some reference to this in (E:2241) dated 31 October 2017 it appears from that email that Miss Fischer was trying to encourage the KAM's and the customer care team to understand each other's perspective instead of making assumptions. It therefore appears that there was some general conflict because the objective of the KAMs is to onboard contracts

as quickly as possible and the objective of the customer care team is to be entirely thorough in processing the paperwork and ensuring that regulations were followed meant that their interests were not entirely aligned at all times. Both the claimant and his UK based colleague disputed Miss Ganswindt's interpretation of the contract form and we do not see that they were in a different position to each other in relation to this.

152. The next allegation about contracts is that Miss Ganswindt rejected the Pentatonic contract because of the format of the lease price. This arises out of an email at (E:2455 to 2456). In that, two other members of the customer care team email the claimant and said that they were "very sorry", but they could not proceed with the contract and list seven different pieces of information or corrections they wish to have made. One states "please clarify the lease price - is it 400.00? 40.00 or 4? same for the configuration and the delivery fee – use dot. In your format [smiley face emoji] 00.00". It was put to the claimant that this wasn't treatment of him by Miss Ganswindt at all but by the other two members of the team and he said, "yes they do but following it up with Agnus on the telephone, she said that she instructed them to do that".

153. The email itself in our view explains why they want the clarification; they want to be sure they have recorded the price correctly. The claimant in his para.40 alleges that his UK based colleague was able to make far more serious errors without rejections from Miss Ganswindt. This refers to E: 2228 which is an email from Mrs Fischer to the UK based colleague about an out of date contract template. This was not a question that was asked of Miss Ganswindt in cross examination and she has not therefore, had a fair opportunity to respond to it. There seems to be a perfectly straightforward non-discriminatory explanation for the questions on the face of the emails even, if the customer care team members were directed by Miss Ganswindt to ask it. As it happens, we are not satisfied of that because they are the authors of the email.

154. As evidence of an even-handed approach by Mrs Fischer, the email at E:2228 shows that she pointed out to the claimant's UK based colleague that he had erred by using an old template contract. She directed him to use an up-to-date contract. This demonstrates that he was dealt with appropriately by Mrs Fischer if he made a mistake. We heard no evidence about whether that was something that Miss Ganswindt inappropriately overlooked.

155. It is next alleged that on around the 24 October 2017 Miss Ganswindt rejected the Euro car parks contract because an internal member of staff was copied. This is covered in the claimant's statement at para.52, and by Miss Ganswindt at para.22 to 24. On 24 October 2017, Mr Logo emailed Miss Ganswindt about this contract (page C:874) saying "I spoke with Franco, and he has asked if you can create a 'technical' place. So that the customer can have terminal ID's". Miss Ganswindt replied with a response to the technical query and Mr Logo sent a further email referring to an arrangement with a different customer and asked Miss Ganswindt to check

how it was achieved. He copied this second email to someone (C:872) and says, "sorry to copy in Franco, but customer is going toward the site." That email includes an extract from the contract involving the other client referring to in the body of the email.

156. Miss Ganswindt replies "Jerry, it is not allowed to give information to our existing customers to one another – DATA PROTECTION". She copied that email to Rebekka Fischer, who was then known by the surname Lux, the claimants line manager. The claimant wrote straight back saying that he doesn't understand what he has done and then says that Franco is part of the R1 team. The email that Miss Ganswindt sends back in response (C:871) is a little difficult to understand. She said "we spoke together, that you should call the customer and you used the name Franco. Did you call the merchant, or did you speak only internal?" and then later down she says, "it is so difficult to find the right solution with you. Sorry."

157. A lot of the detail of the background that to exchange that appears in paragraph 52 was not explored with Miss Ganswindt in evidence. The claimant has focused upon the accusation referred to at para.156 above that he had given information from one customer to another. This was in the midst of an exchange which he describes a lot of detail about attempts he was making to find a technical solution for the customer to seek to avoid them cancelling the contract. Miss Ganswindt says in her para.22 that setting up a 'technical location' was not something that was commonly done and although the claimant gives evidence in his statement that his UK based colleague told him that it had never been a problem. This was not something that Miss Ganswindt was specifically challenged about.

158. Miss Ganswindt accepts in her para.24 that she had made a mistake and that her actions in emphasizing data protection and copying the managers was because she mistakenly believed there had been a potential data breach. The allegation against her is that she made a hasty error in accusing him wrongly of data protection breaches because she intended to be racially discriminatory. She denied this. She does explain to the claimant (C:871) that they had spoken together – which she explains was on the telephone - and she had said that he should call the customer. Her recollection as of 24 October 2017 was that he had used the name Franco. It is implicit in that that she had inferred that Franco was the customer. She does not apologise for her mistake as such because the use of the word "Sorry" seems to be more in relation to a difficulty in finding a correct technical solution for Mr Logo than in respect of the accusation of data protection breach.

159. We take account in this that these are fast paced exchanges written in English which is not Miss Ganswindt first language. We can see how someone might read the claimant's email at (C:872) - which includes a screenshot of data from another customer - as potentially implying that it has been copied to a customer. Miss Ganswindt does seem to have been quick to presume that Mr Logo has made an error and her explanation about how she fell into error is not the same as a full apology. However,

taken as a whole this is one terce exchange quickly corrected in the middle of exchanges about many other issues.

160. Although the claimant argues that his comparator the white UK based colleague was never treated in this fashion, we have not been shown evidence that Miss Ganswindt was ever in a position where the content of an email from that colleague might potentially have suggested he was responsible for a data protection breach so are not satisfied that the UK based colleague and Miss Ganswindt were involved in a comparable exchange.

161. We next consider the allegation that Miss Ganswindt unnecessarily delayed the Westgate contract. The claimant alleges that this was the second occasion within a few months that he was accused of infringing GDPR and that this was part of an ongoing racial harassment directed towards him. (CSUB para 43).

162. The claimant had provided information about a new contract to customer care on 17 September 2017 (C:811). The contract was to be in the name of a limited partnership. There is an exchange of emails with Miss Ganswindt which and we infer from the response from the claimant at (C:810) that she raised reasonable and legitimate concerns. In that email he comments "a bit of a labyrinth with the company structure".

163. Miss Ganswindt says in her para 25 to 27 that she does not recall this specific contract, but the email chain causes her to think that there was an anti-money laundering and beneficial ownership question when onboarding the customer. Further correspondence concerning this is (C:838 to 860).

164. In the middle of the exchange there comes a point in time where the claimant is absent from work because he has an operation. The claimant alleges in his witness statement that Miss Ganswindt attempted to contact him on the afternoon of his operation by voicemail to his personal phone seeking information about this particular contract when he had set an out of office on MS Outlook and sent a message blocking out several days of sick leave. However, as he had accepted in cross examination, he had no reason to know whether Ms Ganswindt had got that message as at the time she attempted to call him.

165. The gist of his accusation is that the customer care team were being formulistic in their request that when a contract was rejected it needed to be resubmitted with every document and that this would restart the time within which they needed to respond – which caused delay in the on-boarding process. He states that his UK based colleague told him that he had not himself encountered such requests.

166. However, reading through the exchange of emails now, it seems to us that the questions and challenges raised not just by Miss Ganswindt but by other members of the customer care team were not trivial or insubstantial. There was, an unusual ownership structure which was unfamiliar to members of

the customer care team (C:844). Mr Logo discussed the situation with the anti-money laundering team and provided that to Miss Ganswindt (page C:838). Ultimately, the exchange at (C:851 to 852) speaks to Miss Ganswindt working to ensure details are correct so that the contract can be onboard and in time for the client opening. The claimant expresses his gratitude to her for her efforts.

167. We do not see evidence from which it is right to infer that Miss Ganswindt deliberately bothered the claimant when he was on sick leave during this period. There were multiple stakeholders involved in the exchange of emails clarifying details about a contract which involved a novel ownership structure – at least so far as R1's customer care team was concern who perhaps had limited experience of UK limited partnerships. The need to be satisfied of the identity of the beneficial owners and of those who were directing the client for anti-money laundering purposes was an issue we regard to have been genuine and substantial. Frustrating though this must had been for the claimant this seems to us to speak more to the difference in priorities between the KAM on the one hand and customer care on the other. The latter have to ensure that the regulatory framework is strictly adhered to. The allegation of unnecessary delay is not made out.

168. As we mentioned at para.151 above, Ms Fischer arranged a meeting between the claimant and his UK based colleague, Miss Ganswindt and the other customer care agents, their manager and herself. The claimant completed a questionnaire setting out his issues (E:2564). He states in his para 73 that he made reference to inconsistencies.

169. Under the question "what are your requirements and needs?" he states, "consistency in requirements on the form." The context of that clearly refers to a perception that he is sometimes required to provide a certain type of document as proof of identity and seems to be complaining about the lack of consistency of approach. This is not the same as (and cannot reasonably be understood as) complaining about inconsistent treatment of himself compared with that of his UK based colleague.

170. The claimant states that the meeting took place on 20 October 2017 but that his UK based colleague decided not to attend. The meeting was followed up by an email from Mrs Fischer (E:2241). In oral evidence the claimant said that this meeting to resolve conflict had been held as a result of a complaint to Mrs Fischer about different treatment he was receiving compared with his UK based colleague. He states in para 73 that Mrs Fischer "advised me during a telephone call that I should refrain from mentioning discrimination and/or unfair treatment" in comparison with his UK based colleague. However, when it was put to him in cross-examination that he never mentioned discrimination to Mrs Fischer at all he accepted that he had not said the same words but confirmed that he said he thought he had been treated differently to his colleague. He stated that she had asked him not to say he was being treated differently to his colleague because that could complicate the meeting. The claimant states that Mrs Fischer advised that it would be aggressive of him to mention it. It was put to him that, on the

contrary, she had merely asked him to keep the meeting factual and professional not to interrupt but to listen to what the customer care agents said.

171. Mrs Fischer's account of the evening is in her para.42.b (WB page 60). She describes there being always difficulty in concluding contracts, in her experience, and that had been why she organized the conversation. In oral evidence she said she had not asked the claimant not to be aggressive: she recalled advising him not to be too emotional and to stay focused on things that happened and not become loud or interrupt people. In fairness to the claimant, the summary he provides (E: 2564) does refer to specific issues which he finds disappointing although his frustration with delay which he considers to be built into the system is apparent.

172. The claimant alleges that a particular matter that he was criticized for (C para.77.c) led to an instruction not to send emails marked as urgent without the approval of Mrs Fischer. Although he states in his witness statement that he had spoken to Mrs Fischer immediately after the meeting and expressed concern "that this point would set a premise for further discrimination on the grounds of race" again he accepted that, as a matter of fact, at no stage had he alleged to Mrs Fischer that he considered himself to be discriminated against on grounds of race by the customer care team or by any one member in particular. It may be that the claimant expressed concerns about this point to Mrs Fischer but the way it is expressed in the witness statement suggests to us that he is recounting making an express complaint of discrimination when he did not – and accepts he did not when challenged on it. This is one of the matters which causes us to find it difficult to take the words of the claimants witness statement entirely at face value. He is willing to include in his statement a sentence which the impartial observer would read as an allegation that he expressly stated that an outcome of the meeting would be used as a pretext for racial discrimination of him when, on his own case, he did not. If it is the case that he felt at the time that that was what was happening, he did not express it and we accept that there was no reason for Mrs Fischer to know that that was a concern of his.

173. Reading the language used in the claimants' emails where he is pressing for action on the task of on-boarding particular contracts, we think that his description of himself as being driven is apt. We accept the proposition put to him by Ms Masters that, as a passionate salesperson, he was pushing for his deals to get closed as quickly as possible. That was in his interests and in the interests of R1. We can imagine that customer care felt under pressure as a result and have already referred to the tension between their objectives and the objectives of the KAMs. We think it is probable that there was some discussion about not overusing the words "very urgent" in the subject of emails. It would be curious for the claimant to refer to an agreement that he would stop using it in his email a few weeks later if that were not his genuine belief (C: 897).

174. The issue over the Ports of Jersey contract is that on 1 December 2017 the claimant forwarded a new contract to customer care for onboarding (C:899). The email subject heading was "New Contract: Ports of Jersey". When on 8 December 2017 one of the customer care agents respond about this contract the words "very urgent!" have been added to the subject heading. The claimant replied to ask why the words very urgent has been added. The manager of the customer care team intervened on 11 December to suggest that perhaps somebody else did it in order to internally prioritise the contract. This had already been explained by the customer care agent the claimant was corresponding with, although she said she herself had not added the words. On 11 December Miss Ganswindt explained that she had inserted it into the subject heading "for me/intern to prioritize this case." That is an explanation that she repeats in para.28 of her witness statement.

175. We accept that one of the action points from the meeting in October 2017 was a request not overuse the words "very urgent". It sounds like the kind of common complaint that people working under pressure might have. Had Miss Ganswindt been intending to make the claimant look as though he was disobeying the instruction then we think it is extremely unlikely she would have volunteered the information that she was responsible. The reason for her doing so is entirely as she said in the contemporary email.

<u>Two day UK Meeting in March 2018</u>

176. R1 and B&S Card Services GmbH merged in the third quarter of 2017.

177. The claimant received pay rise in August 2017 taking his grossly salary from £3,333.33 to £3,400 p.c.m.

178. Mrs Fischer returned to work in Germany in about November 2017. Other relevant changes which took place were that the claimant's UK-based colleague retired in May 2018 which left the claimant the sole UK-based KAM employed by R1. The London office was closed on 28 June 2018 (page E:2500). That document is an email from Mrs Fischer to the claimant, copied to Sabine Niedenthal (her own manager) and to Mr MacMahon instructing the claimant to ensure that all R1's material is eliminated from the office and asking him to store two to three terminals at his home for urgent cases. She asked him also to send back to Frankfurt anything that he did not need in his office at home.

179. Mr MacMahon also reported to Mrs Fischer as she explains in her para.22. One of the claimant's allegations is that, about three months before the office closed, he was informed that Mr MacMahon was to be his line manager which he regarded as disadvantageous and humiliating to him since Mr MacMahon was a peer. He deals with this in para 134 and following of his witness statement. He explains that Mr MacMahon had joined the Fashion & Lifestyle team from another team in a horizontal move. He alleges that without explanation or consultation, on 21 March 2018 – during a two day visit to the UK - Mrs Fischer told him to report to Mr MacMahon "demeaning me and keeping me in my place".

180. An agenda for the two-day meeting in London is C:913. The second day is not mapped out in detail, but Mrs Fischer says "I'll send you invites for target reviewing & settings & individual teamwork".

181. The claimant's allegation is that Mr MacMahon was being invited into his annual appraisal.

182. Mrs Fischer's account is completely different. She says (para 21 of her statement) that when she returned to Germany her role changed to Team Head Fashion & Lifestyle and not UK Country Manager. She also says that, from that point, the two UK based account managers and Mr MacMahon who is also an international account manager but was based outside the UK, in France, reported to her.

183. She states that the market in the UK had not been growing as planned and that after five years it was still not established as a standalone business so there was continued uncertainty about a replacement for her, getting on for four months after her return to Germany. However, by March 2018 there was concern on the part of her managers, one of whom is Sabine Niedenthal, that – to put it colloquially - she had too much on her plate. Her account is that Mr MacMahon was an experienced manager and the discussion she had with her managers was about receiving assistance from him in managing the UK business but that at no time was it intended that the claimant or, prior to his retirement, his UK based colleague should change their line management to Mr MacMahon. She states that Mr MacMahon was promoted to senior account manager but all three continued to report to her and were involved with weekly strategy calls which she led.

184. Before making findings about whose account we prefer, we need to consider a specific challenge to Mrs Fischer's credibility as a result of corrections she made to para 42.a of her witness statement. Para 42 starts by Mrs Fischer saying

> "I have never witnessed racist behavior or racist comments amongst the team towards Jerry and as a manager, I would have taken action and called this out straight away. In particular:
>
> a. I do recall the Agnes Ganswindt … dressed as Whoopi Goldberg at a 'get together' event shortly after Jerry joined but I believed that year, the theme was 'Oscar Night' so those who chose to wear fancy dress all dressed differently and at this event, fancy dress was taken seriously with prizes for the best dressed. However, Payone did not specify what individuals could dress as. I cannot recall what I dressed as at that event. There were people in a variety of costumes and colours including individuals dressed for example, in green as Princess Fiona from Shrek. It was not intended to be offensive and Jerry never mentioned having been offended by the event. it was a good and fun evening."

185. In his statement, the claimant stated that Mrs Fischer had not been present. The correction she made in evidence-in-chief was to say that she had

remembered that she hadn't been able to part take in the event as she had been in hospital at the time and that was something that she had forgotten. The corrections she made were specifically to strikeout the sentence "I cannot recall what I had dressed as at that event" and "it was a good and fun evening".

186. In cross-examination it was suggested to Mrs Fischer that she had given quite a lot of detail for someone who had not been at the party and asked why that was there. Her response was that the picture had shown the different costumes and that she had been talking beforehand of the event with others and discussing what they were going to wear. She had been planning to attend and the hospital stay had been spontaneous. She had been willing to confirm the truth of the paragraph originally because every year there was that event and she had been confused with another year. She rejected the suggestion that she was by this original error showing unconscious bias because her motive had been blindly to support someone who was the same race as her. She repeated that the first line of the paragraph remained correct because she was in hospital but was in contact with colleagues and shortly after the event everyone was talking about it, and she saw the pictures of Agnes.

187. She was also challenged about her recollection about para.42.c about the leaving event for Florian Risch which she described as being May or June 2019. Details of this event are set out in para.250 to 259 below, but it was positively suggested to her that the event had been on 11 June 2019 which the claimant recalled specifically because it was the day before a running event, and he had travelled to Germany to participate in that. He suggested that Mr MacMahon had not been present. Mrs Fischer said that that could be the case and that she was incorrect in her memory but since her recollection was that the whole fashion team had been there she therefore expected him to have been present. In this instance this seems to be a relatively small change to her recollection and the claimant did not positively assert that she was sitting in a place relative to him that means that she would have heard the offending comment.

188. We do consider carefully whether her apparent willingness to say that she was at an event that she could not have been present at adversely affects her credibility as a witness in general. Had it been the case that the claimant positively asserted that he had complained of discrimination to Mrs Fischer, and she had ignored him then that might give us more cause for concern that she was guilty of affinity bias. The claimant accepts that he never used the word discrimination to her in his complaints about conflicts with customer care as we set out above. He did not complain to her or explain to her his reaction to the black face incident so she is correctly recollecting that he did not do so and, in all probability, correctly recollecting that conversation she had with colleagues after the event caused her to think it had been a fun evening.

189. This incident was first raised as a complaint more than four years after the get-together. We find her explanation that, in her recall of the event, she

confused seeing pictures of the 2016 event with attending the 2016 event (when she has attended other similar events) credible. It is probably true and we accept that it explains how her statement came to contain that inaccuracy. The claimant himself does not say he complained about the black face costume so to that extent there is no contradiction between his evidence and that of Mrs Fischer's. We accept that Mrs Fischer was genuinely unaware of any continuing sense of offence that the claimant had towards Miss Ganswindt arising out of this incident. This amendment does not cause us to doubt her credibility as a whole.

190. The agenda on (C:913) does not suggest that an appraisal meeting was to take place on day two. What was put to Mrs Fischer in cross examination was that the meeting involved discussing targets and it was suggested that those were individual targets per person. Her response was that the two-day meeting was to introduce Ms Niedenthal to an overview of what was happening in the UK which would involve the countries target for Q2 and Q3 and this contrasted in her view with a personal appraisal meeting where you agree on the target achievement for the previous year and define the targets for the following year. She insisted that the meeting that Mr Logo and Mr MacMahon had been present at was a strategy meeting focusing on the targets for the country.

191. When taken to SB page 22, Mrs Fischer accepted that she had had the appraisal meeting with the claimant in the same week - despite it not being part of the official agenda. Although Mrs Fischer was not clear that she could specifically remember a one-to-one appraisal meeting she was absolutely confident that she would not have invited a third party to the session because it was confidential between the colleague and the line manager. As Ms Fischer pointed out the email at SB page 22 is directly between herself and Mr Logo and that is consistent with her remaining his formal line manager.

192. Overall we accept the explanation given for Mr MacMahon's advancement that Mrs Fischer had taken on a slightly different role which meant that she needed assistance to cope with the activities of being UK country manager while, at the same time, the failure to thrive of R1's business in the UK meant that there was uncertainty about the wisdom of appointing a new country manager. It provides a logical and coherent background to the decision to advance Mr MacMahon. He was more experienced than the claimant. If Mr MacMahon had been appointed a formal line manager of the claimant there seems to be no reason why he was not included in the email at SB page 22 – or indeed why he would not initiate it. As the claimant says, it does appear that an individual employee target review was undertaken during the two-day UK visit on 21 and 22 March 2018. It seems inevitable that, with his colleague about to retire, a discussion of UK targets in general terms would overlap substantially with his personal targets but there is a difference to having that conversation and a conversation that includes an assessment of whether targets have been met in the previous year. Furthermore, personal targets may not solely depend on the financial result for the company. We reject the claimant's assertion that Mr MacMahon was

appointed his line manager. He seems to have taken this personally but there was a sound business reason for finding a way to give Mrs Fischer additional support. Furthermore, the evidence, taken as a whole, suggests that Mrs Fischer really valued the claimant as a member of her team. We reject this allegation.

Pay differential: May 2018 onwards

193. The next allegation in time concerns the claimant's pay following the retirement of his UK based colleague. LOI4.j. is an allegation that R1 failed to increase the claimant's pay from May 2018. This is a different allegation to the allegation that he was underpaid from the outset.

194. As we said earlier, the salary details at page D:1503 (for the claimant) and D:1509 (for his UK based colleague) were accepted by the claimant to be, on the face of it, accurate transcriptions of the raw data on the pay slips. When the claimant's UK based colleague was recruited in 2014, he started on a gross annual salary of £55,000 and when he left in May 2018 his gross annual salary was £56,100. At all times, his potential earnings for 100% bonus were £35,000 per annum. The claimant's complaint is that his salary was not increased to this level.

195. The claimant started on £40,000 per annum plus a bonus. In August 2017, his salary was increased from £3,333.33 gross p.c.m. to £3,400.00 gross p.c.m. His next increase was notified to him on 18 June 2019 when his base salary was increased to £3,495.92 per calendar month to be backdated to 1 January 2019 (B: 510). He still had a £15,000 100% target bonus. Therefore it is common ground that his salary did not increase when his UK-based colleague retired.

196. Then in September 2019 his salary increased to £4,000 gross per annum following his designation as Key Account Manager (B: 625). This means that at the time of his resignation the claimant's base salary was £48,000 gross per annum with a maximum £15,000 target bonus. Part of the claimant's argument is that, in reality, he had been carrying out the same role as his UK-based colleague throughout his employment, he had allegedly been told to refer to himself as a KAM throughout so the formal designation of that role did not change anything and had been employed on an identical contract. It is certainly true that he used an email signature of Key Account Manager prior to September 2019 (see for example C:812 dated September 2017).

197. The claimant accepted the brief career details of his UK-based colleague namely that according to his LinkedIn profile (E:2538) he started his career in sales in 1987 so he was significantly older than the claimant. The claimant accepted that he had been in a number of roles in which he had been described as a sales manager or account manager and had about 17 years' experience in those roles. He accepted that there was an element of retention of existing clients in the roles with previous employers prior to

starting work with R1 and the claimant accepted that this was relevant to his role at Payone.

198. At the time RF first went to the UK (see RF para.11) the claimant's UK-based colleague was "looking after the largest international accounts due to his experience" (see also details of the client base below at para.202 and ffg.). She points out that the claimant's predecessor was paid less than his UK-based colleague throughout the former's employment which is true although the disparity is not as great as the difference between the claimant's salary and that of his UK-based colleague. We think that was due to the package advertised for a replacement for the claimant's predecessor including a lower remuneration for reasons we have already explained. Neither of the alleged comparators received payrises during their employment except for one to the UK-based colleague in August 2017 when the claimant also received a payrise. Mrs Fischer's evidence (RF para.17) which we accept was that the UK-based colleague

> "was better remunerated due to him being assigned key and lucrative German accounts, major local as well as international accounts and had more experience."

199. By contrast, the claimants CV is at SB page 36. He had 10 years' sales experience in key accounts. One previous employer was in a like-for-like line of business to R1, but another employer was in a similar industry. The employer where he had spent most of his sales career, over seven years, was an organization that sold newspapers and magazines where he was Strategic Advertising Account Manager. He accepted, when it was put to him, that of his 10 years in key accounts/sales, 3 had been in the sector that R1 operates in. The claimant accepted that his UK-based colleague had more experience than him and longer relevant experience to him but was not really willing to accept that that meant that, at the start of his employment, he would reasonably expect that colleague to be earning quite a lot more than he himself as a result.

200. The claimant accepted that his colleague had more relevant experience than him but we need to consider whether the reason that the claimant was not paid the same as him prior to his retirement was because of that experience.

201. One of the areas in which the claimant took issue with the respondent's witnesses was where he gave evidence that both his role and that of his UK based colleagues were split in the middle; both sharing the "farmer" aspect of supporting existing customers and the "hunter" aspect of looking for new business.

202. There's a spreadsheet of clients showing which of the two KAM's was responsible for a particular client and the value of that contract to R1 in a calendar years 2015 and 2016. It starts at D:1639 (the English translation). Mrs Fischer explained in answer to questions in cross-examination that she had pulled it out of the system in 2016 and it compared the figures for 2015

and 2016. When she pulled it out of the system it showed the current salesperson; who was applied to this account at the time the spreadsheet was created not who had been applied to it during, for example, 2015. Therefore it shows the claimant's name against clients allocated to him after he started work and the value to the respondent of those clients in previous years. A comparison can be done with the value to the business of clients supported by his UK-based colleague. The high value clients are clearly those on the UK-based colleague's list.

203. The claimant disputes the reliability of these documents at D:1643 to D:1647 (the German and, presumably original version) arguing that the difference in format compared with SB page 115 means that the document ought to be treated as suspect. We don't see that that follows. He says that the comparison spreadsheets lack the data shown on SB page 117 showing when it was printed out and the source. SB page 117 appears to show a report of the claimant's clients printed on 21 November 2018. However the pages relied on by the respondent appear to have been expanded for inclusion in the file of documents because the tables are spread over several pages. We do not think that this points affects the reliability of the documents.

204. The claimant points to page E:2172 (an organizational chart) and the tasks on that document which appeared to be allocated to himself and to his UK based colleague. They are the same and he states that the contracts were the same. So, he argues that the two of them were equal in job duties. In his closing submissions (CSUB para.48), he describes the £35,000 difference after retirement of his colleague as being astonishing.

205. That chart only describes headline responsibilities and does not provide any relevant analysis of the importance to the respondent of the clients served by the respective KAMs. It is neutral on the point of whether they did serve clients which were of different levels of importance to R1's business and whether their salary was different as a result and is not a piece of evidence we give weight to as a result.

206. The claimant argued that his anti-money laundering experience with Western Union placed him in a better position in terms of compatibility of work experience to his UK based colleague and seems to argue that this demonstrates that the respondents' argument that his colleague had greater relevant experience and that was at least part of the reason for the difference in pay is not well founded. We do not doubt the claimant's experience and in the money transfer business that would have been relevant as a KAM for R1. Our view is that anti-money laundering is an important part of the relevant background experience for R1's business, but accept it was not the most important part and was not equivalent to the experience of the UK-based colleague in the POS industry. Certainly we do not accept the claimant's assertion that it was obvious some discrimination going on in respect of difference in pay.

207. When the claimant was cross examined about D:1639 and following he accepted that in terms of card turnover the Aurum Group Limited was one of the biggest clients with card turnover of £48 million. He disputed that that was one of the biggest in terms of revenue. Other clients of the alleged comparator were pointed out with an Acquired Merchant Volume of £12 million pounds and £22 million pounds respectively.

208. We accept RF's evidence that the analysis at D:1638, on the face of it, shows that the Acquired Merchant Volume of business to be generated by the UK-based colleagues' to achieve target was £120 million pounds as new business and the Acquired Merchant Volume for the accounts that were managed by the claimant for him to achieve target was £40 million pounds as new business. We accept that that makes it difficult simply to compare the amounts of their potential maximum bonuses because they had different personal targets. We do take account of R1's evidence that those targets should have been equivalently capable of achievement because the claimant was targeting new clients and the UK-based colleague was "farming". Nevertheless, we accept that the means that the different bonuses cannot really be compared on a like-for-like basis.

209. The claimant agreed that a consideration in assessing the value to R1 of a particular client was the amount of the money put through the card readers because fees were charged on a percentage for that. For that reason, we accept that the Acquired Merchant Volume is a useful shorthand to assess relative importance of the clients. On this measure, as at 2016, it is clear that the UK-based colleague was working on clients which were more significant in financial terms than was the claimant when he started employment. This is evidence which supports the respondent's assertion that that difference was a reason for the difference in salary at the outset – which continued to the point of the UK-based colleagues' retirement.

210. The claimant accepted that in Spring 2017 there was a concern amongst R1 about whether they would need to set up local authorization with the FCA in the UK in order to continue to operate or whether there would still be passporting via Germany into the UK as a result of uncertainty following on from the Brexit decision. He also accepted that there was a fear of the clash of regulatory systems. C: 786 shows the reduction in both Acquired Merchant Volume and (numerically) the DIA - the profit margin - year on year for Quarter 2 of 2017 in UK based sales (although not in non UK based sales allocated to the UK sales team). Whether the claimant agrees with R1's analysis or not, the SWOT analysis for the next quarter of 2017 (C:788) shows that R1 was worried about a large number of weaknesses, including that they risked losing Aurum which made up 20% of UK volume and "very low awareness level in the UK". This seems to us to be good evidence of the likely concerns of R1 moving into 2018 when the UK-based colleague retired.

211. By 2019, Aurum had been lost. The claimant accepted that but referred to the Westgate contract that had been acquire and described that as massive. No doubt it was an important client for him but it simply cannot be regarded

as a like for like replacement based on the figures we have seen. E:2713 shows the figures for year-to-date 2018 and 2019. We accept that R1 genuinely concluded in 2018 that the UK based sales were not performing well and that this was a risk which meant that it was not advisable to add cost to the business.

212. Further evidence comes in the employee reviews signed by the claimant and Mrs Fischer on 29 March 2018 where it includes as a record of the challenges of the task “tough situation in the UK market”.

213. All of these are documents which support what Mrs Fischer says in her para.23 and following that by the time of the UK based colleague’s retirement R1 had lost many of the key UK accounts and there was no need to replace him. We also accept what she says in para 24 that the colleague’s role had significantly shrunk by the time of his retirement and R1’s plans for the UK market had significantly changed over the intervening two years.

214. She describes the claimant as being an excellent salesperson who was good at account management and states that he move over to nurturing existing clients taken over from his former colleague. She states that his bonus targets change to reflect the change in his role from a hunter to a farmer (see para 26). The maximum possible remuneration achievable if he met his personal targets did not change.

215. Looking at the situation as a whole, by the time of the colleague’s retirement, Ms Fischer had lost at least one key account which previously had amounted to 20% of the Merchant Acquired Volume of the UK business and the strategy for the UK as a whole had changed. The claimant may prefer to assess the rude health of the business using a different measure but that does not affect our finding that this was the way R1 was looking at things and that it was reasonable to do so. There was uncertainty about continuing to do business in the United Kingdom and about whether there was going to be a clash of regulatory systems. The fact that the colleague was not replaced and that in June 2018 the UK office was closed suggests that R1 was counting cost at that point in time. All of these pieces of information fit and provide an explanation for the respondent’s judgement that this was an uncertain period in the UK.

216. Ms Fischer has stressed that claimant was performing well but all of these provide evidence that a failure automatically to award to him a pay rise to the level of his outgoing colleague or to have an identical commission structure have nothing to do with race. It also causes us to conclude that the outgoing colleague is not a suitable comparator for the allegation of disparity in pay.

<u>The WhatsApp group</u>

217. Sabine Niedenthal was, prior to a joint venture with Ingenico Group in early 2019 the Director Key Account Management and managed Mrs Fischer,

who was the line manager of the claimant. She had established a WhatsApp group amongst the KAM's in December 2015 and explains in her para.8 that it was primarily used for personal chat and discussing common interests rather than for work related exchanges.

218. C:1486 is a photograph or screenshot from the WhatsApp group that shows that one of the members of the group posted a shot taken from the website of a clothing manufacturer and retailer where a young boy, who is black, is wearing a hoodie with writing on it which reads "Coolest monkey in the jungle". The clothing manufacturer and retailer is a client of R1. This was commented on by Florian Risch who in a reply post says, in German, "und? Gab bestimmt shitstorm oder?" this was sent on around 8 January 2018.

219. At the parties' request this was translated by the interpreter who said a literal translation was "and? There was definitely a shitstorm?" but she also said that it could have been rendered as "There must have been a shitstorm, right?" saying that it appeared more as a hedging comment. She explained that it could equally be taken as "There must have been a shitstorm, right?" She stated that either of them could be a legitimate translation in the context.

220. In his para.100 and following the claimant describes the backlash that was sparked by this particular advertisement when it came to light and as a result the manufacturer apologized. The claimant describes himself as having been upset by the advertisement not only as a black man with a black son but because the manufacturer was a customer of his employer. He also states and this accords with the tribunal's recollection, that in about that period several footballers were being abused by raciest monkey chants at high profile football matches across Europe.

221. The complaint about the posting of this advertisement in the WhatsApp group is that the claimant states that the three members of the group commenting on it made a mockery of a very serious incident. He argues that the term "und?" or "and?" is dismissive rather than (as contended for by FR) calling it out. In the next comment the person posting includes a monkey emoji where the monkey is covering its eyes with its hands. Dennis Tehas then posted "hahahaha." The claimant argued that this was a suggestion that it was genuinely funny.

222. Whether one accepts the literal translation or the translation involving the hedging comment either support Mr Risch's evidence that he presupposed that there would be a shitstorm; that there would be an uproar and that was why he made his comment. We accept this. He may not be directly critical of the posting, but it is implicit in his comment that he considered right minded people would be likely to object to the image.

223. The translation of the comment with the monkey emoji is "going around on Facebook". The claimant accepted that that in itself is simply an accurate statement, that there was a furore, as we have explained. We accept that the emoji used is one that is commonly used to signify shame or

embarrassment or as it was suggested to the claimant "I wish I hadn't seen that." The claimant's point was that more thought should have gone into choosing an emoji rather than to use the monkey emoji to comment on that particular headline and we can see his perspective on that. Nevertheless, we accept that the emoji is in fact used to signify embarrassment to acknowledge that someone has made a huge mistake and are or should be hugely embarrassed. Our view is that his objections to these posts is that they are examples of the claimant giving the worst possible interpretation to a comment possibly without consider what the nuances of the translation might be.

224. Mr Tehas' evidence about the original photograph was that he finds it controversial but was not personally offended by it. When he explained his perspective, he stated that

> "in general calling a kid or putting a kid in a sweater with a monkey is not offending by nature. It is the viewers perspective and perception that makes it offensive. If you have a history in your life where you think that a monkey a bad sign and it means something offensive to you, but if you don't have that history, you don't find that offensive yourself."

225. He said that he could imagine that the claimant had felt offended. He stated quite simply that his response was "a shameful laughter for what a huge corporation had done in that advert. Because I know it can be offensive to individuals."

226. He also said,

> "I believe that it is not clear to you what I meant. I am sorry that you did not reach out to me when I, what I meant by the "hahahaha". I am not laughing at the kid or the advert itself I am laughing at the company that has done something that could be offending to other people."

227. It was suggested to him that in essence it was not reasonable to put the onus on the recipient, on the person offended by the message to seek out an explanation for an ambiguous comment. He gave an example from his own childhood of growing up in a part of Frankfurt where all bar a small number of children in the classroom were of Turkish origin and "they dissed us all the time 'the stupid German' 'that's so German' I would speak up for myself. Of course, you have to speak up for yourself."

228. The extent to which an individual might feel embolden to speak up for themselves is going to vary enormously depending upon that individual, the context they are in, whether they feel supported, whether they feel there is an imbalance of power. Mr Risch, in his evidence, did say that he considered the claimant could have approached the works council.

229. We think the evidence of Mr Tehas set out in para.226 above does lend credence to what he says in his para.11 where he says that if he had seen anything racist when he was working at R1 he would have called it out. We

also take into account his para.9 explanation of his comment. We accept Mr Tehas explanation about his intentions.

230. The claimant also complains about a meme posted by Sabine Niedenthal on around 18 May 2018 (C:1488). It is a mockup of a Ritter Sport chocolate bar. The particular bar, if one were to buy it in the shops, is milk chocolate with whole hazelnuts in it. A headshot of a well-known professional footballer of Turkish origin who, at the time, played for the German National Team has been placed on a photo of the well-known German chocolate bar. A faeces emoji has been placed near the headshot. The German words "SCHRÄGE ÖZIL VIELFALT" had been placed on a banner just above the footballer's head; the words "TÜRKEI-EDITION" had been placed on the top right-hand corner and the product name has been replaced with the words "DUMME NUSS mit Erdogan-Creme."

231. The German text has been translated as "Özil range" "Turkish Edition" and the strapline as "Stupid nut with Erdogan cream".

232. The claimant in his para.108 describes this as being posted "without explanation and clearly is some kind of a joke likening the colour of the football player's skin to feces".

233. Ms Niedenthal did not accept that, as a matter of fact, the player had dark skin. Setting that to one side (as the player would probably not self-identify as white), her explanation in her para.9 is that this was a satirical image relating to the player in question having been pictured with the Turkish President: President Erdogan. She corrected her paragraph 9 which originally said that the player had been pictured in a Turkish football shirt when she had meant to say he had been pictured with a Turkish jersey in his hand. This does not seem to be a significant difference which has any impact on the reliability or credibility of her evidence.

234. She explains that it was frowned upon for the player to have met the Turkish president, distasteful for him to be holding a Turkish football shirt when he played for the German team, provocative because it appeared that to some that it was opportunistic at a time when there were elections in Turkey and some German residents were entitled to vote. She states, "the post was there for calling [the player] a 'stupid nut' for putting himself in that situation." She states the faeces emoji was showing disapproval.

235. She states, and we have no reason to disbelieve this, that the imagine was widely circulated in the German media and was not created by her. Her evidence was she did not believe the picture had any racial connotations.

236. The claimant's evidence when cross examined about this was that he felt othered immediately when seeing this because he was at the time the only black person in the WhatsApp group.

237. It seems to us that in order to take offense at this and to rationalize his instinctive reaction the claimant has had to look at parts of this meme in

isolation. He said, "we are not talking about Erdogan we are talking about the use of faeces and chocolate to describe someone of darker skin tone." We do not think it is informative to get into a debate about whether the footballer in question has a darker skin tone or not; as we say, he would probably not identify as white. However, it seems to us to be only reasonable to seek to understand the meme as a whole.

238. Objectively viewed, we do not think that this post relates to race – it relates to politics. The only aspect of race that is at all linked with the meme is that it is linked to Turkish politics and the actions of a member of the German football team who was of Turkish origin who had done something perceived as related to politics. It seems to us be an illustration that the claimant is liable to see racist connotation where there is none at all. The colour of the chocolate is irrelevant; this significance is that it is a well-known German brand.

239. Although the colour of faeces can be used by abusers as a way of abusing people with a darker skin tone we do not think that that is so widespread or widely known that whenever the faeces emoji is used it must be linked to race or should reasonably be regarded as linked to race. We have considered whether the use of that emoji to show disapproval of a footballer of non-white origin is inevitably racist and are of the view that this is not sufficient because the meme should be viewed as a whole. It includes the bare bones of the explanation given by Ms Niedenthal and the interpretation the claimant wishes to make requires him to ignore the reference to Erdogan. We do not consider it to be a reasonable connection to make between skin colour and faeces in the whole context of this meme. We do not consider it reasonable to presume that connection when it appears that the claimant did not understand the context. If the elements of the meme were objectively inherently offensive on racial grounds that would be different, but they are not, in our view.

240. C:1490 is another example where the claimant has drawn the worst possible conclusion when it was not reasonable to do so and without seeking any explanation when, as he has pointed out, the overwhelming majority of those using the WhatsApp group were German speakers posting in German and that is relevant to his understanding of a post.

241. On 20 May 2018, Sabine Niedenthal posted a short video of two minions (the animated characters from the movie franchise). She explains in her para.10 there had been an important football match between Eintracht Frankfurt and Bayern Munich which Eintracht Frankfurt had won by three goals to one. Ms Niedenthal is a fan of Eintracht Frankfurt, Florian Risch is a fan of Bayern Munich. One minion appears under the logo for Bayern Munich and the other appears under the logo for Eintracht Frankfurt.

242. The next post into the group chat is a photograph of a group night out, posted by the claimant's UK-based colleague which shows seven people round a table - including the claimant - at a work-related social event. The

post includes the comment “a great night was had by all”. That post is timed at 10:26.

243. Another post was also timed at 10:26 from Mr Risch which states “Ist da nicht was mit dem Logo falsch.”

244. The next post is by Ms Niedenthal who first posts the comment “nice pic” and then “Nein, Florian!”.

245. What Ms Niedenthal explains in para.10 is that her understanding is that the comment was directed to the video because German language capitalizes nouns so the word “Logo” in Mr Risch’s post does not refer to the claimant Mr Logo but to the logo in the video. The outdated logo for Eintracht Frankfurt had been used in that video.

246. Mr Risch says that when he sent his message, he had not received the message from the UK-based colleague with the photograph of the night out. He states that he intended to say, “isn’t there something wrong with the logo?”. The claimant stated that he was unaware that the two football teams were great rivals and unaware that they had just had a match against one another. Although he knew that Sabine Niedenthal was an Eintracht Frankfurt fan he did not know that Florian Risch was a Bayern Munich fan.

247. The interpreter confirmed that nouns in general were capitalized, objects as well as country names. She also stated that the definite article could be used to refer to a person as well as a thing and that the word ‘falsch’ could be used to mean there was something incorrect or wrong or out of place – again either relating to a person or to a thing/the logo. In other words, the German is ambiguous and could be understood to refer to the wrong or out of place logo or to Mr Logo. It could not be understood simply from the German text whether Mr Risch’s explanation was correct.

248. Nevertheless, we are satisfied that it was a coincidence that a comment had been made about a logo in a video that crossed with the post including a photograph of Mr Logo. The above explanation about use of language seemed to us to be within the interpreter’s expertise. Although the German text was ambiguous in the sense we explain, she did confirm that, in the German language, nouns are capitalized. This means that the fact that the post includes a capital letter does not necessarily mean it was referring to Mr Logo. The explanation put forward by Ms Niedenthal and Mr Risch is entirely plausible taken in the context of the series of posts as a whole and taking account of the time at which they were made. This was not directed at the claimant it was not related to race. It does not become related to race, when it had no racial connotation in itself, by simple fact of it following a photograph of a group of people which included the claimant.

249. According to para.28 of Mrs Fischers statement, following the joint venture in early 2019, there was a shift in emphasis for R1 to the DACH region.

<u>FR leaving event</u>

250. Mr Risch had left the company in 2019 to move to Worldline but, when the latter brought Ingenico in 2020, he transferred back to R1. During the interim, he was invited back for a leaving event which took place sometime after he had formally left.

251. When the claimant started his claim he alleged (para.16.8 - A:51) that Mr Risch attended a dinner in Frankfurt with the claimant and “made a crude ‘joke’ over dinner, the punchline of which involved a black man having sexual intercourse with an animal.” This was the allegation responded to (A:68 at para 3.14.7) where it was simply denied and the respondents stated that “the claimant has failed to particularize this allegation and it is, in any event, out of time”. It was covered in a limited way in Mr Risch’s para.16 where he recalled the dinner but did not recall speaking to the claimant making any jokes to him or making a joke of that kind.

252. The claimant’s statement evidence about this incident was contained in para 164 onwards. He describes the table and who was sitting in various spaces including where Mr Risch was sitting. He describes much but not all of the conversation being in German and then an incident where Mr Risch was conversing in German with a named colleague and then burst out in loud laughter. The claimant then alleges that “I looked over to him and stated words to the effect of ‘that must have been funny’ he stated the joke would be difficult to translate in English, but it was about “black man fucking a rabbit”. The claimant stated that he believed that this was something Mr Risch would genuinely be thought to be amusing but that the colleague looked alarmed and apologized later. This is a considerable amount of extra detail compared with the original allegation.

253. When Mr Risch gave evidence, he stated that he wished to make an additional comment about this allegation. He denied that there had been a joke on his part with regards to what the claimant was referring to. He stated that, since making his witness statement, he has had another conversation with the colleague named by the claimant and, although Mr Risch himself had not recalled the conversation, the colleague had reminded him of it. Mr Risch evidence now was that at the dinner he had recounted to the colleague in question that in his new employment he had met a former colleague of them both who had told him about having to review adult material as part of a due diligence process. He says that it was this that he was relating to the colleague at the dinner party

> “it was no joke at all, but I was telling this colleague about the really bad stuff that she had to face when onboarding the merchants… well it was bad stuff like people having sex with animals for example and that is what is referred to in this paragraph.”

254. When cross examined about it he said “I cannot image that this has ended up in bursting laughter. More shocking.” He did however accept that the words alleged by the claimant were stated that night in German or in English.

255. We accept that words alleged were probably used. Mr Risch clearly struggled with his recall of this event. His initial recollection had simply been that nothing happened. Naturally, we expect people to come to Tribunal and, in the words of the oath or affirmation, tell "the truth, the whole truth and nothing but the truth" but we think it is to his credit that he volunteered this further information. His explanation for late recall is plausible. The first time a comment it heard is the most memorable occasion – for the claimant, that would have been at this event, for Mr Risch it would have been when the story was first relayed to him. If a long passage of time occurs before the individual has to remember the occasion, then their recall is likely to be worse, in our experience. We think that the event in June 2019 was therefore more likely to be memorable to the claimant than to Mr Risch. It is not clear, even now, how much Mr Risch remembers himself rather than accepts on the basis of being reminded by the colleague.

256. Given the claimant's modest German language skills, it is more likely than not that this comment was explained in English as well as in German. There is a coincidence in the claimant's account and the words Mr Risch accepts he used in German (although he was not clear about their use in English). It is such a striking and indeed shocking comment that it is unlikely that this was invented by the claimant. However, it appears that, as relayed to the claimant, it was deprived of the context – namely a story about what a colleague had experienced.

257. We think it is the sort of situation were although the adjective black to describe the man in the offensive material does not appear to have been an important part of the story that cannot reasonably have been apparent to the claimant. Furthermore, we think it probable that an adjective about colour would not have be used if the participant in the image was white. There can be no doubt that what was described as likely to offend. We accept that the claimant was offended and felt demeaned as a black person. It was reasonable for that comment to have that effect.

258. This incident is not referred to in the reasons for resignation given in (C:1207). We consider that the allegation that this will stay with him for the rest of his life is overstated as he didn't complain about it when he took the opportunity to complain about other instances.

259. We consider the claimants evidence at para.165 that Mr Risch laughed. We think the claimant inferred that a joke had been told from the laughter, but that description is not necessarily inconsistent with the R1 witnesses denying that they were telling a joke. People can laugh for more than one reason and Mr Risch now giving evidence long after the event is doing his best, but he is hampered by the difficulty of recalling it. We accept that there probably was laughter.

<u>Nettetal</u>

260. The next allegation in time is said to have taken place around 24 July 2019 at a work event in Nettetal, Germany. It is covered in para 171 of the

claimant witness statement and following. The event took place at an external venue, not on R1 premises, and hosts for the event had been provided by a third party. The claimant account is that a male host from that third party provider greeted him when he arrived and asked his national origin and when told that the claimant resided in the UK apparently, appeared not to accept it and asked how it felt to have African blood and what was the claimant doing in Germany. Mr Logo states that this seemed hostile to him and complained that colleagues did not react to the incident or check that he was alright. He explains in para.174 how this made him feel and described it as ruining the conference for him.

261. Although he also says that the event was held in German this seems to us to be a separate reason why the claimant might have felt "othered" and we deal with the complaint about use of German language in meetings in detail below.

262. Mrs Fischer says in her para.42.d that although present at the event she did not hear such a comment and would have regarded it as wrong. However, in cross examination she said that she did not say that it did not happen merely that she had been in Nettetal and did not realize that he had had that conversation. The claimant's account was that Ms Fischer was not present at that event but in any event, she is not alleged to have overheard it. Indeed, none of those who gave evidence at the hearing are said to have overheard this comment. As recorded in the list of issues the person responsible is said to have been the male host for making the comment rather than for a failure to protect although there is a separate allegation to that effect (LOI4.V).

263. Just because no one heard this, does not mean it was not said and we understand that receiving a comment of this sort is an all too common experience of Black people even in the present day. We can imagine it being said and accept the claimant's evidence about the comment. He does not allege that he made a specific complaint about it at the time either about the comment itself or about anyone else whom he knew had overheard and did not react and we accept that he did not. The perpetrator was engaged by a third party and our conclusion on this is that there is no evidence that this unnamed individual was an employee of R1 or their agent within s.109 EQA.

264. On the second day of the event, 25 July 2019, it is alleged that Mr Schrader had a conversation with the claimant in which he explained he was unhappy because he had lost a tender and that was a source of shame because, at that event, he was in the presence of a number of the senior managers. Whereas the claimant was in the Fashion & Lifestyle vertical, Mr Schrader is in a different vertical: DIY & Food. They have only known each other through cross-team events in Germany such as that at Nettetal. The claimant accepted that Mr Schrader was a German national.

265. The claimant's account is that he reassured Mr Schrader who then said, "Jerry, I feel like I am the black man of the company". The claimant states

he asked for clarification and Mr Schrader said again “I am like the black man of the company”. What the claimant says he took from this was that Mr Schrader was stating that he felt he was a black man because he lost a high-profile tender and was thus ashamed.

266. Mr Schrader, who gave evidence in German, states in his para.10 that he did not use that comment. His recollection is that he has a vague memory of talking to the claimant socially in the evening in a wide ranging conversation which, to his recollection, covered “God and the world” and also about some colleagues. He states that he cannot understand what the phrase he is alleged to have used could mean and had never used the sentence in his life. He says it was loud with dancing and loud music so hypothesized that the claimant might have not been able to understand him. Although he is aware of the phrase ‘black sheep’ he did not appear to think it likely that he had used that phrase because “this too is not a common phrase in Germany and not one I would have naturally used.”

267. There was a dispute between Mr Schrader and the claimant about where the conversation was likely to have taken place. Mr Schrader’s memory about the details of the topics discussed was hazy but he was clear that he remembered sitting in the outside seating area with some colleagues at one point but that the claimant was not present in that discussion. He accepted that he had sat outside for a long time because it was a warm evening but was very clear that he had spoken to the claimant at the bar inside.

268. The other dispute between the claimant and Mr Schrader was whether he had discussed losing the Aldi contract. He was taken to an email of 19 July (SB page 39) which was how the claimant found out that a message had been posted on the WhatsApp group about a competitor being awarded a contract to handle card payments for Aldi Nord/Aldi Sue. Mr Schrader said that he didn’t constantly look at the WhatsApp group and he had not spotted it. He was adamant that he could not remember discussing losing Aldi at a time so close to the two-day event and stated that the bid lost had, in any event, been limited to specific payment streams and would have been “relatively small revenue had I won that”. Furthermore, he had only been dealing with the claimant on an interim basis because the customer had actually been that of a colleague who ultimately won the tender.

269. We found those answers in relation to the Aldi tender, in particular, to be convincing in their detail. Mr Schrader sounded confident of the details he gave which persuaded us that there was no reason why the fact that this particular contract had gone to a competitor would be a significant concern to him for his career or something that he would be preoccupied with at the event. This makes it unlikely that the context was as the claimant described.

270. Although Mr Schrader is less certain of the details of the conversation he had with the claimant we are satisfied that he had no reason to consider himself to be ashamed or likely to be in trouble and that makes it unlikely that the comment would have been made. We think it is more likely that the

claimant misheard a comment and gave a negative interpretation on something that he had not properly heard.

271. Although a formal notification of change in job title to key account manager was communicated to the claimant on 15 August 2019 it does appear that the claimant used the title before then. It was at this point that he received an increase in salary with effect from January 2019 back dated and then a further increase with effect from August 2019. Ms Fischer explains in her para 24 that one of the consequences of the joint venture was that the claimant was fully integrated into the Fashion & Lifestyle team. The claimants' German peers' pay was governed by a works counsel agreement and Mr MacMahon via collective agreement in France which was where he was based. She states that she wanted to align the claimant in terms of job title and pay with the rest of the team so as far as she was able but had to operate in certain budgetary constraints. We accept that evidence.

272. Later in the year she approved the cost of a Fintech course. This and the fact that she sanctions two payrises in the space of 12 months are matters which are part of the reason why we accept that Ms Fischer valued the claimant and was keen to try to keep him onboard.

<u>WhatsApp messages: 2</u>

273. On about 6 October 2019 Sabine Niedenthal posted a photograph of a footballer in the WhatsApp group. The footballer in question played for the team she supported, Eintracht Frankfurt, and he had recently scored a goal. The meme which, like the other she had posted does not appear to be one she had created, has a caption above and below the photograph of the black footballer which is translated in English as 'NO MATTER WHAT DIET HE DOES and then below his picture '[footballers first name]' REMAINS '[footballers' surname]'. The claimant accepted that, in German slang, the footballer surname is a homophone for a slang word meaning 'fat guy'.

274. The interpreter assisted the Tribunal by interpreting also the foregoing post "Also der Reporter hat Goal gesagt" the translation of that is 'this reporter said goal.' The interpreter told us that the strapline under the photograph could be interpreted as [first name] remains buddy or fat guy because it was a term that might be said to a friend. The interpreter explained that although the word means 'fat guy'. that is not negative, "it has not got negative connotations" and stressed that in saying that she was attempting to convey the linguistic nuance of the word.

275. We accept that this post contains a pun; a pun on more than one level because of the fact that the surname is a homophone for fat guy but also that word is used in German by its literal meaning but also to mean buddy or mate. That makes sense of the words above the photograph and the reference to a diet which, as Ms Niedenthal explained in (para 11) is ironic because the footballer "is extremely fit and a good goal scorer and is not fat".

276. In this instance we consider that a complete explanation has been provided by the respondent. The footballer happens to be black, but the message of the meme and the posting of the meme are not related to race simply by dint of that fact.

Conversation with Mr Rusch

277. About a week or so later, the claimant and Mr MacMahon were staying in a hotel in Frankfurt and went for dinner with Mr Rusch. This is another example of the challenges that could face the respondent when they seek to investigate an incident about which complaint is first made a long time after the event. As originally stated, Mr Rusch is said to have commented during the dinner that “there was no such thing as a black Italian”. Mr Rusch’s evidence in his witness statement was that he did not recall anything memorable that about the dinner and did not remember making such a comment, did not understand the meaning of the phrase and could not imagine saying anything of that kind having worked in international companies for many years.

278. In the claimant’s witness statement he sets out an expanded context to the allegation. The claimant states that they had a conversation about a particular footballer alongside a conversation about the European migrant crisis; this was at a point in time when the then chancellor Angela Merkel had accepted 1 million refugees into Germany.

279. When these details were put to Mr Rusch in cross-examination he stated that he did not recall there being a discussion about the European migrant crisis, that he did know the name of the footballer but was not himself very interested in football and did not have a lot of knowledge about him. The claimant said he was not offended by the immigration views but suggested to Mr Rusch that he had in effect criticized the decision to admit those migrants. Mr Rusch denied that it was his view but said he could only imagine that he had called it a mess and conceded that they may had discussed it at dinner. He did now recall that the particular footballer’s name was mentioned and recalled being a bit upset about that footballer’s actions because he had destroyed his shirt and he, Mr Rusch, did not think that was good for a professional footballer. The claimant said he remembered Mr Rusch criticizing the footballer for taking his shirt off and he had agreed with Mr Rusch on that point. When the alleged comment was put to him, he said

> “I do not recall saying that. I do not really understand what it should mean because of course there should be different colours with Italian nationalities… from my ethics I would never say there is nothing like a black Italian.”

280. Mr Rusch was giving evidence through an interpreter, and he had some awareness of a conversation taking place as we have set out above. For reasons which we have explained in a number of places, we have formed a view that the claimant did have a tendency to assume the worst possible

interpretation or even (in the case of the post about the footballer by Ms Niedenthal) a completely unreasonable and false interpretation of something that, because of the language barrier, he did not fully understand. Taking into account the passage of time and that Mr Rusch is seeking to recall details about an event which happened four years ago and which would have only been available to him on exchange of witness statements, we think that his explanations are credible. It is more likely than not that this a misunderstanding by the claimant in the course of the conversation about sensitive topics. We find that this comment was not made.

Retail Expo UK

281. From January 2020 onwards, the claimant was corresponding with Ms Fischer for approval for a budget to organize a marketing event at Retail Expo UK. This was scheduled for May 2020.

282. As is well known, the global threat of Covid-19 started to be understood over the first three months of 2020 with the first UK lockdown starting on 23 March 2020. On 26 February 2020, Mrs Fischer emailed Sven-Moritz Becker to ask whether the RBTE should be cancelled following a town hall announcement of that date "or shall we join in and cancel end of April if there are not news concerning corona."

283. The response was that she should wait for an official information, but he thought that it would be cancelled. On 2 March 2020 the claimant stated that on the basis of an email announcement (translated using google translate – see D:1275) he had informed Retail Pro that R1 would not participate. The announcement in question made 28 February 2020 was apparently a ban on participating in "large events, trade fairs, conferences or training courses etc...". Mr Becker responded very quickly to say that

> "in view of the fact that the event is taking place in the UK and the situation here is currently different we had decided that you would participate and that we would not allow Dara to travel to the event" page C:1075.

284. There is no indication from the claimant's response that he objected to the reinstatement and in cross-examination he accepted that, as of the 2 March, there was no reason to think that he could not attend. However, the claimant said his recollection was that the UK was further ahead in the spread of coronavirus than France was which was where Mr MacMahon was travelling from.

285. The claimant accepted that, in general, people had not realized in the UK that they would be going into lockdown a few weeks later. The claimant's argument was that the direction by Mr Becker to reinstate the booking showed a lack of concern for him compared with that extended to Mr MacMahon. He accepted that he was very driven, and he was always keen to use such opportunities.

286. We have taken into account Mr Becker's evidence about his thought process at his para.10. He reiterated in his cross-examination that he had made clear that any feelings of the individual staff member, including the claimant, of insecurity would trump anything and would be more important. However, there is no evidence in the bundle of any written communication of that. He stated that that communication had been made in team huddles and Mr Becker could not point a specific meeting in which the claimant had been present.

287. We accept that the difference for Mr MacMahon was that he would have had to travel internationally in order to come to the UK for the event. This was a valid distinction between Mr MacMahon and the claimant. The decision to ban international travel, whilst not part of the official communication, was one which seems probably to have been taken based on the growing knowledge of how the disease was spreading from country to country at that time. The claimant did not immediately object. The genuine belief of Mr Becker seem to have been the claimant was keen to attend if he could, which is consistent with the claimant's drive as a competent and committed salesperson.

288. It seems far more likely than not that the distinction between the trade event in the UK and those which had been decided should not be attended is that it was in a different country. We accept that the distinction was that it was genuinely believed that the situation in Germany about the spread of coronavirus was believed to be different to that in the United Kingdom. As we recall, Cheltenham races went ahead in March 2020. The respondent has satisfied us that the reason that the different instruction was given in case of the claimant's attendance at this trade fair was that he was based in the UK for a UK trade fair and would not need to travel internationally. It was not because he is British or is black.

<u>The claimant's application for promotion/maternity leave cover</u>

289. Ms Fischer went on maternity leave in June 2020 and her role, Associate Director Fashion & Lifestyle was advertised for maternity cover (page C:1088 which is the advertisement in German). The response from HR at C:1121 (written in German with an English translation at 1122) shows that the claimant's application was received on 3 June 2020.

290. In the same month there was an unexpected and traumatic development in the claimant's personal life when his long-term partner and the mother of his son died suddenly following a short illness. He was absent on bereavement leave between 8 and 26 June 2020.

291. The claimant was interviewed for the role in October 2020, among other candidates including Joerg Mertens who was the interim replacement. Ms Fischer explains that, when the claimant expressed his interest to her, because she was aware that he wanted to progress and wanted to incentivize his development she told him to speak to Sven-Moritz Becker who was leading the process.

292. She describes her discussions with the claimant as being consistent with an email she sent to Ms Niedenthal and Mr Mertens at C:1112 (English translation at C:1113) where she states that the claimant's application for her job would be "as a sign that he wants to grow and wants a conversation about what prospects Payone or the group can give him." She also makes the following statement "it's a question how we can keep him (he's definitely not going today or tomorrow), but maybe somebody will change in the set up with word line or new decisions will be made for the UK." This is another piece of information that causes us to think the Ms Fischer really valued the claimants' skills and considered him to be an asset to the respondent.

293. The claimant's first complaint is that the job was advertised in German and the second part of his complaint is that it requires the candidate to be able to speak German.

294. We accept specific points made by Mrs Fischer is paragraph 32 of her witness statement. She first says that there was an expectation that annual customer meetings would be held in German. The claimant argued that customer meetings are generally attended at that level by senior managers so that Joerg Mertens, Mrs Fischer or her reporting line would be there.

295. This seemed to be a suggestion that there would be those present as an annual customer meeting on behalf of R1 who could speak German so the Associate Director did not need to be able to. He also suggested that international clients would not necessarily expect the meetings to take place in German. His answer to the suggestion that that meant senior people in German client companies should be required to speak English if he had that role in order to accommodate his lack of German was to suggest that that would be a less discriminatory way of dealing with it. He stated alternatives would be attending such meetings with a German speaking senior manager so that the meetings could be conducted in German or in English if the international client company were able to do so.

296. The claimant relied on Mr MacMahon applying for what he described as a similar role when Mr MacMahon is not a German speaking; the claimant's anecdotal evidence was that Mr MacMahon was interviewed and received a pay rise after being unsuccessful. The trouble with this comparison is that the claimant was interviewed for the role despite there being a requirement for the post holder to speak German essentially as a development opportunity. He accepted, indeed proffered, the evidence that Mr MacMahon did not himself receive an appointment for which there was a requirement to speak German. Mr MacMahon is not black and we understand him to be an Irish national.

297. It was pointed out to the claimant that his suggestion would require him, in the position of Associate Director to attend meetings potentially held in a language that he did not understand. We regard his response that he would be in control of getting any translations to be impracticable and to miss the point – which was not a concern about privacy or data protection but about effective communication. Although it is the case that Ms Fischer

visited the UK as a good, but not fluent, English speaker and was able to rely on the claimant to engage with the customers that does not seem to be equivalent to the position the claimant would be in as Associate Director with essentially nonexistent German when trying to establish a really positive relationship with his German speaking clients.

298. In our view, the claimant insistence that this could work in practice suggests a worrying lack on engagement with the challenges he would have faced had he been appointed to the role.

299. In his witness statement the claimant alleges that R1 has mislead the Tribunal by stating that the invitation to interview was sent in English. We do not think any confusion on this adversely affects the credibility of the individual witnesses.

300. He covertly recorded an interview between him and Mr Becker at D:1657 and a feedback meeting at D:1661. The rejection respondence from HR dated 18 November 2020 (English translation at C:1155) does not give any reason or feedback on the face of it.

301. The first covert recording is patently not from the start of the interview. At D:1658 there seems to be a discussion about what may happen to R1 business with the consequences of the merger working through. The claimant seems to ask a question about the number of meetings that take place in the role of Associate Director with Mr Becker himself and the vertical leaders. Mr Becker says that normally an Associate Director would have a weekly call with vertical colleagues and in every two weeks a general call with the whole enterprise department. The claimant asks, “and I guess English speaking is a barrier? the lack of German obviously a barrier?” and Mr Becker says “yes I think so”.

302. Mr Becker goes onto say that he has always has the problem – that he has English speaking colleagues: the claimant and Mr MacMahon when deciding in what language to run the meeting. The final responses recorded from Mr Becker at the bottom of D:1658 suggest that he has a decision to make whether or not to run the whole event in English but has to consider how many colleagues would he lose if he did so. Then, on the following page, Mr Becker says

> “everybody is so concerned with the English language in the team. Because we do not speak only about key account managers. We also speak about technical account managers; we speak about the colleagues from the sales support and so on” and the final entry from the claimant before the audio cuts off starts “I mean I would expect to have a meeting in”

303. In the feedback meeting at D:1664, Mr Becker outlines what he has described as the two main reasons for the decision not to appoint the claimant. At D:1663 he states,

a. "the majority of customers in fashion and the lifestyle in vertical are still based in Germany … it is therefore important for me to have someone in a leading position who can keep appointments here in Germany very fast" then

b. "and this is also important who speaks German yeh? Of course, the majority of our customers are able to speak English too… but there are still customers for whom it is must easier to speak German here. Particularly in view of the fact that when the supervisor or the head of talents and appointments, it is often a problem or a challenge to deal with a subject of matter. And it is important that there is not a language barrier, let's call it … between him and the customer. I – of course, see that this situation will change more and more. And also, if I look forward and look now after the time, after the merger, I hope that also some further international customers will be transferred into our portfolio."

304. Mr Becker does go onto say that there was another reason but that was not the main reason: the main reasons where the geographical position and the language position.

305. We consider that it was unacceptable behaviour of the claimant to record these meetings covertly. The examples given about recorded meetings by the claimant were recorded town hall meetings where attendees are warned that a recording is to take place and we do not consider that to be at all comparable. Although it may well be the case that the claimant did not see the document concerning the recording of conferences relied on by the respondent prior to disclosure, we consider that it is common business etiquette that it is totally unacceptable to record without permission of the person who is being recorded.

306. Indeed, the claimants answer to that proposition was to excuse his actions on the grounds of it happening during a particular stressful time: he was adapting to becoming a single parent and the emotional and practical consequences of his partners death were still being worked through. He said that he used these calls to keep track of things during this very difficult time in his life but that does not excuse them, nor does it seem to suggest that the claimant himself thought it was acceptable to do so rather that he had some mitigation.

307. In our view, it does not seem at all unreasonable for the R1 to require the post holder of associate director to be a German speaker. There might be a question of the degree of fluency that would be needed but the claimant does not suggest that he had any functional German language skills. The two main points seem to us to be that the role would not simply involve communicating directly with the KAM's who might have good spoken English but would also require communication with the other roles described by Mr Becker in the feedback meeting.

308. Secondly, Mr Becker explains in his para.12 that over 90% of the customers were German headquarters and or were German speaking (some are in

Austria). If a German speaking customer wishes to have a complaint (for example) dealt with by the Associate Director the inability to speak German would be a barrier and barriers to trade can lead to loss in revenue. People can communicate effectively through interpreters but the potential barrier to communication remains nonetheless and it is a matter for R1 to decide what would be preferable.

309. Mr Becker does in D:1665 state

> "another point where we really run into the discussion is the market development we see at the moment, especially in the fashion/lifestyle vertical it facing a great challenge here in the coming time… and therefore its important to have someone in the leading position who has both prowess and economical experience and drives the transformation accordingly."

310. He acknowledges that he sees the claimant's knowledge and experience but the above suggests to us that leadership experience was a condition and if the successful candidate had greater leadership experience than the claimant that would give them an advantage over the claimant, quite apart from the lack of German language skills.

311. The claimant had in fact had a missed interview for the position. As he said, the original invitation for the interview was at C:1146 and is in German. He overlooked it and contacted the HR partner with his apologies saying that often invitations in German are not specific to him and he missed it asking for it to be rearranged. Mr Becker responded reassuring him that it would be rearranged "I had already suspected something like this because I got to know you was a reliable colleague."

312. When asking questions about this the claimant complained that the HR partner wrote to him entirely in German and suggested that that was unfair. This question was asked of Sandra Daniel to whom questions about the advertisement being in German were directed. She argued that he was not disadvantaged by the job advert being in German because the title was in English and as an expert in the field the claimant could imagine what that meant or implied. She accepted that that was making it the responsibility of the claimant to ensure that the advertisement was produced in a language he could understand. The HR colleague who sent the email in question was apparently on parental leave at the time of the hearing.

313. Given that the claimant had had a conversation with Mrs Fischer about the role, we do not see that he was disadvantaged by the advertisement being in German at all. He had a very good idea from his manager what the role involved and clearly was able to apply so we do not see that there is any disadvantage here.

314. At this point during the pandemic the members of the vertical were having meetings by MS Teams. An organization chart as at January 2021 is at B:749 which shows Mr Mertens as Associate Director Fashion & Lifestyle,

Mr MacMahon as Senior Key Account Manager and the other Key Account Managers together with two Sales Support Key Accounts.

German language disadvantage

315. The allegations about a German language disadvantage can be broken down into three subheadings.

316. The first is that of the job position being advertised in German and requiring the candidate to speak in German. There may have been some earlier confusions, but it was made clear to us that the translation of the job adverts at C:1089 was done for the purpose of litigation. That shows that a very good knowledge of German and English both written and verbal was a requirement. For reasons we explain in para.313 above, we do not think that the claimant was disadvantaged by this being in German and, as he states in A:19 para.13 (within the grounds of the claim) he translated it. There was no disadvantage as a result of the initial interview appointment being sent by an email written in German because it was rearranged. As an indirect race discrimination case this is no longer part of the claim before us and for reasons we have explained we consider that the requirement that the post holder should have very good knowledge of written and spoken German and English was a reasonable requirement.

317. The next stand of the German language disadvantage relied on by the claimant is that of R1's website being in German. Properly understood, the issue is not that the claimant does not understand the website himself. He used a translation tool where that was necessary, but the website was a means by which R1 would project into the marketplace and not the means by which the claimant himself obtained information and communications. His concern was that clients or potential clients would not be able to understand the website and therefore he felt at a disadvantage because he considered it likely to deter future potential customers.

318. We accept the evidence on this point of Mrs Fischer (RF para.48) that, for a period of time, from January 2020 until mid-2021, following the joint venture within Ingenico, R1's website was only available in German with no English version. She stated the reason for this was that the focus for obtaining new customers was in the DACH region where the clients would be German speaking. For reasons we have expanded on at para.210 – 215 above the decision had been taken to pivot the focus of the UK business to try to retain existing customers and this was a business judgment that R1 was entitled to make.

319. We can imagine that this must have been frustrating for the claimant but think it likely that is had a limit defect upon his existing customers. It had an impact on him, but we quite accept that this was not something done to him. For that period, R1's policy was only to have a German language website – we do not accept that this was done to target the claimant. It is likely that Mr MacMahon, being based in France, was also affected by trying to attract

customers who did not have German as their first language and who were more likely to have English as their second.

320. The final strand of this argument is that of meetings being conducted in German. There was some confusion in the oral evidence about the extent of meetings which were conducted exclusively in German. The MS Teams meetings we refer to in para.314 above with the member of the vertical were held weekly and were held in English. It does not matter whether they were held in English to accommodate the claimant and Mr MacMahon. Some other communications were in German. As the claimant points out most of the WhatsApp messages but not all of them are in German. Some of them are chat rather than important communications but not all of them.

321. The claimant accepted that once a fortnight there would be a meeting across all of the verticals, including the Fashion & Lifestyle vertical, with account managers such as himself. We are talking about an allegation that covers a period of at least two years and it is quite possible that the number of attendees, the number of verticals, and the organization of the business means that the attendance at these meetings varied over the course of that time. Meetings of that kind took place in German and the issue in dispute for us to resolve is whether Mrs Fischer, to whom both the claimant and Mr MacMahon reported, made sure that those who attended but where not German speakers understood anything that was pertinent to them.

322. The claimant had a one hour meeting each week with Mrs Fischer in addition to the team meeting with the vertical to which he belonged (once that existed). It seems improbable that she did not ensure that he was aware of the matters that were discussed in the meetings that were of importance to them. We accept her evidence that the claimant was made well aware in his second interview what the realities of working for a German company would involve (RF para.15).

323. The claimant sets out the evidence he relies on in CSUB para.85 & 86. It does seem to be the case that the claimant worked around the fact that some presentation were made in German by photographing them and translating the slides through an online translation tool. This may have meant the claimant had to work harder than those who did not have to do so, but we do not see that R1 or any of its managers were targeting the claimant by speaking in German in meetings just because he doesn’t speak it, given that it was their first language.

324. There is a particular allegation that Mr Mertens asked the claimant to translate particular documents which he argues caused him potentially to break Data Protection rules. Axel Moritz, whom we considered to be an impressive witness, explained that there was an alternative to sending an entire document to a third-party translator website if it contained private names, such that there was a concern about data protection. That alternative would be to translate only those sections of it that did not contain proper names and therefore did not contain personal data.

325. Sven-Moritz Becker was also asked about this issue in relation to the Enterprise Ratinger team meetings. We accept that that team meeting was mainly aimed at former employees of Ratinger - the Ingenico side, R1 being the Frankfurt branch. He was asked specific questions about C:1060. Mr Mertens had apparently encouraged his team members to attend the Enterprise team meetings on a fortnightly basis and C:1060 was a protocol in German which Mr Becker agreed in part was highly sensitive. Mr Beckers rejected the suggestion that the claimant had been forced potentially to breach data protection rules by circulating German language protocols.

326. His confident and detailed answer was that the claimant did not necessarily need the information discussed in the meeting. The background to the meeting was that it was relevant for German solutions offered for customers in Germany whereas the claimant and Mr McMahon's customers was all through the Frankfurt platform. For that reason there was less content in the Enterprise meetings that were directly relevant. Although he accepted that the claimant had Footlocker as a client which had 150 stores in Germany, he stated that they dealt with the Frankfurt platform and not the Ratinger platform. Mr Becker was asked specific questions about the slides that the claimant had photographed and stated firmly that one of them, in particular, was not relevant to the claimant's vertical; it was Food, Warehouses & Public Transport, not Fashion & Lifestyle. It appears therefore that the claimant has put in evidence as an illustration a document that he has photographed when it was not of direct relevance to him in any event. He may not have known that – because his point is that he did not understand the material - but it is weak evidence of disadvantage nonetheless.

327. The claimant has not demonstrated to us that he was being forced into data protection breaches. He may have translated the whole websites but there was an alternative that did not require him to include any personal data as explained by Axel Moritz. The evidence of Mr Becker gives practical examples of reasons to think that the quantities of German documents in the bundle do not mean that there was an equivalent quantity of relevant information that the claimant did not have access too. At least some of what he has relied on has been shown to relate to different verticals. The claimant would be in no different position to Mr MacMahon or, prior to May 2018, to his other UK-based colleague.

328. Overall, we are satisfied that Mrs Fischer (and Mr Mertens in his turn) reported to the claimant any matters that were relevant. The extent of German language used in the documents was certainly not the huge disadvantage the claimant seeks to make out.

329. C:1010 is an example where one of R1's managers has emailed the minutes of a KAM meeting to a large number of individuals and has translated those points within the body of the email. That was something that was done for the claimant and Mr MacMahon in that instance - although he alleged when asked about C:1010 that the information was not particularly relevant to him.

330. To our mind this is evidence that supports both points by the respondent: efforts were made to render into English for the benefit of the English speakers key points from meetings that had been conducted in German, and meetings took place which contained an awful lot of information that was not relevant to the claimant in the execution of his role.

331. Overall, our finding is that the claimant was overplaying the extent to which this was a problem for the litigation. There was no suggestion by the R1 that he was not performing his job. For the most part, all of these so-called disadvantages due to German language barrier were not a substantial difficulty. When it comes to consideration of the issues, we are of a view that this cannot be a breach of contract as he accepted the job with a German company on these terms. There is no suggestion that anything changed during the course of his employment.

<u>MS Teams meetings: December 2020 onwards.</u>

332. One of the specific allegations of race related harassment is about a comment that alleged to have been made by Mr Boyens on around 9 December 2020 during an MS Teams meeting. The claimant either accepted or did not dispute that Axel Boyens was a German national who had lived in Germany his whole life, was probably working in Germany and located in Germany during the teams meeting which is referred to in LOI4.t. Mr Boyens is in the same vertical as the claimant; a peer KAM reporting to the Assistant Director but had no line management responsibilities towards the claimant or the claimant towards him.

333. D:1715 is a transcript of a covert recording of an MS Teams meeting. The claimant had joined the call but had not switched on his camera. There is the following exchange

> "Ebru: Jerry can you also show the camera then we can take a team picture?
>
> Jerry: yes I was just going to town on my tea…
>
> Axel: jerry wanted to be for his own, putting his hand in his tea.
>
> Ebru: no, he is doing his hair.
>
> Axel: he is doing his hair… on his back.
>
> *laughter*
>
> Jerry: *laughter* its very easy, yeh… can you see me?
>
> Joerg: … I like that.
>
> Dara: no not yet.
>
> Claudia: I'm curious where Jerry will be sitting…

Jerry: I'm here. I've enabled the camera…

Claudia: Yes, and now, do the …

Dara: going to set up, and you've got a thing that says together mode, on my thing, in French"

334. The claimant's allegation is that the comment by Mr Boyens that he was doing his hair on his back is racially motivated. A picture of the team in together mode is at C:1499. It is only the head and shoulders of the participants that appears, not their background.

335. When the claimant was asked questions about this picture and the transcript, he was not particularly cooperative. He was very reluctant to accept what must, by now, be the fairly common experience of "Together mode" which allows all of the people in a virtual meeting to be presented as though they were in a theatre, but that people are randomly allocated to a place in the virtual environment. He was therefore reluctant to accept that, when Ms Wetzel asked him to turn his camera on and said "then we can take a team picture", she was asking permission to take a picture. A question mark had been inserted in the apparently agreed transcript of the covert recording, but the claimant was nevertheless unwilling to accept that, that punctuation was a fair representation of how the words sound in the audio.

336. The claimant did accept that he himself, is a balding man and Mr Mertens (who is in the second row down on C:1499) is also bald. The claimant confirmed that Mr MacMahon is also bald and that Mr Boyens himself did not have much hair.

337. Mr Boyens explained in his evidence that, the previous week, there had been a joke because Mr Mertens was running late. It had laughingly been suggested that he was doing his hair (a facetious or humorous comment because, as a bald man, he would not be late for such a reason). Mr Boyens and Mr MacMahon had then discussed what hair he could possibly be doing and Mr Boyens said "I could only do the hair on my back" (AB para.13). When this context was put to the claimant he stated "no that's the amended ET3 that didn't happen."

338. It may be the case that, that factual case was not pleaded and it was open to the claimant to suggest that it should not be accepted on the basis that it was contrary to the original pleaded case, but that does not mean the respondent is not entitled to rely upon what Mr Boyens' instructions now are. It did not provide a reason for the claimant not to answer the question about whether or not he remembered such a joke from the previous week. When pressed, he stated that it was fabrication that there had been an ongoing joke in the team about the men not having much hair.

339. In CSUB para.58(a) the claimant draws attention to the change in respondents' case from saying that the joke was directed to Mr Boyens

himself to the position put in cross-examination and Mr Boyens witness statement which was that it was referenced back to an earlier joke. The claimant also argues (para.58(e))

> "just prior to the offensive comment… Mr Boyens has heard a tempting to dehumanize the claimant where he states that claimant was 'putting his hand in his tea.' Presumably he was predisposed to believe that black people behaved in such a way."

340. The use of the language dehumanize is very strong and completely unjustified by the allegation. The word 'tea' in the extract quoted at para.333 above might be a drink and it might be a meal. It seems to us to be entirely logical that Mr Boyens did not understand what the claimant said, and we accept his explanation in cross-examination that lots of people were speaking over each other, he was struggling to hear and did not understand the phrase.

341. As to the comment that features in the list of issues, even without the explanation put forward, we cannot without more presume that the teasing reference to doing his hair on his back is related to the feature that distinguishes the claimant from the other men in the meeting - in other words that he is black. Even in isolation, it is clearly about someone not having hair on their head. We do not accept the claimant's denials that there had been a previous joke about Mr Mertens being late because his credibility has been impacted for reasons we have explained. We accept that the comments both by Ms Wetzel and Mr Boyens in fact refers back to a previous comment (see AB para.13) when Mr Boyens said self-depreciatingly of himself that if he was doing his hair, he would be having to do it on his back.

<u>WhatsApp messages 3</u>

342. On around 19 December 2020, Stefan Schrader, the second respondent, posted a video on the WhatsApp group of an advertisement for a brand of beer called Pure Blonde. As screenshot of the post is at (C:1500). We have not been shown the video because there was no dispute about the contents and the parties agreed it not necessary. The claimant accepted the description put to him by counsel for the respondents who described the advert as depicting a utopia of blonde people who make Pure Blonde beer who have been splattered in mud at the end of the advertisement. There is a shot from the advertisement at C:1501. This image shows a group of young, toned, blonde people apparently waving. The front row have what appeared to be mud splats on them and one is holding a bottle of beer. The claimant stated that the people had been 'stained' with mud but accepted that a lorry that turned up to collect the beer, drove away and splattered mud on them. He agreed that the lorry driver opened a bottle of beer on leaving using a bird that was flying past him. The claimant did not agree that it was meant to be a funny advert.

343. The respondent's case is that the hair colour of the people in the advertisement is a play on that fact that it is a blonde beer. The claimant stated that he did not see it as a joke but was offended by the pure blonde utopia depicted. In para.127 and following of his witness statement, the claimant explained his concern as being that the advert appeared to promote an all-white utopia without any black or brown people and associated that with the ideology of Nazis "both historically and in the present day as it pertained to the 'pure Aryan race'." The claimant has put in evidence a copy of the cover of a 1938 calendar to illustrate the point (C:1502). It was suggested to him in cross-examination that when he implies that such Nazi ideology was being circulated in the workplace and was highly concerned that it was posted by a German colleague in a predominantly German WhatsApp group he was stereotyping because he was eliding being German with being a Nazi.

344. He denied that, saying that was ludicrous. However we do think there is an element here of the claimant eliding being German with being a Nazi. Why else would it be relevant to state that it was posted by a German colleague? What otherwise would be 'highly concerning' that some of that nationality placed the post.

345. When accepting that there was no negative depiction of black people in the advert the claimant said "there doesn't have to be. It's the omission of black people of ethnic minority people in the advert that sees pure blond and speaks to the Aryan race coming from a German group." Based on this answer and his statement para.128 we have formed the view that the claimant would have been much less likely to make a connection with the Nazi ideology of the Aryan master race if this advertisement had not been posted by a German.

346. When Mr Schrader was cross examined about it he said that he could not see that someone who was not white could be offended by this advert and if he had thought that he definitely would not have shared it. While not denying that there was a Nazi ideology of the Aryan race of predominantly blonde people, Mr Schrader said it was simply the name of a beer and he had interpreted the message of the advert completely differently but did not see any links to the holocaust or African minorities in the advertisement.

347. The claimant suggested that Mr Schrader did not answer the question about whether he was comfortable showing it to holocaust victim for example, but we consider that he was open and honest in his answers and accept that he would not have posted it if he had thought people would be offended. The claimant said in his evidence that he had already had experience that Mr Schrader had made a comment (see para.270 above), but we have found that to be based on a misunderstanding. We accept his evidence that he considered the advert to be humorous and did not see any potential for offence.

348. In support of his allegation that there was a failure to protect him the claimant argues that there were no policies in place to protect him from

various acts. In his CSUB.para.60 he complains of no policies in the English language relating to harassment.

349. He also refers to the use of the WhatsApp which he suggests included common racist jokes. We reject this to the extent that it is based upon matters that have been taken forward within these proceedings that were dealt with above. However, the claimant also refers to a post which he alleges is about staying away from Chinese people (CSUB para.60(b)). He chose not to ask Mr Tehas about the post with a depiction of a graveside seen in consideration of Mr Tehas' recent bereavement. That was to the claimant's credit but the fact remains that we have heard no evidence about it and therefore do not take it into account.

350. However the post at C:1361 within the print out of the entire WhatsApp chain, was something that was pursued with Ms Niedenthal during cross-examination. Ms Niedenthal has posted something in the German language on 26 February 2020 which the claimant suggest should be translated in English as,

"*information for Coronavirus! and this you should do to avoid getting it:* …

351. There are then 10 lines of what may be Chinese characters but which have not been translated (if it is possible to do so). There is then a final line at the bottom, in German, which the claimant translated as "*and then wash your hands*".

352. Ms Niedenthal said that this was supposed to be a joke in that the title says that there was information about the coronavirus which was supposed to be a guide - but no one could read it. The claimant put to Ms Niedenthal that the interpretation one should take from this is that you should stay away from Chinese and then wash your hands. We do not consider this interpretation to be a reasonable one at all. There has been no attempt of translating this or even identifying whether it is in fact correct Chinese rather than filler text. The point Ms Niedenthal was making was that something had been circulated which was introduced as being a guide to avoid coronavirus and then contained something unintelligible to the ordinary German reader because it was in Chinese or what passed as Chinese. This does not support the claimant's case, the WhatsApp was used systematically or regularly to share racist communication or abuse.

353. The claimant complains that R1 did not reach out to him following the black face incident. We do not in anyway seek to suggest that the claimant was not offended by that. However we have found that he internalized his reaction so there was nothing to alert the respondent to there being a problem that they needed to intervene in. At worst, one could say that in 2016 when the incident happened, the management and Ms Ganswindt herself were not aware if the impact her costume would have on a black British employee. It is an example of the claimant jumping to unreasonable conclusions.

354. Ms Fischer, did take action in relation to the complaint about the customer care team which was not put on the basis that they involved racial discrimination. This suggests that she would have taken action had she been aware of the problem. The grievance, which we will detail alone, was not dealt with in good time but there is no reason to think that was connected with race (see findings at para.382 below).

355. In reality, this topic almost entirely overlaps with other allegations. There was nothing to cause R1 to have to take proactive steps and the allegation of failure to protect is not made out.

<u>Alleged breaches of privacy from 18 November 2020 to 9 December 2020.</u>

356. The claimant lodged a grievance on 5 January 2021 (C:1177). He was certified unfit to work and did not return after the Christmas break. it was directed to a HR inbox rather than to a specific individual in HR although Axel Moritz (responsible for data protection), a HR Executive Manager who was supporting JM (the HR Executive Manager) and Sven-Moritz Becker were copied. Mr Becker is the person to whom Mr Mertens reports and at this time the claimant reported to Mr Mertens.

357. The claimant starts his grievance by relating that, following the death of his fiancé the previous year, he had been harassed by a third party not employed by R1 but known to two members of his vertical. We do not need to go into any detail about that to enable the parties to understand our judgement in this case but it concerned very sensitive personal matters for the claimant.

358. He alleged in para.1.1 of the grievance that between 18 November 2020 and 23 December 2020 his ability to blur or change his background on MS Teams video calls "had been deliberately disabled. All other members of the team during the call/meetings were able to use the functionality, and on one particular call I shared my screen with the team to demonstrate that the feature was disabled."

359. The claimant inferred that the third party was trying to establish his whereabouts and would find that information useful. This is a very serious allegation put very high. He alleges that firstly, the ability to blur his photograph on MS Teams has been deliberately removed so that, secondly, a photograph could be taken of his and his background by someone on the call in order, thirdly, that it could be disclosed to a third party.

360. We quite understand why, based on this allegation, when the respondent investigated it they set about investigating whether the functionality could be deliberately disabled. Carolin Gustmann was R1's witness on this point, in particular in para.20 onwards of her statement. She explained in para.21 that. having investigated the matter. she understands it is not technically possible to change user settings for one person on MS Teams.

361. This allegation as it is set out in the grievance is not the way the claimant put his case at the hearing before us. He alleges that the transcript of 9 December 2020 (referred to at para.333 above) shows a comment being made by Ms Wetzel where she asks him to switch his camera on for a team photo and another member of the team saying she's curious where the claimant will be sitting. He relies on these comments to show that members of the team were deliberately trying to record and pass on personal information.

362. This is not a reasonable inference to draw from the evidence in front of us that we have to described. In CSUB.para.68 the claimant alleges that his MS Teams invitations were being placed within a guest group by the organiser Mr Mertens as a way of blocking his ability to blur his background in order that his whereabouts could be ascertained. He points to photographs at SB page 27 and 28 as showing that he Is logged in as guest. He does appear in the icons at the bottom of what appears to be Mr MacMahon screen without his camera on with the word "Jerry (Guest)" on the icon. The date on Mr MacMahon's laptop is 9 December 2020.

363. This was the argument put forward by the claimant when it was suggested to him in cross-examination that the evidence relied on by the respondent from Ms Gustmann showed there was no basis for his fear that R1's IT system was being misused to share information about him.

364. Even if it is the case that a guest is unable to blur its background this is not evidence that someone has deliberately restricted him to entering in that way. He has not made out his case that that is what happened. In answer to questions by NLM Bhatt, the claimant said that he did not go back to Ms Gustmann when she explained she had not received a request to change the background, to ask her why he was in the guest group. In supplementary evidence Ms Gustmann suggested that if someone did not identify themselves as expected for example, as an employee of R1 they may join as a guest only, for example if an incorrect email address was used or only the name. Her evidence was that guest were also able to blur the background. In cross examination she was firm that anyone with an invitation for the call could login with any email address. But she did accept that guests had some limited rights for example, inability to search Teams rooms, use Outlook or SharePoint. There was no suggestion that the claimants functionality was restricted in that way.

365. The logic of the claimant's allegation is that it would have had to involve an element of conspiracy not just amongst the individuals who asked him to raise his camera but also Mr Mertens. It was Mr Mertens who sent the invitation, if the claimant is right that that had some impact on whether he entered as a guest or not then JM would have had to affect that. Mr Mertens said he was not a technical expert and indeed said that he did not have any influence on the technical settings. Overall, the claimant has not demonstrated that this behaviour happened as a matter of fact.

<u>Resignation and grievance</u>

366. The claimant complains that Mr Mertens sent him an email on 2 February 2021 when he was absent due to ill health. That email is at C:1204 and by it Mr Mertens says

> "in order not to jeopardize possible bonus pay in terms of time, I am sending you my suggestion of target achievement with the request to review. If you do not agree with points or assessments, please let me know."

367. The claimant argues that the fact of his grievance was widely known and suggests that it can be inferred that Mr Mertens knew that the grievance had been raised by this point. The grievance includes at point 2 that he had noted a significant number of events that amount to unlawful and discriminatory behaviour. At point 1.3 he makes a specific complaint about his manager which is a reference to a meeting on 23 December 2020 between the claimant and Mr Mertens at which salary was discussed (a transcript of the covert recording of this at D:1728).

368. The claimant also suggests that an updated data protection policy on 20 January 2021 - C:1196 - was clearly a reaction to his grievance. We reject that argument. This translation was provided for the purposes of the litigation that the original document was at C:1195. In his questions of Ms Daniel the claimant suggested that this would have been sent a day after the HR partner for the UK arrived back from her holiday; that it was a direct response to the content of his grievance where he makes an allegation about breach of privacy. He alleged that the company decided to cover themselves with a new policy rather than respond to the grievance itself. Ms Daniel rejected that. We think this allegation is just fanciful. As Ms Daniel said at a time of considerable increase in home working, if those responsible for data protection had looked again at the policy that was their job. If someone had been breaching the claimant's privacy as he alleged, then any responsibility by R1 would surely not be helped by a policy which postdated the behaviour. Furthermore, these policy updates tend to take a long time to finalise in draft before they are circulated.

369. Mr Mertens said that he recalled hearing about the grievance sometime in the first quarter of 2021. The grievance was not responded to or acted upon as quickly as it should have been, and it seems to us that Mr Mertens should have been made aware of the grievance by the time of his email of 2 February 2021 but was probably not.

370. The question he raised in that email was asked to ensure that income calculation was done in a timely manner because he wanted to ensure the bonus payments could be calculated in good time. He explained in oral evidence that he had not been able to get in touch with the claimant because he had been sick during January and did not want the claimant to be disadvantaged. We accept his evidence that he had given the claimant a positive review and had told him that. We accept that Mr Mertens did not want to put pressure upon the claimant but did not want him to be disadvantaged. He was clearly aware that the claimant was on sick leave.

Had he had not done anything he might potentially have faced a complaint if the claimant's bonus was jeopardized. We agree with the respondent's characterization of this as entirely innocuous. Even the claimant put to Mr Mertens that his intention in sending the email was not in question it was the fact that, on the claimant's account, answering it would have required a considerable amount of work.

371. The claimant accepted that the mention in his grievance of the word discrimination was the first time it had been used, although he stated that he had mentioned unfavorable behaviour compared with his UK based colleague.

372. As we have said previously, he did not make any official complaints or informal complaints. When he submitted that seeing people from HR at events and they and managers did nothing about his feelings, we did not see that there was anything they were alerted to that should have provoked their action. In closing he argued that there was a common personality of lack of action of not having policies that would have protected him and that was part of his argument in support of an alleged failure to protect. Yet he himself accepted he did not complain of discrimination as such. We do not think that Mrs Fischer ought to reasonably have realized that race was an issue and in discussion with her and Mr Mertens he simply complained that he was not paid as well as his UK based colleague. The language of less favorable treatment or comparison because of race was not used.

373. Turning to the grievance, Ms Woellner originally gave evidence through the first interpreter stopped and restarted as we have described in paras.41 & 47 – 49 above. Whilst the Tribunal heard evidence from her initially through the first translator and that is evidence in the case, we have concluded that insofar as Ms Woellner's original evidence given through the first interpreter appears contradictory compared with evidence given with the benefit of the second interpreter, the latter should be preferred. It seemed to us that the first interpreter did not regard herself as having adequately interpreted during some of Ms Woellner's evidence that was reinforced by our impression of a lack of coherence and fluency in interpretation. Ms Woellner did have difficulties in responding to questions asked through the first interpreter. Some of her difficulties were not to do with interpretation and this approach is limited to where there is an apparent difference in her accounts on the two occasions then it seems more likely to be explained by interpretation difficulties than by her changing her story.

374. Ms Woellner was not able specifically to say when the email was noticed or why is was not noticed sooner; this was one of the areas where she had difficulties in answering questions because, in reality, there is no fully satisfactory answer. She gave generic evidence that English would not have been readily understood by all employees who had access to the inbox and who would have been tasked with actioning emails received by it. She states that most employees in the HR department are German nationals and speak German. She states that the inbox was one set up with the intention of receiving day-to-day enquires about salaries, payroll, ways

of working hours and about 12 people had access to it. It is that fact, that a relatively large number of people had access to the inbox which is part of the reason why the respondent cannot pinpoint any particular individual who first noticed it.

375. The claimant did not do anything wrong by using that inbox. Indeed, he pointed out that, on 8 January 2021 employees were specifically directed to send communications to it. It also seems to be the case that German HR professionals are not familiar with the English concept of a grievance. LW referred to this in para.11 of her statement where she says that the usual procedure in Germany would either be a personal conversation with a supervisor, a meeting with a works counsel or submitting a letter.

376. We consider this to be evidence which does explains the likely true reasons why the grievance was not acted upon by HR in the initial few days and weeks. We remind ourselves that we should not simply presume that a failure on the part of the respondent is due to poor administration or incompetence (which is what the explanation amounts to) and look to R1 to satisfy us of this as it is an allegation of race discrimination. We take into account that some of the explanation is informed speculation by the respondents witnesses as to why it might have been missed. Nevertheless we accept the factual evidence that it was not the sort of document the HR agents expected to find, it was in English and not all of them spoke English and it has not been possible to find who first came across the grievance in the HR inbox because there are a large number of people who had access to it. Those are factual matters from which we infer that they are the probable true reasons for inactivity.

377. The grievance was also copied to the HR Executive Manager supporting that team who was covering for a colleague on parental leave and was then absent herself. Ms Daniel explains in her para.6 onwards that she was covering for the HR Executive Manager from 9 to 19 February 2022 (by which time the claimant had resigned). We do not know for certain what happened between 5 January and 9 February but it is a reasonable conclusion that those matters we have explained above are why it was not acted on as it should have been.

378. Since the claimant was complaining about his manager, Mr Becker would have qualified as in the line of management as an appropriate person to approach, and was copied in. However Ms Woellner said that going to someone of his seniority would not be the normal first step and his evidence to us causes us to think that he took the view that it had not been directed to him so he did not need to do anything about it until he was told to. We also take account of Ms Daniel's evidence that in Germany there is not the legal concept of an individual grievance in this context. She also refers to the grievance arriving just after the Christmas break which may have been a factor in the poor handling of administration even if not a good reason for it.

379. The claimant also sent an email on 6 January 2021 (page C:1184) asking for an English language version of the employee handbook and received no response to that. There has been no explanation for that. The grievance email is headed "Important-employee complaint" (see page C:1177).

380. Clearly, attention should have been paid to it. The claimant labelled the email "important". His contract states that the ACAS code of conduct on disciplinary and grievance matters would apply although it is explicitly stated in clause 13.1 (B:489) that such procedures do not form part of the contract of employment. He emailed the HR inbox which he had been told was the method to communicate with HR and copied in a specific HR business partner with whom he had had other dealings and his next but one manager. In terms of UK employment law, the claimant did exactly what you could have expected someone wishing to raise a grievance to do.

381. He alleges that the inactivity was deliberate and suspicious. Despite the limitations of the evidence relied on by the respondent, we reject the claimant's counter narrative and consider the respondent to have been incompetent rather than deliberate inactivity coupled with a behind the scenes putting in place of new procedures.

382. The reasons we conclude that are, first, that we found Ms Woellner and Ms Daniel to be credible if justifiably embarrassed at the gap in HR coverage. It is unreasonable for R1 to have UK-based employees and no provision for dealing with grievance and disciplinary matters despite what is in their contract. HR could have used translation tools or translation services in order to understand the grievance and the subject heading should have made clear that it was something that needed to be prioritized. The reasons why they did so included assumptions that someone else would deal with it, the lack of familiarity with what the UK employees would be entitled to expect by way of grievance procedure, some lack of knowledge of the English language and the lack or taking ownership for it – possibly because the HR agents do not appear to necessarily provide HR support as we understand it in the U.K.. When we say an assumption someone else would deal with it, by this we refer to Mr Moritz. He said that he would have seen the grievance as soon as he returned from holiday but then said that immediately afterwards he received a lawyers letter, the data subject access request at (C:1200) dated 28 January 2021 and he focused on investigating the response to that.

383. Ms Daniel seems also to have been confused by a reference to expecting contact from the claimant's lawyer in the final line of section 3 on (page C:1178) and a request that the lawyer be present in any further calls or meetings. She appears to have thought that it was inadvisable to contact the claimant directly and that they should wait for the lawyers (para.11).

384. Viewed from the perspective of people versed in employment law in the United Kingdom, this is an inadequate response but we accept that it was not deliberate. A comparator for this would be someone who was not black or not British who submitted a personal grievance in English in the same

way and we are satisfied that it would probably have been mishandled in the same way.

385. The claimant resigned giving one month's notice on 4 February 2021 (page C:1210). The following day he sent a follow up letter (C:1207) which sets out further reasons for resignation. When deciding the reasons for resignation we think it is also important to consider the terms of the grievance itself. In addition to the privacy issues raised as we have discussed in para.356 - 365 above, the claimant at point two states "I have chronologically noted a significant number or events and acts over the years and presented them to my counsel: and we assert that they individually add in total are tantamount to unlawful discriminatory behaviour within the workplace." He also states that he is currently unwell with stress and anxiety and states "I would like you to address my grievance by 19 February 2021 by which time you will have been in receipt of the outline letter from my lawyer." The lawyer's letter at C:1200 is a data subject access request.

386. The claimant provides fit notes covering the period to 1 February 2021 the reasons stated for absence are stress. On 29 January 2021 he had a further appointment as a result of which a fit note to 12 February 2021 was produced.

387. It was suggested by the respondent that the focus of the data subject access request was communications and other documents concerned containing personal data between R1 and the third-party company who employed the individual who was causing concern in the claimant's private life. It is suggested that we should infer that the claimants principal concern at that time was fear of his own privacy and his son's wellbeing.

388. We reject the suggestion that this was the only effected cause of resignation. The reasons for resignation are all of the matters set out in C:1207 and 1210. In the resignation letter itself, of the points that we are asked to concerned within this litigation, the claimant refers to unfair treatment "including the indirect harassment both verbally and in documented form". He complains that he is waiting for a response from the company for his grievance one month after he submitted it. He complains of the email sent by Mr Mertens on 2 February 2021 and he cross refers to the data subject access request. He also states "I am suffering anxiety at the thought of the unwanted prejudice continuing this year (2021) and refused to be subjected to a hostile environment amidst indirect racial harassment."

389. We think that even in the original letter of resignation there is sufficient reference to the racial issues he now refers to in broad terms for us to accept that that was an effective cause of his resignation, however we do not think that necessarily means that he can be said to have resigned because of specific WhatsApp messages or incidents.

390. The respondent argues that this is a reference rather to the German language detriment issues such as indirect race discrimination and the

sentence quoted above is immediately followed by a sentence which clearly refers to his concern about having to operate in German by using public translation tools on documents “to decipher critical product and customer information pivotal to being successful in my role.” He refers to customers being invoiced in German the website removing English as an option and the request that he attends the event in Q1 2020 (para.281 and ffg. above). Specific other reasons are set out in C:1207 which does refer to him experiencing a stream of jokes on the WhatsApp group. However, it seems unlikely that the claimant would resign because of matters that happened years previously were it not for the later matters. It is unlikely that the earlier matters in themselves were any effective part of the reason for resignation. We consider that C:1207 is more of the nature of a letter before action setting out complaints rather than setting out matters that individually were all effective of causes of resignation.

391. However, C:1210 makes clear that the failure to progress the grievance was at least part of the effective cause of resignation. None of the actions of Ms Ganswindt are stated to be reasons for resigning even in the original letter or in the C:1207 follow up. Ms Ganswindt no longer worked with him and had not since 2019. Specific incidents about alleged face-to-face racial harassment were not mentioned although a complaint about disparity in pay is. There is no mention of the matter involving Mr Rusch’s alleged ‘joke’. None of those specific things were effective causes of the resignation.

<u>Conclusions on the issues</u>

392. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

393. In the light of our conclusions about the allegations against the second respondent and third respondent, we do not need to make findings on LOI.2.

394. We start by considering the allegations as complaints of race related harassment because if they succeed under that head then, by reason of section 212(1) the conduct cannot also be a detriment within s.39(4)(d) EQA.

395. As to LOI.4.a, the event happened. It is conceded by the respondent that this incident would amount to race related harassment on the basis of the unwanted conduct causing the harassing effect and we accept that it does. The claimant argued that this incident was harassment because Miss Ganswindt had the purpose of creating the harassing effect.

396. We refer to but do not repeat our discussion at paras. 134 to 142 in which we concluded that Miss Ganswindt dressed up in costume using black face paint not because she intended to harass the claimant, whom she had not

met at the time she decided on her costume. We accept, after careful consideration, that she was genuinely unaware that a black British person would be likely to associate a white woman dressed as a black actress with offensive and demeaning portrayal of people based on race.

397. Since this is race-related harassment, the act is excluded from the definition of detriment within s.39(4)(d).

398. The event happened on around 18 November 2016. Therefore, on the face of it, it happened more than 3 months before presentation of the claim. In order to decide whether the claim based on this event is out of time we need to consider arguments about whether there was a continuing act and whether it is just & equitable to extend time and do that below.

399. As to LOI.4.b this and all the other allegations relating to the contracts are not based on conduct which itself is related to race. Although set out in the LOI as race discrimination and harassment in the alternative, in reality it is advanced as an allegation of less favourable treatment. The only connection with race advanced by the claimant is that Ms Ganswindt is said to have been motivated by race by her actions.

400. Ms Ganswindt did reject the Hair@22 contract because the box without DHCP was not ticked but she has satisfied us that that was entirely because she genuinely believe that that was how the contract should be completed and it was not less favorable treatment of the claimant let alone on grounds of his race. There is documentary evidence consistent with her stance. There is evidence (admittedly some from some months later) that the claimant's UK-based colleague also experienced the "very small but extremely irritating misunderstanding" (para.149) The allegation of less favourable treatment is not made out. Alternatively, Miss Ganswindt was not motivated by race and there is no relationship between her actions and race.

401. As to LOI.4.c, we permitted a minor amendment to the LOI because the figure of '49 GPB' and '49.00 GBP' should have read the contract was rejected because it did not show a dot in the format of the lease price. The Pentatonic contract was not proceeded with by the customer care agents for a number of reasons including that the lease price did not include a decimal point or two significant figures after the decimal point (see para.152.). However, we find that this was not an action by Miss Ganswindt. In any event it was done for a perfectly straight forward nondiscriminatory reason as set out in para 153 above namely to make sure that customer care had recorded the price correctly.

402. LOI.4.d the allegation that the Euro car part contract was rejected was not made out. However, as articulated before us the complaint was actually about an exchange in the middle of correspondence concerning a technical difficulty about the provision where Miss Ganswindt, as we found, mistakenly believed that one of the people copied into the correspondence

was an external customer rather than an internal member of staff. For reasons set out above we accept that this was an error on her part and do not think that this was less favourable treatment let alone on grounds of race see paras159 & 160 above.

403. As to LOI.4.e we reject the allegation that Miss Ganswindt was responsible for any unnecessary delay in onboarding the Westgate contract. For that reason the underline factual basis of the claim is not made out (see para.166 & 167 above, in particular).

404. The next allegation is that Miss Ganswindt doctored the claimant's email for the Ports of Jersey contract (see para.174 above). It was admitted that Miss Ganswindt had entered the words "very urgent" into the subject heading of an email sent by the claimant, but we do not think that it is right to describe this as doctored. The allegation was that she did so in order to make the claimant appear to have written the email originally with those words in the subject heading in contravention of a request that he not describe the emails as urgent. That factual allegation is not made out. In the alternative we are satisfied that the reason Ms Ganswindt entered that tag was for internal customer care purposes in order that the urgency of the email should be acted upon. It was not in order to make the claimant appear to be at fault and certainly not have anything to do with race. Her actions here are neither s.13 direct discrimination nor s.26 race related harassment.

405. None of those allegations were said to have anything overtly to do with race but rather to be targeting the claimant related to race because the motivation was discriminatory. We reject that was Ms Ganswindt's motivation and none of these incidents show evidence from which it could be inferred that Ms Ganswindt had treated the claimant less favorably on grounds of race than a comparator. We refer to our findings about the experience of his UK based colleague in para.149 & 154 above.

406. Taking the allegations concerning Ms Ganswindt as a whole therefore, the allegation of race related harassment in relation to LOI.4.a is made out, subject to the tribunal having jurisdiction and therefore, does not succeed as a direct race discrimination claim. The other allegations LOI.4.b to f. fail both as s. 26 race related harassment claims and as s.13 race discrimination claims.

407. The next allegation, LOI.4.g concerns the WhatsApp comments on the photograph by which a client of R1, who is a manufacturer and retailer of clothing, had dressed a young black boy as to model their children's wear in a hoodie with the words 'coolest monkey in the jungle' on it. The claimant has shown that the post was made, and he saw it, his complaint is about Mr Risch's comment as explained in para.221 above, the monkey emoji on the next post and the third post which indicated that Mr Tehas was laughing.

408. We refer to our findings set out above in which we broadly accepted the respondents' explanations. The original advertisement could reasonably be

regarded as related to race: the child is black and is wearing a hoodie bearing words that imply the child is described as a monkey which is a term of abuse sometimes directed toward black people. If one looked at the hoodie not worn by a black model it might be more likely to remind someone of a commonly used phrase such as cheeky little monkey which could be applicable to children of any race. However, for a black child to be wearing that hoodie is clearly capable of giving offence as tapping into a racist trope. Mr Tehas' evidence by which he explained why he was not personally offended by it but could fully understand why the others would be shows sound analysis, in our view (see para.224).

409. We are aware that regrettably and not only in the past black people have been likened to monkeys and that trope has been used to dehumanize and to "other" people including footballers as described by the claimant in his witness statement. Our findings about the intention of the people who posted are, in the case of, Mr Risch that he expected that there would be an uproar and that was why he made his comment, he did not express a dismissiveness of the seriousness in the way he made that comment. His comment presupposes that the image will cause a "shitstorm" and it is implicit in that that he considered right minded people would be likely to object to the image. Even taking into account the claimant's limited knowledge of the German language we do not think it is reasonable to interpret 'and? There was definitely a shitstorm?' as dismissive. This appears to be the translation that the claimant had obtained from an online translation tool and the alternative translation put forward by the interpreter either of which she said could it be legitimate was seeking information such as "there must have been a shitstorm right?". We are satisfied of FR's intention but need to go on to consider the alternative formulation of the harassment test.

410. Objectively speaking, we consider that the person who has posted that post is certainly not saying it is wrong that there was a furore, but confidently stating there must have been one and this causes us to think it is not reasonable to read the comment as dismissive. Mr Risch commented on a post informing Key Account Managers that one of their clients had marketed an item of clothing in the way which clearly them laid open to allegations that they had used a racist stereotype. We do not consider it reasonable for a comment that is essentially critical of the actions of the client to have the harassing effects. Furthermore, the connection with race is indirect which affects how likely it is to be seen as reasonable for it to have the harassing effect and whether Mr Risch's post can reasonably be regarded as related to race.

411. Similarly, it is not reasonable to regard the monkey emoji as an aggravating feature. There are other tropes potentially at play here (such as "see no evil") and covering one's eyes indicative of shame. Again we struggle to see that a comment is necessarily related to race as a result of being about a post which informs correspondents that there is in existence an offending photograph which was related to race. The concept of conduct being

"related to" race can be indirect but the relationship to race needs to be analysis and not presumed. In any event, we are confident that it was not reasonable for it to have the harassing event giving full weight to the words of that definition as we must.

412. Although the laughter is open to misconstruction (LOI.4.h.) we have accepted that it did not have the purpose of creating the harassing effect. When considering whether it was reasonable for Mr Tehas' post to have the harassing effect, again we bear in mind the words of Lord Justice Underhill that it is not every racially slanted comment that is capable of having the effect. This comment is not racially slanted but from those words it is not possible to know whether Mr Tehas is laughing sarcastically at the misfortune of the huge corporation or finding the post itself funny – although the context strongly suggests the former. Where something is open to misconstruction we think there is some responsibility on someone to seek clarification. Without doing so, it is not reasonable to consider that post of Mr Tehas as having the harassing effect.

413. The next allegation on the list of issues is LOI.4.i that of changing the claimants line manager to a peer. We have explain in the passage culminating in para192 above why we do not find this allegation made out on the facts. The claimant has not shown that this event took place.

414. The next allegation concerns an alleged failure to increase the claimants pay and continuing from May 2018 onwards to pay him less that his comparators. Mrs Fischer has explained, and we accepted that the UK based colleague was not a suitable comparator. The full analysis is in paras.193 to 216 above. The UK-based colleague had significant more experience than the claimant and although there is a truism that more years in a role do not equate to more experience if they are the same year again and again, the information on his LinkedIn profile, shows that he has many years' experience in the supply chain industry and experience selling POS technology which is complementary to R1's work.

415. This contrast with the claimant who had some prior experience in a related industry, but the majority of his career had not been spent in that industry. The difference in years' experience was quite considerable because the UK based colleague had around 17 years of experience whereas the claimant had 10 in sales and two in the POS sector. In contrast with his colleague he had never had a senior sales role. The UK based colleague managed the biggest accounts and we have accepted the accuracy of the spreadsheet at D:1639 (see para.202 to 209 above). The UK based colleague has a personal target of 120 million turnover whereas the claimants target was 40 million turnover, which underlines the financial importance of the client base managed or farmed - in R1's jargon - by that colleague.

416. The claimant argues that he took over the clients when the colleague retired in May 2018. There is objective contemporaneous evidence that the drop in Acquired Merchant Volume was relevant. There was beginning to be a fear

that the most valuable client would be lost (see page C:788). There was a SWOT analysis which included as one of the bullet points under weaknesses a risk of losing Aurum, their biggest client; this dates from the last quarter of 2017 and the UK-based colleague retired the following May. These pieces of evidence support Mrs Fischer's evidence, which we therefore accept, that there was uncertainty in the market particularly in the UK that was part of the reason why she was not in the position where she could increase the claimant's salary immediately to the level that had been enjoyed by this retiring colleague.

417. Although the claimant has shown that he was paid less than his UK based colleague who retired in April 2018 and less than the agent that quitted the business leaving a vacancy to which he was recruited that has not been shown evidence to which we might in the absence of any other conclusion infer that this was less favorable treatment than anyone in an comparable position would have received or that it was on grounds of race. In the alternative, in particular in relation to the predecessor, the respondent has satisfied us that the remuneration envelope was set before the claimant applied for the job and he was appointed at a salary within that envelope. For that reason we accept that the reason for the difference between the claimant's initial salary and his predecessor's salary was to do with the market rate, the claimant's lower level of experience and the priorities of R1 for the business (as set out in particular in para.121 above).

418. Having accepted that the respondents' reasons had nothing to do with race the alternative race related harassment claim is also not made out.

419. The two WhatsApp messages at LOI4.k and l cannot be described as less favourable treatment. They were posted in the group WhatsApp used for personal chat between work colleagues and therefore, all members of the group were treated equally by the posting. They are more apt, by the nature of the allegation, to be analyzed as s.26 race related harassment. The claimant has proven that each of the two messages was posted.

420. Sabine Niedenthal explanation of the purpose behind her posting the document at C:1488 is at para.233 & 234 above. We accept her evidence and therefore find that posting this meme, whilst it may have been unwanted conduct, did not have the purpose of creating the harassing effect. In order for the alternate limb under s.26 to be made out, the complainant needs actually to perceive themselves to have suffered the harassing effect and for it to be reasonable for the conduct to be regarded as having had that effect: Pemberton v Inwood. It also needs to be related to race.

421. For reasons we explain in para.238and 239 above our finding on this is that the meme was not related to race at all but related to Turkish national politics. It showed disapproval of a German national player being drawn into a position where their profile could be used to influence people's opinion at a time when there was an imminent election in Turkey. It is fair to

say that all of that detail could not be understood by the casual observer who had to use an online translation service to translate the English words and was not a follower of German football or Turkish politics. Nevertheless, the relationship with race advanced by the claimant is not a reasonable connection to make at all. As we explain in para.239, the faeces emoji does not necessarily relate to skin colour either because it is brown or because a reference to faeces is used as a way of abusing people with a darker skin tone and nor is the colour of the chocolate. Simply because some people use those analogies in order to abuse people of colour does not mean that whenever the faeces emoji is used to show disapproval it necessarily is related to race.

422. It comes across that the claimant did not understand the context of the meme although, when it is explained, the meme itself holds the bare bones of the explanation, it is certainly not related to race in the way the claimant argues his case, naming that of his being black or British. Furthermore, we do not think that it is reasonable to consider it as having the harassing effect even if we were persuaded it was related to race. If, as appears to have happened here, the observer has jumped to a conclusion without checking what someone meant by particular conduct then that, in our view, affects how reasonable it is for the conduct to have the harassing effect. The s.26 harassment claim based on this posted meme fails.

423. LOI.4.l is the post by Mr Risch (para 243 above) which is not directed to the claimant at all. It doesn't become related to him or related to his race because the post is next to him. He didn't seek any clarification whether the post was about him. There is a coincidence that a post with a photograph of him appeared at the same time and just ahead of the comment from Mr Risch about the football logo in the earlier post by Ms Niedenthal which, because of capitalization of nouns in German, appears to include the claimant's name. It is this coincidence which appears to have led the claimant into error.

424. Were quite satisfied that this was not done with the purpose of harassment and was not related to race. Furthermore, it would not be reasonable for that post to be regarded, in context, as having the harassing effect. The s.26 EQA race-related harassment claim based on this was not made out.

425. For reasons we explain at para.256 above we accept that a comment about a black man fucking an animal probably was made at a dinner in around June 2019. Given the claimant's modest German it is more likely than not that the comment was explained in English as well as in German. He could quite easily (and reasonably) have been offended by this comment and felt demeaned as a black man hearing such a very offensive comment. As we explain above we think that it is hard to understand why the word black was included in the narrative because it is not at all a relevant detail for the purpose of the description of the kind of offensive material that the former colleague had experienced. We do not think that the adjective would have

been used if the participant in the image was white and therefore this comment was related to race.

426. It is unrealistic in a social setting to expect the claimant to explore what was meant more directly by something so obviously offensive. The claimant says that the laughter meant that he believed that they found this actually funny. There may well have been laughter. This was not necessarily inconsistent with Mr Risch explaining in German something which was shocking and provoked nervous laughter and therefore not necessarily inconsistent with them denying that they were telling a joke. As we've explained we consider that Mr Risch has done the best he can to try and recollect the event but now he is hampered by being asked about it for the first time so long after the event.

427. We have concluded that Mr Risch did not deliberately set out to offend or humiliate the claimant but, given the shocking nature of the comment, we accept that it did so. In all the circumstances, it is reasonable for the conduct to be regarded as having the harassing effect, the test of harassment is made out and the comment was related to race. It occurred in June 2019 and the question of jurisdiction therefore falls to be considered in due course.

428. We've accepted that the comment referred to in LOI.4.n was probably made but by a host engaged by a third party and we do not accept that the R1 has any liability under the EQA this male host's comment. No evidence has been adduced which leads to the conclusion that he could be regarded as either an employee or an agent and there is no basis for R1 to be liable for his actions.

429. The next allegation is LOI.4.o. For reasons we explained in para.269 & 270 above we have found that this comment was probably not made by R2 and the core factual allegations underpinning this complaint are not made out.

430. LOI.4.p concerns the post at C:1494. Our findings about this are at para.273 to 276 above. As with the other WhatsApp messages this cannot in our view be less favourable treatment since the post was put in a WhatsApp group visible to all but could more easily be analysed as potentially unlawful harassment under s.26 EQA.

431. This post is a play on words because the footballer's last name sounds like the slang word for 'fat man' which is sometimes used to mean 'mate'. The comment above the footballer is that "it doesn't matter what diet" he is on or "what diet he eats" is easily understood in that context. We are quite satisfied that this has nothing to do with race and it fails as a claim on s.26 race related harassment as a result. This is a good example of a comment made about a person of colour which does not, without more, become about race as a result of the race of the person in the post. We also think our comment that when someone who does not fully understand a post

takes no steps to seek clarification of it, it is not reasonable of them to be harassed by it are also relevant in this context.

432. We have found as set out in para.280. above that the allegation in LOI4.Q that Mr Rusch made a comment about a footballer to the effect that there was no such thing as a black Italian was not said. The claimant has not made out the facts on depending on this allegation.

433. We dismiss the allegation on less favourable treatment on grounds of race against Mr Becker in relation to his statement to the claimant on 2 March 2020 that he could still attend a regional sales exhibition. For reasons we explain in para.288. above we do not consider that Mr MacMahon is a suitable comparator. This was shortly before a UK national lockdown was announced when concern about the coronavirus disease was growing but the full implications of it and what decisions should be taken as a result were not clear. We have accepted that the German based senior leadership took the view that there was a potentially different situation in Germany compared with the United kingdom. There was a ban on international travel so Mr MacMahon could not travel from France but the claimant did not need to travel internationally to attend the function. This is not as the claimant alleges, a lack of consideration for his safety. Neither has the claimant shown the basis from which to it could be inferred in the absence of any other explanation that the email saying that he could continue with this event was sent because of his race.

434. When it comes to LOI.4.s, the allegation of failure to promote, it is relevant to consider the arguments by the respondent that the claimant, in some of his arguments, seeks to equate speaking in German with race. In a direct discrimination claim one cannot simply equate a requirement that someone speaks German to race. Language is not a proxy for race because there is not exact coincidence between being black British and not speaking German: some black British people will have strong spoken and written German language skills and some will not have. However, the same could be said of white people who are not natives of a German speaking country. The racial group the claimant relies on is that of being black British and therefore any comparator whether evidential, actual or hypothetical would need to be white but for the purposes of this allegation they would still be a white native English speaker with negligible German language skills.

435. We have explained the reasons why the claimant was not appointed to the associate director role in para.303 and 309 & 310 above. Given the circumstances of the covert recording, which does not appear to be a complete record of the conversations, we need to be careful about whether the claimant failed to record something important. Although Mr Becker said that a lack of commercial experience was a reason for not appointing the claimant, he said the main reasons were that someone who was not based in Germany would be unable to attend meetings in Germany at short notice and at the lack of German language would be an impediment to forming a relationship with some of the customers.

436. It does not seem at all unreasonable to have this requirement for the post holder to have very good spoken and written German; there were sound practical reasons for it. R1 seems genuinely to have had this criterion for the role which were applied regardless of the race of the applicant. The claimants' arguments that a less discriminatory criteria should be used are relevant to an indirect discrimination claim which is not before us.

437. Although it is accepted that the claimant was not promoted there are no grounds to conclude that a white native English speaker with no or negligible spoken and written German language skills would have been treated differently. The successful appointee was a German national. He might be presumed to have sufficiently strong German language skills.

438. The next allegation at LOI.4.t is that Mr Boyens (R3) made a comment during a MS Teams meeting. The comment is admitted and is evidenced in context in the agree transcript of the covert recording the claimant made of that meeting (D:1715). Our findings on this is set out on paras.332 to 341 above. As we say there, even in isolation it is a mild joke about someone not having hair on their head. And it is evident from the team photo that that applies to all of the male members of the vertical. In fact, we have accepted it is a continuation of a joke from the previous week which was originally a self-deprecating joke directed by Mr Boyens towards himself when he said that if he was doing his hair, he would be having to do it on his back. The purpose was not to create the harassing effect. The reason the comment was made was that the claimant had not immediately appeared with his camera up in the Teams meeting – hence teasing speculation about why he was not present.

439. We're quite satisfied that this comment had nothing to do with race and also that, in context, it is not reasonable for it to have had the harassing effect so it fails as an allegation under s.26 EQA. The alternative case under s.13 EQA also fails because the evidence is that similar quips were directed to Mr Boyens, who is white, at the previous week or alternatively because the comment is nothing to connect this to race but rather is to do with the claimant not having much hair on his head.

440. The WhatsApp post at C:1500 by R2 is likewise argued both to be less favourable treatment on grounds of race and in the alternative harassment. This relates to the post of a video for Pure Blonde beer.

441. The Tribunal is unanimous that this particular allegation of race related harassment fails but there is split reasoning. We all accepted that, as a matter of fact, R2 considered the advert to be humorous. Of course, this does not preclude it also being an act of harassment but we all also accept that he did not see the potential for offence and therefore conclude that his action did not have the purpose of creating the harassing effect.

442. The majority (NLMs Holford and Bhatt) see no connection with race in this post whatever and find that it is straightforwardly about a beer the name of which is Pure Blonde and the video contains blonde people in a pure world as a play on words because it is Pure Blonde beer. NLMs Holford and Bhatt not only accept Mr Schrader's evidence that he thought it was humorous but do not see any connection with race at all. They consider it offensive for the claimant to have assumed that it was deliberate rather than thoughtless by Mr Schrader whom they accept did not see any possibility of causing offensive.

443. The minority (Employment Judge George) accepts that there is a play on words between an Australian beer called Pure Blonde and blonde hair. However, her view is that is a connection with race because hair colour, like skin colour, is an aspect of race and, typically, blonde people are white. The attempt at humour appears to be to contrast the alleged purity of the beer, the purity of the world they live in and the pure white of the clothing with the impurity of mud. That latter point does not in the view of any of the tribunal members mean that the advert is connected with race.

444. Judge George considers that the connection with race is tenuous and weak. Overall, there is a play on words between Blonde beer and blonde people and an attempt to use mild comedy to sell beer. Furthermore, in her view, the connection with race is not the connection contended for by the claimant which is that there is a connection with the Nazi ideology of the pure Aryan race.

445. What the claimant is doing is reading into the advertisement that it is projecting a world which is a utopia *because* it is only occupied by white and blonde people and that is not an interpretation that any of the Tribunal agree is a reasonable one to take, based on the description given to us of the advertisement.

446. Notwithstanding their differing conclusions on whether the advertisement is related to race, the Tribunal is unanimous that it is not reasonable for the post to be regarded as having the harassing effect. Judge George's reasoning is that, as Underhill LJ says in Richard Pharmacology Ltd v Dhaliwal it is not every racially slanted adverse comment or conduct which violates a person's dignity. The advert cannot reasonably be described as an adverse comment and is not derogatory towards black people. The relationship with race is tenuous and weak and the presumption that offence was intended was itself based upon the nationality of the person posting the advert. In those circumstances, given the mild attempt at humour, the Tribunal are unanimous that it is not reasonable to regard Mr Schader's actions as having the harassing effect.

447. As with the other WhatsApp messages, the unanimous view of the Tribunal is that, a post into a WhatsApp group which has both black members and non-black members treat all of them the same and there is no less favorable treatment. As above, we accept that R2 himself did not see any

connection with race in this advertisement. Overall, he was open and honest about his answers, and we accept that he would not have posted it, if he had thought people would be offended.

448. We have rejected the allegation that R1 failed to protect the claimant from the matters outlined in LOI.4.a to 4.u for reasons we set out in paras.348 to 355. above and do not now repeat.

449. For reasons set out above, our conclusion is that two of the complaints of race related harassment succeed, that based on LOI.4.a - the black face incident and LOI.4.m - the leaving party comment.

450. We turn to the constructive unfair dismissal claim and the allegation in LOI.13(b) of alleged breaches of privacy. For reasons set out in paras.364 & 365 above, we have found as effect that the respondent did not breach the claimant's privacy as alleged. Neither of the two acts of race-related harassment were reasons for the claimant's resignation and therefore cannot be relied on by him in relation to his constructive dismissal claim.

451. Our conclusion about the email sent on 2 February 2021 from Mr Mertens to the claimant is that it was wholly innocuous. He wrote the email because he was concerned that the claimant might be disadvantaged if figures were not agreed for processing bonus it cannot reasonably be regarded as putting an unreasonable amount of pressure on the claimant even though he was on sick leave, given the limited action asked of him and the potential consequences to his bonus.

452. It is true that there was a failure to address the claimant's grievance between 5 January 2021 when it was received and 5 February 2021 when he resigned. Any conduct after resignation cannot be relied on as having been a cause of resignation. For the purposes of the constructive dismissal claim we need to consider whether the respondent, in its handling of the claimant's grievance, was in breach of contract; whether they conducted themselves without reasonable and proper cause in a way that was intended or likely to serious damage or to destroy the relationship of trust and confidence.

453. We remind ourselves of our findings about the reasons for delay, in particular those at para.382 and 383. We also remind ourselves about the claimant's expectations of the grievance (see para.385.). He stated that he would like R1 to address my grievance by 19 February 2021. We have not heard positive evidence that the respondent thought that they had until the 19 February 2021 to respond to the grievance or that that was part of their reason for delay: none of the witnesses has said that. However, as a matter of fact when the claimant resigned, they had not yet failed to comply with the deadline he gave them. The question of whether they were in breach of contract is an objective one – not dependent upon their intention.

454. We consider that this means that the failure to progress his grievance at all, poor practice though it undoubtedly was, was not a repudiatory breach of

contract. More than a month had passed and the claimant had not had contact from his employer which is unacceptable. However, given what the claimant said about his expectations for action, we do not think that R1 has shown itself not to intend to be bound by a fundamental term of the contract unless the claimant can rely upon some other factor which, set against the background of the complete failure to acknowledge the grievance precipitated a breach of the implied term of mutual trust and confidence. We have found that the email from Mr Mertens was wholly innocuous. There is no other action which could precipitate a breach and therefore do not consider that the respondent was in repudiatory breach of contract as of 4 February 2021.

455. Inactivity of the kind demonstrated in this case does risk undermining an employment relationship. However, applying the relevant test in respect of failure to advance grievance procedures objectively it is not possible to say that they had shown or evinced an intention not to be bound by an important term of the contract in all the circumstances of this case. We do not think their explanations excuse their lack of response for four weeks (at the time of resignation) but its means we are not satisfied there was a repudiatory breach of contract and the claimant was not dismissed.

456. It is true that R1's website was in German for the last 13 or 14 months of the claimant's employment (LOI.13.e). This was clearly frustrating to the claimant but was not something done to him it was not something that targeted him. Furthermore, we think that the inconvenience to the clients by lack of an English language website is overstated given that the claimant was at that point in "farmer" activities and a lack of a website was likely to be of more significance when attracting new clients.

457. For reasons we explain above we do not think that there was any real disadvantage to the claimant in the job positions being advertised in German and the requirement that the candidates speak German was for perfectly legitimate reasons which did not, therefore undermine the employment relationship.

458. We consider the complaint that the meetings were conducted in German and our finding is that the claimant's manager ensured that he and his other English-speaking colleagues had the relevant parts of meetings translated for them. We do not accept that these matters amounted to a substantial difficulty. The claimant accepted employment by a German company based in Germany and it is difficult to see how it could be a breach of the implied term of mutual trust and confidence for the respondent to conduct internal meetings in the language that the majority of participants could understand when reasonable arrangements were made to enable the English speakers to get the information they needed.

459. We accept that the complaints about the so called German language disadvantage were cited as reasons for resignation as was the alleged failure to address the claimants grievance. For the most part we consider that the respondents' actions to the extent that they are proven do not

cumulatively or individually amount to a breach of the implied term of mutual trust and confidence.

460. Given the age of the successful allegations of harassment we do not think that those matters played any part at all in the claimant decision to resign. There is a mention of discrimination in the resignation letter at C:1207 but that sentence is immediately followed with complaints about the German language disadvantage rather than specific complaints of in-person comments. Neither of the two comments which we have found proven are listed in the further details of reasons for resignation C:1210. The allegation against Mr Risch took place nine months before resignation. The black face incident took place within the first few days of the claimant's employment, and he had not had any interaction with Ms Ganswindt' since she left her role in 2019 so it is entirely logical that his resignation had nothing to do with any action she may or may not have carried out. Those are the reasons we conclude that such of the acts as we have found to be unlawful harassment, were not reasons for resignation and therefore the claim of discriminatory constructive dismissal fails.

461. We then return to the question of jurisdiction set out in LOI1. As we stated above which we do not need to make a decision about LOI2 because we have dismissed the allegations against R2 and R3 on their merits.

462. We first consider whether these two acts amount to a continuing act. There are different people involved. There are different circumstances although both took place at an out of work social event. There is a long time between the two incidents - more than two years. They are different kinds of thing. Miss Ganswindt dressed up using black body paint and was oblivious to the potential for offence by an act which she considered to be a tribute. The other act was a crude or lewd comment which it is objectively reasonable to think offensive, humiliating and liable to violate the claimant's dignity. There factors cause us to conclude they do not amount to a course of conduct. The allegation that there was an overarching failure to protect, which might have provided a link is one we have rejected.

463. A claim based on LOI.4.a should have been presented by 17 February 2017 and was actually presented on 16 March 2021 nearly four years late. A claim based on LOI.m. should have been presented around 10 September 2019 at the latest - if one assumes in the claimant's favour that the incident happened on 11 June 2018 (see the claimant's statement at para.163). In order to be in time, he should therefore had contacted ACAS or presented no later than 10 September 2019. He contacted ACAS on 6 February and therefore the claim based on this allegation is approximately four months late.

464. We consider that the respondent has suffered prejudice in relation to LOI.4.m because the way in which Mr Risch's evidence emerged itself demonstrates that his memory was adversely affected by the passage of time. He had no recollection of the meal or conversation at all and only was able to comment upon the allegation having consulted someone else. It is

entirely possible that his recollection would have been more extensive had the allegation been made in full detail in good time.

465. So far as LOI.4.a is concerned the conduct complained of is not in dispute. The respondent advisedly accepted that it met the statutory test for harassment, subject to jurisdiction. Furthermore, there is some photographic evidence to be relied on. Mrs Fischer's evidence about this event changed. The claimant contended that her credibility was powerfully affected by this. We've accepted however that Mrs Fischer had been to the event before and planned to go but had been unable to at short notice which is how she was confused.

466. The change in her evidence shows how memory of an event can be affected by the passage of time. The claimant alleges that he was powerfully affected by this incident (see his para 23 and 24) and has now named a relevant witness. Even if he was still in employment, the difficulties experienced by Miss Ganswindt and Ms Fischer in recalling the event and conversation before it show that he might also have problems recalling detail.

467. The claimant relies on fear of losing employment if he raised the claims at the same time about the respondent and we note his paragraph 26. However there is no evidence that he had any basis for such a fear.

468. Overall, we do not think that the claimant has put forward a convincing explanation for the delay in presentation of the claim based on either event. He relies upon job and security and financial reasons which would undoubtedly have been matters to weigh in the balance when deciding whether to take action or not. His claim to have been unaware of the process or lacking an English language employee handbook is not a sufficient explanation, in our view, for not taking action if he was as effected by it then as he now says. It may be understandable that a new employee in a new company not sure of the culture in the company who has family responsibilities does not take action about an event such as that described in LOI.4.a. In our view that is, in essence, a judgement call that he was entitled to make. That does not mean that he is entitled years later to say that he should be able to bring an Employment Tribunal claim.

469. The arguments on whether it is just inequitable to extend time raised by the claimant as set out in CSUB para 34 and following. Amongst these the claimant states he was fearful of losing employment by retaliatory action but there has been no evidence of the risk of that being at all likely to come to pass and we do not consider it to objectively be demonstrated to be a reasonable fear.

470. Overall, we do not consider it to be just inequitable to extend time for these two claims and the tribunal does not have jurisdiction to consider them. The claimant does not succeed on any heads.

471. We do not therefore need to go onto consider the arguments on Polkey or as to whether there should be an ACAS uplift. However, since we were asked to consider them, we do set out our conclusions.

472. The respondents' arguments on the issue of whether there would have been a fair and or non-discriminatory dismissal in any event is based on four possible ways in which it is alleged the claimant employment could have come to an end.

    a. It is alleged that the claimant made covert recordings which would have been regarded as serious misconduct.

    b. The claimant is criticized for harvesting documents.

    c. It is suggested the claimant would have resigned in any event because he was firmly of the view that was not a view based in any objectively verifiable evidence that there had been a serious breach of privacy which was a risk to him and his young son.

    d. Redundancy.

473. Turning to each of these in turn. We accept the evidence of Axel Moritz about the seriousness with which covert recordings are viewed in Germany, very persuasive. We think there is a high degree of likelihood that the respondent would have regarded making covert recordings as gross misconduct and the claimant admittedly did make them.

474. As we explained above the argument about harvesting of documents is limited to documents listed at AM 15 which are described in RSUB para 126.

475. Although the claimant denied harvesting documents it seems clear to us that the claimant has not got any explanation for having the specific documents set out in RSUB.para 126 in his possession. The claimant was utterly unconvincing on this point. He was taking copies of these documents for litigation. As Ms Woellner says in her para.30, we find that German nationals are very aware of their privacy and data rights and that covertly recording an individual can be a criminal offence in Germany. We accept that the respondent would regard this as misconduct potentially less serious than covert recordings but misconduct nonetheless which could lead to fair disciplinary action.

476. We think it very likely that the claimant would have resigned his role in any event because he was so firmly of the view that actions would have affected his personal security had been taken and was completely mistaken about that.

477. We consider, based on the evidence of Mr Becker, that the claimant was unlikely to be made redundant. There may well have been a reorganization in the UK and he may well have been offered alternative positions with the incoming joint venture partnership, but we consider that the claimant was

highly valued and was believed to be working well within the direction of his line manager.

478. We think the most likely situation is that, if the covert recordings and document harvesting had come to light, an internal process would have taken a few weeks to complete after which there was 100% chance that the claimant would have been dismissed or resigned after investigation. Ordinarily we would think that one month would be sufficient, but here there were issues of some complexity to be investigated. However, given the interaction between various team members and the need for the German HR team to take advice from the UK lawyers, we consider that the disciplinary process probably would not have been completed for two months.

479. Therefore, doing the best we can, we consider that there is a 100% chance that the claimant would have been dismissed in any event for non-discriminatory reasons but that would not have taken place until approximately two months after he gave notice.

480. There was an unreasonable failure to follow a grievance process. However, had we found that either of the two matters that were successful in time we are satisfied that the claimant wasn't grieving about either of them, and therefore we do not consider it would have been just & equitable to apply an uplift to any compensation had we found that the Tribunal had jurisdiction to consider those two complaints.

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Employment Judge George

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Date: 15 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

15 September 2023

FOR EMPLOYMENT TRIBUNALS