Case Numbers: 2202809/2020
2200247/2021

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr S Khakimov		**Nikko Asset Management Europe Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 2-18 October 2023; 19-20 October 2023 (in chambers)**

BEFORE: Employment Judge A M Snelson MEMBERS: Ms M Foster-Norman Ms S Aslett

On hearing Mr Simon John, counsel, on behalf of the Claimant and Mr Andrew Smith, counsel, on behalf of the Respondent, the Tribunal determines that:

(1) All claims shown struck through in the list of issues annexed to the accompanying reasons ('the list of issues') are dismissed on withdrawal.
(2) All remaining claims under the Equality Act 2010 (for direct race discrimination, race-related harassment, victimisation and discrimination arising from disability) are not well-founded.
(3) Of the claims referred to in paragraph (2) above, all save for those noted under the list of issues, paragraphs 6(b)(iv) and 6(b)(v) were presented out of time and fail on the further ground that the Tribunal has no jurisdiction to consider them.
(4) The complaint of unfair dismissal is not well-founded.
(5) Accordingly, the proceedings as a whole are dismissed.

REASONS

Introduction and Procedural History

1 Nikko Asset Management ('Nikko') is a very substantial global asset management organisation with headquarters in Japan. The Respondent is the corporate vehicle for its activities in Europe.

2 The Claimant, who is an Uzbek national, took up an appointment with Nikko Asset Management Co Ltd, the Respondent's parent company, on 1 April 2009 as a Product Manager based in its Tokyo office. At his request, he moved to Nikko's London office with effect from 1 January 2013. At that point he became an employee of the Respondent. The employment ended with dismissal on 13 January 2021, purportedly on ill-health capability grounds. By that date his annual salary stood at about £100,000.

3 By a claim form presented on 17 May 2020, the Claimant brought various complaints under the Equality Act 2010 based on his protected characteristics of race and disability and, under the Employment Rights Act 1996, of detrimental treatment on 'whistle-blowing' grounds, together with claims for holiday pay, arrears of pay and 'other payments'. On 19 January 2021 he presented a further claim form, containing further Equality Act complaints, a complaint of unfair dismissal and a claim for interim relief.

4 By its response forms, the Respondent resisted all claims on their merits and a large proportion of them on the further ground that they had been brought out of time.

5 For the purposes of his disability discrimination claims, the Claimant relies on a diagnosis of Functional Neurological Disorder ('FND'). On 29 April 2021, the Respondent conceded that he had been affected by that condition since 17 April 2019 and that it had at all times amounted to a disability.

6 The dispute has a tortuous and disproportionately expensive procedural history. It has been listed for trial three times. At least seven Employment Judges have been involved in managing it and adjudicating on countless interlocutory issues. The interim relief application was held to be misconceived and resulted in a costs order against the Claimant. The Tribunal has been forced to resort to its enforcement powers to compel him to comply with orders for the delivery of a witness statement and medical evidence. He has pursued numerous appeals to the Employment Appeal Tribunal ('EAT') on points pertaining to the costs order and on case management issues. None has succeeded (one is currently stayed).

7 The matter came before us in the form of a face-to-face 'liability-only' hearing[1] commencing on 2 October 2023, with 18 sitting days allocated. Both parties were represented by counsel: Mr Simon John for the Claimant and Mr Andrew Smith for the Respondent. We are very grateful to both. Mr John merits particular credit. He was instructed late in the day and played a notably difficult hand with skill and good grace.

8 In the course of pre-trial case management, directions had been given that the listing should include rest days to accommodate the Claimant's disability. In addition, we granted all requests on his behalf for breaks during the sitting day. To their credit, counsel agreed an outline trial timetable and kept to it. The evidence was completed on day 11 of the listing. We then adjourned to day 13 to allow

[1] To determine also *Chaggar/Polkey* and contribution points, should they arise

counsel time to prepare closing argument. Having read the comprehensive written submissions on both sides, we heard oral argument on day 14 and then reserved judgment. Our private deliberations in chambers occupied days 15 and 16.

The Claims and Issues

9 In his opening note Mr Smith drew attention to, and placed reliance upon, the list of issues approved by Employment Judge Spencer at a case management hearing on 4 October 2021 and by Michael Ford KC, sitting in the EAT, in a judgment delivered on 16 March 2023 following a hearing on 23 February 2023. At the start of the hearing before us, there were some brief exchanges about the list of issues (in particular, Mr John tentatively suggested that it might have wrongly omitted a complaint of failure to make reasonable adjustments), but in the end no ruling was required of us as, having taken his client's instructions, he unequivocally confirmed his agreement that it fairly identified the matters for determination. For convenience, a copy of the document (hereafter, 'the LoI') is appended to these Reasons. It can be seen that large parts of it are struck through. This reflects the fact that, at an early stage of the hearing and again after the evidence had been completed, the Claimant withdrew various elements of his pleaded case. As will be explained in due course, that left only one point of controversy about the shape and scope of the case, namely a disagreement which arose in closing submissions about the proper interpretation to be given to the 'something arising' element of the discrimination arising from disability claim.

10 For present purposes, it is sufficient to say that the Claimant ultimately pursued claims under five heads: direct race (nationality) discrimination, harassment related to race (nationality), discrimination arising from disability, victimisation and 'ordinary' unfair dismissal, and that the Respondent resisted all claims on their merits and further contended that most were presented out of time and so fell outside the Tribunal's jurisdiction in any event.

Evidence

11 The Tribunal received oral evidence from the Claimant and, on behalf of the Respondent, Mr Michael Mulholland, at all relevant times Chief Financial Officer, Mr Christopher Yik, Head of Product Management, Product Team (to March 2017), then Head of Product Management (Asia, excluding Japan), then Head of Product (EMEA) from March 2019 to date, Mr Steve Worrall, at all relevant times Head of Global HR, Mr John Howland-Jackson, Chair and CEO (EMEA) from October 2017 to date, Mr Philip Yeo, International Head of Product Development and Management and, from November 2018 onwards, Joint Global Head of ETF Business, Mrs Elizabeth Marks, Head of HR (EMEA) and Mrs Deborah Leen, Interim Head of HR (EMEA) from October 2019 to October 2020 (covering Mrs Marks's absence on maternity leave).

12 In addition to oral evidence, we read the documents to which we were referred in the seven-volume agreed bundle.

13 We also had the benefit of chronologies from both parties, a cast list, a set of organisational structure charts, a proposed trial timetable, Mr Smith's opening note and the written closing submissions of both counsel.

The Legal Framework

The Equality Act 2010

Direct discrimination

14 The Equality Act 2010 ('the 2010 Act') protects employees and applicants for employment from discrimination and analogous torts. Chapter 2 lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

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

'Protected characteristics' include race, which comprises (*inter alia*) nationality and ethnic and national origins (s9(1)). By s23(1) and (2)(a) it is provided that, for the purposes of (*inter alia*) a direct discrimination claim, there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

15 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 HL Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation (which replaced 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

Discrimination arising from disability

16 Discrimination arising from disability (to use the convenient shorthand) is covered by the 2010 Act, s15, which, so far as material, provides as follows:

> **(1) A person (A) discriminates against a disabled person (B) if –**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably be expected to know, that B had the disability.**

17 In *Pnaiser v NHS England* [2016] IRLR 170 EAT, Simler J (as she then was), sitting in the EAT, summarised the meaning and effect of s15(1)(a) as follows (para 31):

> **In the course of submissions I was referred by counsel to a number of authorities … From these authorities, the proper approach can be summarised as follows:**
>
> **(a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.**
> **(b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.**
> **(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment …**
> **(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history … the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability …**

18 In *City of York Council v Grosset* [2018] IRLR 746 the Court of Appeal approved the analysis of s15(1)(a) in *Pnaiser* (see the judgment of Sales LJ (as he then was), para 52) and further held that the defence under s15(1)(b) involves an objective analysis (paras 54, 58): a 'range of reasonable responses' approach is inapplicable and the Employment Tribunal must make its own assessment.

Harassment

19 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in sub-section (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.**

20 In *R (Equal Opportunities Commission) v Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording of the definition of harassment in the EU Equal Treatment Directive (EU/2002/73/EC), Article 1.2.2, from which the 2010 Act, s26(1) is derived, did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic. We agree, subject to the caveat that more is required than a mere contextual (or 'but for') connection. There must be an evidential link between the act of the putative harasser and the protected characteristic of the complainant. So, for example, allegedly harassing treatment by A of X, a victim of sexual harassment by a third party, B, is not *per se* harassment related to X's sex (or sex generally). The claim against A is not validated as one of sex-related harassment simply by virtue of the relevant conduct being linked contextually to the sexual harassment committed by B. But it will succeed if the Tribunal finds that A's conduct is itself related to X's sex (see *Unite the Union v Nailard* [2019] ICR 28 CA).

21 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the Claimant must show that the conduct was unwanted. Second, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

22 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry v Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the [treatment] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

Victimisation

23 By the 2010 Act, s27, victimisation is defined thus:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
>
> **…**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

24 For the purposes of s27(2)(d), an allegation which is false and made in bad faith will forfeit protection (s27(3)). Subject to that, protection will attach to an allegation even if it is later shown not be well-founded, provided that it complains of conduct *capable in law* of amounting to a contravention of the 2010 Act (*Waters v Commissioner of Police of the Metropolis* [1997] ICR 1073 CA). When considering whether a claimant has been subjected to particular treatment 'because' he has done a protected act, the Tribunal must focus on 'the real reason, the core reason' for the treatment; a 'but for' causal test is not appropriate: *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 HL, para 77 (*per* Lord Scott of Foscote). On the other hand, the protected act need not be the sole reason: it is enough if it contributed materially to the outcome (*Nagarajan*, cited above).

Protection against discrimination, harassment and victimisation

25 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment (*Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL).

26 Employees enjoy parallel protection against harassment and victimisation under the 2010 Act, s40(1)(a) and s39(4)(d) respectively.

27 2010 Act, by s136, provides:

> **(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.**

28 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 Act legislation (from which we do not understand that Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (para 32) that they have 'nothing to offer' where the Tribunal is in a position to make positive findings on the evidence. Lord Leggatt, giving the only substantial judgment in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863, passed similar comments, adding (para 41):

> **I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or decline to draw, inferences from the facts of the case before them without the need to consult law books before doing so.**

But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

29 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Now, under the Early Conciliation provisions, the limitation period is further extended by the time taken up by the conciliation process. The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

Unfair dismissal

30 The unfair dismissal claim is governed by the Employment Rights Act 1996, s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do …**
>
> **(3) In subsection (2)(a) –**
>
> **(a) 'capability' in relation to an employee means his capacity assessed by reference to skill, aptitude, health or any other physical or mental quality …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

31 From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, we draw the cardinal principle that, when considering reasonableness under s98(4), the Tribunal must not substitute its view for that of the employer but rather ask whether the dismissal fell within a range of reasonable responses open to it in the circumstances. That rule applies as much to the procedure applied as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

The Primary Facts

32 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision we find as follows.

Setting the scene

33 As we have mentioned, the Claimant moved to Nikko's London office with effect from 1 January 2013. In order to take up his new appointment, he set up home in the UK in November 2012. His wife and family followed in March 2013. His first role in London was as Offshore Funds Manager within the Funds Admin Team, reporting initially to the Head of Offshore Funds and after September 2015 to the Head of Operations & Technology.

34 Following a restructuring exercise directed from Tokyo, the Claimant was promoted in July 2017 to the post of Product Management Director (UK), within the Product Team. In that capacity, he reported locally to Mr Jiro Ikegaya, EMEA Head of Product & Marketing and functionally to Mr Yeo (already mentioned), the International Head of Product Development & Management based in Singapore.

Alleged detriments/unfavourable treatment

Tier 2 visas, indefinite leave to remain, grievances and related matters

35 The factual findings in this section are directed to the claims noted in the LoI, para 3(b)(ii) (direct race discrimination), 7(a)(i) and (ii) (race-related harassment) and 8(b)(ii)(1), (4) and (5) (victimisation).

36 When the Claimant transferred to London in 2013 'Tier 2' visas were granted for three-year terms.[2] In accordance with its normal practice, the Respondent sponsored his application. It did so again 2015, when the time came for the visa to be renewed for a further three years.

37 On 30 September 2015 a member of the HR team sent an email to the Claimant which confirmed the cost incurred by the Respondent in procuring the renewal of the visa. It is likely, we find, that the message was sent on the instruction of Mr Mulholland. We accept his evidence that it was common practice for the Respondent to notify its employees of expenditure incurred on their behalf.

38 Quite understandably, the Claimant was not content to rely on the limited protection of a 'Tier 2' visa. For his own and his family's well-being, he wished to enjoy the security of indefinite leave to remain ('ILR') at the earliest opportunity.[3] There was some debate before us as to precisely how the rules operated but ultimately it was common ground that the right to apply accrued 28 days before the end of a period of five years' continuous residence within the jurisdiction.

39 In or about early March 2017, the Claimant made contact with Ms Francesca Ronco, an HR manager at Nikko's London office, with a view to getting the process of applying for ILR underway. By an email of 8 March 2017 she advised him that the Respondent had incurred visa fees covering the period to November 2018 and had made no provision in its budget for sponsorship of ILR in the financial year 2017/18. (For the avoidance of doubt, there was never any question about the Respondent meeting the cost: timing was the only issue.) She added that it remained open to him to apply early for ILR, at his own expense. We find it likely that the comment was prompted by Mr Mulholland.

40 On 17 August 2017 the Claimant sent an email to Mr Mulholland asking for news of progress on the ILR application. After receiving several chasing messages from the Claimant Mr Mulholland wrote to Mrs Marks and Mr Ikegaya saying that he intended to refuse the request for early sponsorship on the grounds that the

[2] The standard term now is five years.

[3] As its name suggests, that status is not limited in time. Nor is it tied to any particular appointment, as a Tier 2 visa is. Rather, it is personal to the individual who holds it.

family's visas would not expire until March 2018 and the cost of the application (over £15,000) had not been included in the current year's budget. Mrs Marks supported Mr Mulholland, observing that what he proposed was in line with the way in which the company had treated other employees.

41 The Claimant took the matter up with Mr Ikegaya, arguing that early sponsorship of ILR would enable the Respondent to save (a) the annual fee payable in respect of the Tier 2 visa; (b) visa fees to enable him to make business trips. When the matter was referred back to him, Mr Mulholland was unmoved, informing Mr Ikegaya on 27 September 2017 that point (a) was simply wrong: the annual fees regime did not apply to the Claimant's Tier 2 visa, and that point (b) was unpersuasive as he was not likely in his Product role to be doing much business travel – at least to destinations for which he would require a visa. Although we may be mistaken, we do not recall Mr Mulholland being challenged on either point in cross-examination.

42 The Claimant then raised an informal grievance. The single protected act relied on for the purposes of the victimisation claim was the sending of his email dated 27 September 2017 to Mr Udo von Werne, then CEO (EMEA), Mrs Marks and Mr Ikegaya complaining about allegedly unfair treatment by Mr Mulholland in relation to his application (or planned application) for ILR. The email is attached as Appendix 3 to the LoI and we need not say anything more about its content here.[4]

43 The Claimant's case is that he was subjected to detrimental treatment because of the (alleged) protected act, in the form of a failure properly to investigate his complaint and in the 'false and defamatory remarks' contained in the email from Mrs Marks of 29 November 2017 conveying the outcome of the grievance appeal. We next make brief findings on the grievance process. The message of 29 November 2017 is attached as Annex 2 to the LoI, and again, we can safely leave it to speak for itself.

44 Mrs Marks met the Claimant on 28 September 2017 and they discussed how the grievance should be handled. The Claimant said that he wished to pursue an informal grievance in the first instance. Some written exchanges followed. We cannot disagree with Mrs Marks's observation about the 'confrontational' tone of the Claimant's emails. On 6 October 2017, after discussing the case with several senior managers, she wrote to the Claimant to deliver the outcome of the grievance. She found that he had been treated fairly and in a manner consistent with the Respondent's handling of ILR applications on behalf of other employees.

45 We find as a fact that Mrs Marks was right. The Respondent's standard practice was to sponsor employees' applications on the expiry of their visas and not before. We accept Mrs Marks's unchallenged evidence (witness statement, para 43(a)) concerning the one case in which the Respondent had acceded to a request for early sponsorship for ILR. There, genuine urgency arose because without ILR the 18-year-old son of the relevant employee (a US citizen) would have been precluded from travelling into and/or out of the UK. The Claimant's

[4] In our narrative below, we make certain findings relevant to the substance of the detriment claims concerning the ILR application.

suggestion that one other individual had also benefited from early sponsorship for ILR was not supported by any evidence and we reject it.

46 Despite expressing apparent satisfaction with the informal grievance process the Claimant on 13 October 2017 issued a formal grievance, alleging unfair treatment in relation to the ILR application and raising several other complaints. The matter was entrusted to Mr James Rippey, then Chief Operating Officer. The Claimant attended meetings with Mr Rippey on 26 October 2017 and 10 November 2017, at both of which he was given a full opportunity to make whatever points he wished. At a meeting with the Claimant on 29 November 2017, at which Mrs Marks was also present, Mr Rippey gave his decision on the formal grievance. In summary, he rejected all complaints of unfair treatment but nonetheless recommended that, in light of further information about the Claimant's family and financial circumstances which had emerged in the course of the investigation, the Respondent should treat his as an exceptional case and process the ILR application early.

47 In a private email to Mrs Marks dated 21 November 2017 Mr Rippey had remarked that the Claimant's 'conduct throughout this process has been disappointing, often leading to aggressive and demanding behaviour'. Following the meeting on 29 November 2017 Mrs Marks prepared a file note directed to the subject of the Claimant's conduct at the meeting, which she characterised as 'aggressive and rude' and 'extremely unprofessional'.

48 Mrs Marks wrote an email to the Claimant on 29 November 2017 summarising the outcome of the grievance and confirming that the Respondent had decided 'to sponsor the ILR application for you and your family once all of your family members are eligible in March 2018'. In addition she expressed regret that it had taken so long for him to be forthcoming about his family circumstances. She also addressed the subject of his behaviour, observing:

> **… it has been noted that your conduct during the grievance process has, at times, been disappointing and has led to some difficult behaviour on your part, which at times bordered on being quite aggressive.**

49 In early February 2018, the Claimant, without notifying the Respondent, contacted the Respondent's external immigration solicitors ('Magrath') in connection with the anticipated ILR application. This communication came to the attention of Mrs Marks who, wrote to him on 13 February 2018 pointing out that the ILR application process would be run by the HR team at the appropriate time and that he should not contact Magrath directly. In subsequent correspondence she confirmed that the Respondent had been advised that it would be possible to apply after 5 March 2018. The Claimant replied, pressing for it to be done sooner. Mrs Marks then wrote again, attaching written advice from Magrath to the effect that the earliest date was in fact 13 March 2018. As a consequence of further pressure from the Claimant, the Respondent obtained revised advice that the application could be made earlier, although it would not be in keeping with Magrath's usual practice. Mrs Marks then approved the commencement of the ILR process and, on 26 February 2018, instructions were sent to Magrath accordingly. On 25 April 2018

Mrs Marks received notification that the Claimant's application for ILR had been approved by the UK Visa and Immigration Service.

Promotion to Senior Vice President

50 The facts under this heading relate to claims for victimisation noted in the LoI, para 8 (b)(ii)(2) and (6).

51 In November 2016 the Nikko introduced a system of corporate titles across the organisation. These included Vice President ('VP') and Senior Vice President ('SVP').

52 Under the Respondent's standard arrangements, promotions from one corporate title to another are effected on year-end reviews. The title does not change automatically where an individual is promoted mid-year into a role to which a higher corporate title is attached.

53 The Claimant held the title of VP when he was appointed in July 2017 to the Product Management Director position.

54 There was a debate among senior managers about whether that position should be designated a VP or SVP role[5] and about whether the Claimant was fit to be elevated to SVP. Mr Ikegaya took the view that the post should sit at VP level and that in any event it would be premature to promote the Claimant for the time being. Ms Stephanie Drews, then Global Co-Head of Product and Marketing, strongly disagreed on both counts. Mr Yeo took the same view as Ms Drews. What was not in dispute was that promotion (if applicable) was for consideration at the year end and not before.

55 Ms Drews was a very senior figure in Nikko's Tokyo Head Office and her view prevailed, although Mr Ikegaya's strong reservations are evident from his correspondence in July 2017 and over the months thereafter. His concerns were not about the Claimant's technical skills (which have never been in question) but about his ability to manage people and earn respect from those around him (see *eg* his email to Mrs Marks of 21 December 2017). In private correspondence, Mrs Marks expressed agreement with Mr Ikegaya. She did not, however, sabotage or do anything to undermine the Claimant's prospects of securing promotion. On the contrary, she made constructive comments on the draft nomination form prepared (with evident reluctance) by Mr Ikegaya, suggesting ways in which it could be improved to focus on demonstrating how he was meeting the standards which the organisation expected of those holding the title of SVP.

56 Mr Worrall was another senior figure in the organisation who had serious doubts about the appropriateness of promoting the Claimant to SVP. He also had wider concerns about the approach of senior managers to promotions generally. On 24 January 2018 he sent an email to Mr Howland-Jackson (already mentioned) pointing out that globally around 6% of staff had been put up for promotion and that

[5] Unusually, the job description did not specify a corporate title. This appears to have been a simple oversight.

the percentage in London was 20%. He stressed that promotions must be justified and went on to identify six candidates who did not appear to him, on an initial review, to warrant promotion. The Claimant was one of these. Mr Worrall's view was that promotion in his case would be premature in circumstances where he had taken on his new role, at VP level, only five months earlier. He argued that a decision about his promotion should be based on the answers to three questions: (a) Is the local management team supportive? (b) Does the new role fit the SVP title criteria? (c) Does the individual warrant SVP status based on behaviour and conduct? His view was that the proper answers to questions (a) and (c) argued against promotion. The debate about the Claimant among very senior managers was renewed around this time. Ms Drews had become aware of Mr Worrall's doubts about the Claimant's suitability for promotion and resumed her vigorous advocacy in his support. In a number of email exchanges she argued that he had local management support, at least from Mr Ikegaya, and that the role which he was performing was if anything *above* SVP level. She acknowledged that he was 'difficult as a person' but did not accept that his behaviour was an obstacle to promoting him. Mr Worrall's concerns were not assuaged. From exchanges with Mrs Marks he formed the distinct impression that what Mr Ikegaya was saying to Ms Drews did not correspond with his real opinion. Mrs Marks also agreed with his worries about the Claimant's behaviour, citing in particular the ILR matter. Nonetheless, in an email to Ms Drews of 12 February 2018, he said that he would be open to approving promotion provided that it was accompanied by written notification to the Claimant of the 'behaviours we expect to see and consequences if we do not.'

57 The Claimant's promotion to SVP was confirmed on 8 March 2018 and took effect on 1 April 2018.

58 On 16 April 2018 Mr Worrall sent to the Claimant the email appended to the LoI as Annex 4 (the 'Promotions Expectations letter' relied upon for the purposes of the victimisation claim at LoI, para 8(b)(ii)(6)). We will not reproduce its content here. The document was the product of a number of drafts and in its final form was approved by Ms Drews, Mr Ikegaya and Mr Yeo.

Mr Yeo trying to change the Claimant's reporting line

59 The facts recorded here relate to the three allegations of direct race discrimination noted in the LoI, para 3(b)(ii)(1), (2) and (3). We will address them in turn.

60 Allegation (1) rests entirely on an email of 10 July 2017 sent by Mr Yeo to the Claimant, suggesting certain performance goals in respect of his new role as Project Management Director UK (which he had commenced on 1 July). The Claimant makes no complaint about the content of the message. His only complaint is that it was copied to Mr Yik.

61 At the time, Mr Yeo, in his capacity as Head of the Product Team, line managed Mr Yik and the Claimant.

62 The template document used by Mr Yeo (attached to the email of 10 July 2017) had been designed by Mr Yik at Mr Yeo's request. It set out the Product Team's 'high level' objectives and included a section in which the goals of the individual team member concerned could be entered.

63 Mr Yeo told us in evidence that he could not recall precisely why he had copied the email to Mr Yik, but that he imagined that it was because he was conscious that Mr Yik had a team of direct 'reports' for whom he would be setting goals, and he felt that showing him the proposed goals for the Claimant would help to ensure consistency.

64 It was not suggested that there was any sensitivity about the goals which Mr Yeo proposed for the Claimant.

65 The Claimant raised no complaint about the email being copied, although he did inform Mr Yeo that he had removed Mr Yik from the chain and substituted Mr Peter Owen, a London-based manager for whom he was still carrying out some work.

66 By Allegation (2) it is said that Mr Yeo 'made' the Claimant provide updates to Mr Yik on 'weekly catch-up calls between July 2017 and August 2017'.

67 For the purpose of sharing information on progress and development relating to Nikko's Luxembourg-based funds, for which the London office had responsibility, a programme of fortnightly calls was set up, commencing on 17 July 2017. Those expected to attend were Mr Yeo, Mr Yik, certain other members of the Singapore Product Team and the Claimant. Mr Yeo would usually chair the meetings but on any occasion when he was unable to attend he would invite Mr Yik to take his place. This was less than surprising since Mr Yeo treated Mr Yik as his 'de facto deputy' generally within the Singapore office. There is no clear evidence one way or the other but we strongly doubt whether Mr Yik deputised for Mr Yeo more than once, if at all, during the relevant period, in which there would have been no more than three fortnightly meetings.

68 The Claimant complained that updates travelled 'one way' at the meetings, which we understand to mean that he was not a beneficiary of information but simply required to report on developments to which he was privy. Even this of itself was not presented as a ground of complaint except where the meeting was chaired by Mr Yik, apparently because in this circumstance the Claimant felt that he was being required to 'report to' someone of (at best) equal status to himself. We do not accept that there was anything 'one way' about the meetings, regardless of who was in the chair. It was not suggested that, when deputising for Mr Yeo, Mr Yik behaved in an overbearing way or otherwise unreasonably, towards the Claimant or any other participant. There was no contemporary complaint about the meetings, from the Claimant or anyone else.

69 Allegation (3) charges Mr Yeo with encouraging or inciting or instructing Mr Yik to attempt to 'dictate to' the Claimant how he should work on projects and what his responsibilities should be, in February and June 2018.

70 We accept Mr Yeo's evidence that he did hold Mr Yik in high regard and relied on his advice and assistance in overseeing projects and activities, not only locally (in Singapore) but also internationally. He also told us, and we accept, that Mr Yik was not reluctant to share his experience and expertise and provide guidance in order to assist colleagues. We have been shown some instances of communications between Mr Yik and the Claimant to which, it seems, the latter took offence. It may be that, on occasions, Mr Yik allowed his enthusiasm to get the better of him and perhaps misjudged the possible effect of the volunteered advice on the recipient. But he was invariably courteous and we have been shown no evidence suggestive of any negative or ulterior purpose behind his interventions.

71 In any event, if and insofar as Mr Yik ever overstepped the mark, we have been shown no evidence pointing to Mr Yeo manipulating or encouraging him to do so.

Mr Yeo depriving the Claimant of access to senior management

72 We are here concerned with the three allegations of direct race discrimination noted in the LoI, para 3(b)(v)(1), (2) and (3). Again, we will take them in turn.

73 Allegation (1) arises out of an email from Mr Yeo to the Claimant dated 7 February 2018 concerning the 'WBGFB' project, referring to work about to be started on the launch of a fund. Mr Yeo acknowledged with hindsight that he ought to have 'looped in' the Claimant when the Nikko Product Committee granted its approval for the project the previous December, adding 'my bad'. But he went on to point out that nothing had happened since then. The Claimant made no complaint. He was included and involved in the work which followed relating to that particular fund.

74 Allegation (2) complains that the Claimant was excluded from a meeting on UCITs cost and pricing in 'May 2018'. The meeting in question was called by Ms Drews. Mr Yeo had nothing to do with the selection of invitees and was not privy to Ms Drews's plans beyond the fact that the aim was to discuss the establishment of a task force to address the pricing of the Luxembourg UCITs funds.

75 The meeting took place on 23 April 2018. On 2 May 2018 the Claimant sent an email to Mr Yeo asking to join the meeting. On learning that it had already taken place, he complained that he appeared to be the only person who had not known about it. Mr Yeo replied that the meeting had been called by Ms Drews. The Claimant replied 'No worries'. It appears that he raised no further complaint, with Ms Drews or anyone else.

76 Allegation (3) is a complaint that the Claimant was not added to 'the UCITs Working Group email address'. As Mr Yeo explains in his witness statement (para 55), there was a 'UCITS Working Group' email address set up by a member of Ms Drews's staff in Tokyo. Mr Yeo was not involved in setting it up. The recipient list

did not include the Claimant or Mr Yik. We accept that Mr Yeo is not responsible for the fact that the Claimant was not on that list.

77 Mr Yeo further explains (witness statement, para 56) that there was not an official 'UCITs Working Group' in any event. Communications on UCITs funds and projects might involve sensitive questions or high-level strategy, calling only for participation by senior figures. But equally, there would also be meetings and activities involving only more junior staff. It would all depend on the nature of the business in hand. We accept that evidence.

78 We further accept Mr Yeo's evidence (witness statement, para 58) concerning the 'NGUF Product' mailing group which he established, and that he selected its members, who included the Claimant, Mr Yik and several others, for the reasons he gave.

Appointment of Chris Yik to Head of Product

79 Facts recorded under this heading relate to claims noted in the LoI, para 3(b)(v) (against Mr Yeo for direct race discrimination) and 8(b)(ii)(7) (against Mrs Marks and Mr Worrall for victimisation).

80 The background of the creation of the Head of Product role was explained by Mr Howland-Jackson in his witness statement (paras 23-25). In summary, his perception as CEO in London (a position he took up in the autumn of 2017) was that there was a serious impediment to the management and development of the Luxembourg funds owing to the fact that the Singapore Product Team had control of international product matters and the approval of decisions relating to funds was led from Tokyo. Apart from anything else, the time zone differences made cooperative working between London and the Far East exceedingly difficult. In all the circumstances, Mr Howland-Jackson considered it necessary to shift the centre of gravity for the management and control of Luxembourg funds to London. He secured the agreement of the then Global CEO, Mr Takumi Shibata, that this end might be achieved by creating a new product development post based in London. The core aim would be to grow Nikko's Luxembourg fund range. As to candidates for the role, it was also agreed that the appointee must be drawn from the Singapore Product Team. This was seen as 'politically' essential in order to secure the 'buy-in' of the Singapore office.

81 Once the thinking had reached this point, it was then rapidly agreed that the only suitable candidate was Mr Yik, then Head of Product Management (Asia, excluding Japan). He was seen as a key member of the Singapore Product Team and had a very strong reputation across the entire Nikko organisation. Although his background was primarily in product management, it was judged that he also had the necessary experience and skills to take on a more strategic, product development function.

82 The result of appointing Mr Yik would be that the London Product Team would be expanded to two. It would then be necessary for one to be in charge. Given Mr Yik's seniority, reputation and engagement skills, the view of Mr

Howland-Jackson and Mr Shibata was that it would be necessary for the Claimant to have a reporting line to Mr Yik. In turn, Mr Yik would report to Mr Yeo, who would retain responsibility for the International Product Team.

83 Mr Howland-Jackson considered that there was no need for Mr Yik's appointment to impinge upon the Claimant's central product management responsibilities.

84 From the outset, it was envisaged that Mr Yik's appointment would take the form of a secondment, rather than a permanent change of position. Although we were not told of any specific time period, we accept Mr Howland-Jackson's evidence that he regarded 2 to 3 years as the likely duration of the secondment.

85 Mr Howland-Jackson and other senior managers worked together to construct a job description. In late 2018 the post of Head of Product (EMEA)[6] was offered to Mr Yik on a secondment basis (no precise term was specified) and he agreed to take it. No consideration was given to holding any form of competition, internal or external. Mr Howland-Jackson and his senior colleagues were agreed that the candidate needed to be from within the organisation and, specifically, someone based in the Singapore office and that the only suitable person was Mr Yik.

86 Although the idea of the secondment had begun with Mr Howland-Jackson and Mr Shibata, the decision to make the proposed structural change and appoint Mr Yik to the new position was taken collectively with the unanimous agreement of senior management including (in addition to Mr Howland-Jackson and Mr Shibata) Mr Hiroshi Yokoyama, Global Head of Products, Mr Hideyuki Omokawa, Global Co-Head of Product and Marketing, Ms Drews and Mr Yeo.

87 There was no material involvement of HR in the decision. As one would expect, Mrs Marks was involved in discussions about implementation of the changes which senior managers had decided upon. No doubt Mr Worrall was made aware of the decision but again, there is no evidence of him having played any part in it.

88 Unfortunately, the Claimant did not take the news of Mr Yik's secondment well. He felt that the new post should have been offered to him and that he was a stronger candidate than Mr Yik. He also considered that the new structure, adding a new layer of management (Mr Yik) between him and Mr Yeo would involve a demotion for him. He rejected the arguments of senior managers that the changes would provide him with career development opportunities. On 14 December 2018 he presented the senior management with a set of what he called 'options', the first of which would involve reversing the proposed changes so that Mr Yik would report to him. The decision of senior management was that the planned changes would not be varied.

[6] Europe, Middle East & Africa

89 On 1 March 2019 Mr Yik's secondment began. Shortly afterwards, a structure chart was circulated which showed the Claimant's new reporting line to Mr Yik.

90 On 14 March 2019 the Claimant sent a calendar appointment to Ms Drews, Mr Omokawa, Mr Worrall, Mrs Marks, Mr Ikegaya and Mr Howland-Jackson stating that it was intended to stand as a 'daily reminder that I am acting under protest' and requiring that 'the matter' be rectified. Having been advised in writing (on 22 March) and at a meeting (on 5 April) that the company's decision had been taken and would not be revisited, the Claimant raised a formal grievance about Mr Yik's appointment. The conduct of that grievance is the subject of a separate complaint, upon which we record our findings under a separate heading below.

91 On 17 April 2019 the Claimant commenced a period of sick leave from which he did not return.

Performance assessment score – March 2019

92 The findings which follow relates to the complaint of victimisation noted in the LoI, para 8(b)(ii)(7).

93 Under the Respondent's arrangements, annual performance scores were awarded in an ascending range from 1 to 5. A score of 3 translates as 'performing'. 4 means 'great'.

94 The Claimant received scores of 5 and 4 respectively in respect of the years to March 2017 and March 2018. In each of those years he held the status of VP. The March 2019 score of 3 came at the end of his first year as an SVP.

95 The proposal to award 3 came from Mr Ikegaya, against whom the Claimant makes no allegation of unlawful conduct. That proposal was approved by Mr Yeo. He told us (witness statement, para 70) that performance scores reflect the seniority of the individual in question and the company has higher expectations of those with higher corporate status. He judged that a score of 3 seemed appropriate and that the Claimant had performed at the level expected of him as an SVP.

96 The score of 3 was awarded some 18 months after the alleged protected act on which this complaint of victimisation hangs. The score of 4 for the previous year (about which no allegation of unlawful treatment is pursued) was 12 months closer in time to the alleged protected act.

Handling of the second grievance – April 2019

97 The findings under this heading relate to the complaint of discrimination arising from disability noted in the LoI, para 6(b)(i).

98 The Claimant sent an email to Mrs Marks on 5 April 2019, raising a grievance about the appointment of Mr Yik to the Head of Product position and consequential matters. Given that there had already been much discussion of the

subject and the Claimant had been advised that the decision of senior management would not be reconsidered, Mrs Marks attempted to reassure him, pointing out that he was a valued employee and that the creation of the new position could present him with a career opportunity. Unpersuaded, the Claimant responded that he wished to pursue his complaint as an informal grievance. Since the issues had been considered informally at some length, Mrs Marks advised him on 16 April 2019 that the next step was to raise a formal grievance. He responded at once to say that his original complaint should stand as his formal grievance.

99 Mr David Cruise, the Respondent's Chief Financial Officer, was allocated to investigate and decide upon the grievance.

100 On 25 April 2019, by which time he was absent from work on sick leave, Mrs Marks invited the Claimant to attend a grievance hearing. He replied that he wished the matter to be dealt with in writing given that he was unwell and, in addition, had concerns that his points might be 'misinterpreted and manipulated' if he presented them in person. Mrs Marks wrote to the Claimant on 1 May 2019 to express her view that it would be preferable to hold a grievance meeting and suggesting, as a compromise, that it could be recorded and a transcript provided. The Claimant responded, stating that he was not well enough to manage 'real time discussions'. Accordingly, Mrs Marks advised Mr Cruise that the Claimant wished for the grievance to be conducted in writing. His wish was respected. Mr Cruise submitted a list of questions to him. Having considered his answers and the input from certain other individuals, he concluded that the grievance should not be upheld. In accordance with the Respondent's standard processes, the result was conveyed by Mrs Marks, in a letter dated 18 June 2019, but the decision-making, and the drafting, were Mr Cruise's.

Sickness absence and the Group Income Protection ('GIP') scheme claim

101 The findings below relate to the complaints of discrimination arising from disability noted in the LoI, paras 6(b)(ii) and 6(b)(iii).

102 We have mentioned that the Claimant's period of sick leave commenced on 17 April 2019. He did not return to work thereafter. A series of 'fit notes' followed, certifying that he was unfit for work and referring to work-related stress and other problems.

103 In relation to the Claimant's complaint that Mrs Marks failed to contact him during the first six months of his sickness absence, we record the following findings. He returned his work mobile phone shortly after his sick leave began. Mrs Marks tried to reach him on his personal mobile phone but he did not answer her calls. He told her not to contact him on his personal email account, but she did have frequent contact with him via his work email address, much of which was concerned with the second grievance and the question of a GIP claim. Mrs Marks's emails were polite and supportive. On occasions she asked after the Claimant's health and wished him a prompt recovery.

104 The Respondent had a GIP scheme backed by an agreement with an insurer, Zürich. Employees, including the Claimant, were contractually entitled to the benefits of the scheme, subject to its rules and 'qualifying conditions'. In the usual way, those benefits were intended to compensate employees for loss of income in the event of long-term incapacity to work extending beyond an initial 'deferred period' of six months (over which they, or at least those at the Claimant's level of seniority and above, had the protection of the company sick pay scheme).

105 The Claimant complains that, in August and September 2019, Mrs Marks and Mr Worrall mishandled the GIP claim made on his behalf. A claim was submitted to Zürich on 30 August 2019. The 'fit notes' were sent in support. The Respondent had no other evidence to supply. The Claimant provided it with no medical evidence at the time or at any material point thereafter. In fact, despite repeated requests, he did not disclose his medical evidence to the Respondent until 21 April 2021, and then only pursuant to an unless order of the Tribunal.

106 Following a call with the Claimant on 27 September 2019, Zürich rejected the GIP claim on the basis that 'work-related stress' was not covered under the policy. In a separate communication a representative of Zürich informed Mrs Marks that the Claimant had been 'quite guarded' during the call but had confirmed that his absence from work was 'work-related'. In an email to Mrs Marks of 30 September 2019, the Claimant confirmed that he had told Zürich that his medical issues resulted from workplace stress.

107 Mrs Marks asked Zürich to provide a formal response to the claim, which followed on 3 October 2019. In summary, this document stated that the Claimant's absence from work was 'situational' rather than reflecting an inability to perform the work for which he was employed and that he could perform such work for another employer.

108 The Claimant alleged that Mrs Marks misrepresented his medical condition to Zürich. We find that, in her telephone and email conversations with Zürich, she did nothing more than convey her understanding, based on the 'fit notes', that his indisposition was a result of workplace stress.

109 On 3 October 2019 the Claimant gave notice that he disputed Zürich's decision and asked the Respondent to resolve the matter. Mr Worrall then approached him with an offer of a call, but he rejected the proposal, referring to 'too much useless conversation'.

110 On 8 October 2019 Mr Worrall suggested to the Claimant that the Respondent should make an OH referral on his behalf. He did not respond to the suggestion.

111 On 15 October 2019 Mr Worrall sent to the Claimant at his request copies of the Respondent's healthcare policy, GIP policy and certain other information.

112 On 16 October 2019 the Claimant raised a grievance about the Respondent's handling of the GIP claim. Mr Cruise was again appointed to

investigate. On 11 November 2019 he gave his decision dismissing the grievance. The Claimant appealed against Mr Cruise's decision, but on 11 December 2019 Mrs Leen dismissed that appeal.

113 In the meantime, Mrs Marks commenced a period of maternity leave on 18 October 2019, from which she returned about a year later. She was not involved in any matter relevant to these proceedings during her absence.

114 Mrs Leen replaced Mrs Marks for the duration of her maternity leave.

115 On 29 October 2019 the Respondent, through Mrs Leen, raised an appeal against Zürich's rejection of the GIP claim. Among many others, she made the points that workplace stress did not appear to be an excluded condition under the GIP policy and that it would be helpful for Zürich to have sight of the Claimant's medical records (if he agreed to release them).

116 Zürich then asked the Claimant to release his medical records to them and he provided his consent. They were delivered on 13 November 2019 and the Respondent was made aware that he had supplied them. A review by Zürich's Consultant Medical Officer followed, after which, on 20 November 2019, the appeal was rejected. The stance taken in the letter of 3 October 2019 was affirmed.

117 On 4 December 2019 Mrs Leen reverted to Zürich to enquire whether there was a means of pursuing the GIP claim further. She was advised that it was open to her to make a formal complaint. Although the Claimant had made it clear in vehement language that he was not prepared to authorise a further appeal and regarded the decision of 20 November 2019 as final, he did not explicitly veto a complaint and Mrs Leen submitted one on 22 January 2020.[7]

118 On 31 January 2020 Zürich rejected the formal complaint. The essence of its reasoning was expressed in this passage:

> **It is the unresolved workplace issues … that are the barrier to him returning to work, not an underlying medical illness preventing him from undertaking his duties. There are multiple entries in the GP notes that support that there is a direct relationship with stress at work (Nikko) and how he is feeling, it is evident from comments that when away from the workplace … his symptoms resolve and it is only the thought of returning to Nikko that leads to an escalation of his symptoms. It is for [this] reason that the definition of incapacity has not been satisfied.**

119 Besides the direct challenges to Zürich to which we have referred, Mrs Leen also encouraged the Claimant to consider making a complaint to the Financial Ombudsman Service ('FOS'), and, on behalf of the Respondent, offered him financial assistance of up to £1,500 plus VAT to cover independent legal advice for that purpose. In the event, the Claimant did not take up that offer but he did make his own complaint directly to the FOS. In these proceedings, he has not disclosed

[7] Mrs Leen called it an appeal, but it seems that its proper status was that of a complaint. She told the Claimant that she had submitted it in order to protect his interests. He later dismissed her action as 'absolutely useless' for him and 'only aimed at defending Nikko's interests' (email of 3 February 2020).

copies of his communications with the FOS and it is unclear what medical evidence (if any) he submitted in support of his complaint. On 16 November 2020 an FOS adjudicator issued a ruling, communicated to the Claimant and the Respondent on that day, in favour of Zürich. It seems that the matter was then referred to the Ombudsman who, on 13 July 2021, affirmed the adjudicator's decision.

OH referral, disclosure of medical records, capability procedure and dismissal

120 The facts recorded under this heading relate to the complaints of discrimination arising from disability under LoI, paras 6(b)(iv) and 9(b)(v) and the complaint of unfair dismissal (LoI, para 9).

121 As we have mentioned, Mr Worrall suggested to the Claimant on 8 October 2019 that an OH referral should be made. At that point, Zürich had rejected the GIP claim and the Claimant's right to company sick pay was about to run out. The Claimant did not respond to the suggestion.

122 On 21 October 2019 Mrs Leen took up the subject of OH, proposing that an appointment be made.

123 On 25 October and 11 November 2019 Mr Cruise repeated to the Claimant that the proposal remained live and explained why an OH referral was likely to be beneficial for all concerned.

124 On 4 December 2019 Mrs Leen proposed an OH review with a consultant OH practitioner, Dr Ryan, on 11 December 2019. She later put the date back to 17 or 18 December and provided further information about the questions and issues that Dr Ryan would be exploring at an OH review.

125 On 13 and 18 December 2019 Mrs Leen wrote again to the Claimant explaining that there was nothing unusual or unreasonable about the request for an OH review and that he had no reason to be mistrustful of an entirely standard process.

126 The Claimant did not engage and the proposed OH assessment by Dr Ryan did not happen.

127 In a further attempt to move matters forward, Mrs Leen proposed that the Claimant be permitted to select three independent OH practitioners from whom the Respondent could choose one, alternatively that the Respondent select three practitioners from whom the Claimant could choose one. The Claimant was not willing to take up this suggestion, apparently on the ground that a doctor chosen in this fashion might not be impartial.

128 On 30 December 2019 Mrs Leen proposed a third-party review through Zürich. The Claimant rejected the idea.

129 On 6 January 2020 Mrs Leen mooted the appointment of two OH doctors in sequence, one appointed and paid for by the Claimant and one by the Respondent. Again, the suggestion was dismissed by the Claimant.

130 On 10 January 2020 Mrs Leen proposed the simultaneous appointment of two OH practitioners, one by the Claimant and one by the Respondent, with a view to there being two assessments on the same day. Again, the Claimant dismissed what was proposed.

131 Mrs Leen was still not defeated. On 17 January 2020 she wrote to the Claimant proposing that an OH practitioner be selected by HCA Healthcare, an organisation of occupational health providers. She also repeated her request for the Claimant's medical notes and records. Again, the Claimant rejected the proposal relating to the OH referral, declaring that all the Respondent's requests were 'unacceptable' and that it had 'all the information from [my] GP including the 'sick notes' …' In fact, as he well knew, the 'fit notes' constituted the only GP material held by the Respondent.

132 On 21 January 2020 Mrs Leen wrote again to the Claimant stating that, regrettably, the parties had reached an impasse. She asked him, if he changed his mind, to provide whatever medical information he might have and in particular the material which he had already given to Zürich, pointing out (again) that the only medical evidence in the Respondent's possession was the set of fit notes and that it was 'incredibly difficult' for it to decide how to proceed. Again, the Claimant refused to engage, on the subject of the OH referral or in relation to disclosure of medical or evidence.

133 Mrs Leen sought the Claimant's engagement on both topics in September and October 2020, again without success.

134 Following her return from maternity leave, Mrs Marks did likewise in her email of 24 November 2020, reminding the Claimant that the Respondent held no medical evidence other than the 'fit notes.'

135 The capability process began the same day with an invitation from Mrs Marks to the Claimant to attend a meeting to discuss his ongoing absence, his fitness to return to work and anything that might be done to facilitate that return. She explicitly stated that the capability process might end in dismissal. A lot of debate about arrangements followed and Mrs Marks agreed with all the terms while which the Claimant proposed. These included limiting any meeting to 30 minutes, providing an agenda and a list of questions which would be considered, arranging a recording and providing a transcript. In view of the time restriction, Mrs Marks proposed two meetings scheduled for 30 minutes each. The Claimant expressed the hope that a single meeting would be sufficient.

136 The first meeting was fixed by agreement for 11 December 2020, in the form of a video conference call. It was chaired by Mrs Marks. Mrs Leen attended to take a note. At the meeting the Claimant stated that he remained unwilling to: (a) undergo an OH assessment by a doctor from the HCA network; (b) allow the

Respondent to know the identity of any OH practitioner selected by him before delivery of that practitioner's report; (c) allow the Respondent any contact with his chosen OH practitioner; (d) provide the Respondent with the details of any specialist who had been treating him; or (e) divulge any medical evidence to the Respondent.

137 Having been given the opportunity on 18 December 2020 to reconsider his position and say whether he would now provide medical evidence and engage with an OH expert as proposed, the Claimant made it clear in his reply of 23 December 2020 that he was not willing to agree to either course.

138 By a letter of 6 January 2021 Mrs Marks invited the Claimant to a second capability meeting. He responded two days later, stating that he did not consider a second meeting to be necessary.

139 Having given the matter further consideration, Mrs Marks took the decision to terminate the Claimant's employment with payment in lieu of notice (as provided for under his contract). She set out her reasons in her letter of 13 January 2021, which included the following:

> **As it stands, we have no independent medical information on your current conditions or prognosis (in fact we are not even fully aware of what those conditions are, save that you have told us that one of them is FND), what adjustments (if any) we can take to facilitate your return to work nor when you are likely to be fit to resume your duties. We had hoped we could work with you to find out the answers to these questions so that we could then make an informed decision on your future employment with Nikko. However, you made it clear in your most recent letter that you are unwilling to co-operate with what we consider to be a reasonable process.**
>
> **As you have now been absent for almost 21 months and there is no evidence that you will be able to return to work in the near future, I have taken the difficult decision to terminate your employment on the ground of ill-health capability. In reaching this decision, I have taken into account that your entitlement to company sick pay has expired and that our claim to Zürich on your behalf for income protection cover was unsuccessful. I have been unable to give meaningful consideration to the issue of whether you might be able to carry out an alternative role, primarily because it is not possible for me to do so in the absence of visibility around your medical condition(s).**

140 Mrs Marks also drew attention to the Claimant's right to appeal. The Claimant then engaged in email correspondence with Mr Howland-Jackson, in which he pressed the argument that he should be reinstated pending any appeal. Mr Howland-Jackson explained that appeals did not work in that way but that, if he pursued an appeal and was successful, one outcome might be his reinstatement. Ultimately, the Claimant declined to pursue an appeal in these circumstances.

141 By the time of the dismissal, the Claimant's extended period of absence had had a serious impact upon the Respondent's business. It had placed a considerable strain upon Mr Yik, who had been required to perform the functions of two roles more or less single-handedly. It had also delayed the growth plans which had been the very rationale for the creation of the Head of Product post and the attendant structural changes.

Disability

The FND condition and its symptoms and effects

142 We have mentioned that the parties are agreed that, from 17 April 2019 onwards, the Claimant has been disabled by his FND condition.

143 In his witness statement, paras 5-7, the Claimant summarises his main symptoms. These include (para 5) 'consistent pain/pressure/noise' at the back of the head, 'sleep disorder and abdominal pain' and 'constant fatigue'. He describes (para 6), 'any real-time or multi-layered cognitive act' or active physical movement as putting substantial strain upon him and aggravating his pain. He states 'I am not allowed to drive, cannot enjoy most personal and family activities that I used to enjoy, let alone doing any paid work. I do not even feel confident in going out on my own.' He characterises his condition as chronic and fears that it may be permanent. His case before us (witness statement, para 3) is that he has been since April 2019, and remains, 'incapacitated, i.e. unable to do any work or activity which involves active thinking and/or active physical movement.' In so far as his evidence states facts about his condition (rather than expressing opinions), it is unchallenged and we accept it.

144 For the purposes of his complaint of discrimination arising from disability, the 'something arising' is stated (LoI, para (6)(a)(i)) to be that the Claimant's FND, 'makes it difficult to think in multiple layers, [and] deal with unclear responsibilities and uncertainty of his allocated roles'.[8] This uncertainty is said to be compounded when 'misrepresentation takes place'. Again, we accept that the condition involves a significant impairment of cognitive functions.

The Respondent's knowledge of the Claimant's disability

145 The 'knowledge' issue is identified in the LoI, para 4.

146 The narrative concerning the Claimant's period of sick leave, the capability process and the dismissal is set out below. For present purposes, it is sufficient for us to record that the Respondent was not made aware of the diagnosis of FND until it received the first claim form. Mr Smith told us on instructions, and Mr John did not dispute, that, owing to the effects of the Covid-19 pandemic, service was not effected until 7 October 2020, some five months after the proceedings were issued. Until it had sight of the first claim form, the Respondent was provided only with 'fit notes' supplied by the Claimant's GP. These referred variously to abdominal pain, headaches, stress, sleep disorder related to work stress, work-related stress and, in some instances after October 2019, anxiety. The Respondent's repeated efforts to prevail upon the Claimant to provide more information about his condition were unsuccessful.

147 In our secondary findings and conclusions below, we will consider, for the purposes of the complaint of discrimination arising from disability, whether, and if

[8] LoI, para (6) a.

so, by what date, the Respondent knew or could reasonably have been expected to know that the Claimant had the disability of FND.

Secondary Findings and Conclusions

Rationale for primary findings

148 In arriving at our primary findings we have had careful regard to all the evidence put before us. We have considered the coherence, internal consistency and general plausibility of the witness evidence. We have also attached particular importance to contemporary documents.

Direct race discrimination

149 The 'live' claims under this head are those listed in the LoI at paras 3(b)(ii) to (v).

Detriment

150 As to para 3(b)(ii), we remind ourselves that the complaint is of Mr Mulholland 'deliberately and unreasonably' delaying consideration of the Claimant's renewed request for early sponsorship of his ILR application made on or around 11 August 2017 and 'unjustifiably' rejecting that request on 21 September 2017. In our judgment the Claimant identifies nothing here about which reasonable complaint could be made. Given that he (a) had been told in clear terms on 8 March 2017 that, in line with its standard procedures, the Respondent would make the application at or around the time of expiry of the current Tier 2 visa, and (b) had brought forward no new ground for accelerating the process, we think that Mr Mulholland can be forgiven for not regarding his somewhat importunate request of 11 August 2017 and subsequent chasing emails as a priority. And the rejection of the request on 21 September 2017 was, in our view, entirely justified and in accordance with the Respondent's normal practice. Mr Mulholland had been given no reason to regard the Claimant's case as meriting special treatment and he would have been open to legitimate criticism if, without good cause, he had simply yielded to the pressure placed upon him to do so. In these circumstances, we find that the Claimant fails to demonstrate an arguable detriment.

151 We turn to the LoI, para 3(b)(iii), which makes three allegations against Mr Yeo of attempting to change the Claimant's reporting line to Mr Yik.

152 We are marginally persuaded that Allegation (1) (copying the email of 10 July 2017 to Mr Yik) discloses a detriment. Allowing that the Claimant was and is clearly exceedingly sensitive on matters of status, we are just persuaded that the low threshold is crossed. He and Mr Yik both reported to Mr Yeo and he was offended to see his personal goals shared with his peer.

153 We find nothing whatsoever in Allegation (2) (making the Claimant provide updates to Mr Yik on catch-up calls). Our primary findings speak for themselves.

The communication was not 'one-way'. Mr Yeo was involved and Mr Yik chaired the meetings only when Mr Yeo was unavailable. It is very unlikely that that happened more than once in the relevant period (July and August 2017). It is possible that the Claimant's sensitivity about status may have caused him to resent the fact that Mr Yik sometimes chaired the meetings. If so, such resentment was unreasonable and if the Claimant felt disadvantaged that sentiment was not justified.

154 In our judgment there is also nothing in Allegation (3) (Mr Yik at the behest of Mr Yeo attempting to dictate to the Claimant concerning his work and responsibilities in February and June 2018). Given his sensitivity already mentioned, the Claimant may, on occasions, have felt irritation about Mr Yik's attempts to provide guidance and advice. It may be that, in his enthusiasm, Mr Yik slightly overreached himself once or twice. But we have found that his interventions were well meant and we have no doubt that the Claimant (and others) understood that they were intended to be helpful and supportive. In these circumstances, we find that an actionable detriment is not made out. In any event, this complaint is directed at Mr Yeo and we reject entirely the charge that he manipulated or encouraged Mr Yik to behave in the manner complained of. It follows that the allegation of detrimental treatment against Mr Yeo necessarily fails.

155 We turn to the allegations against Mr Yeo of depriving the Claimant of access to senior management (LoI, para 3(b)(iv)). Again, there are three separate complaints to consider.

156 We are satisfied that Allegation (1) discloses no arguable detriment. Mr Yeo volunteered to the Claimant the confession that he ought to have 'looped him in' a little earlier, at the point when the Product Committee had granted approval for a particular project. But the project was not yet underway and the Claimant had not been excluded from any work relating to it. This was a trivial oversight involving no disadvantage.

157 Allegation (2) discloses no arguable detriment on the part of Mr Yeo, the only individual at whom this complaint is directed. On our primary findings, the meeting to which the Claimant was not invited was called by Ms Drews.

158 Likewise, on our primary findings, no arguable detrimental act on the part of Mr Yeo is established under Allegation (3). If the Claimant was seeking to rely on the 'UCITs Working Group' referred to by Mr Yeo in his witness statement (para 55), in which neither he nor his comparator, Mr Yik, was included, we have found that Mr Yeo was not responsible for the recipient list. We have also accepted Mr Yeo's evidence that there was no dedicated, official 'UCITs Working Group'. Communications concerning UCITs work went to various people within the organisation depending upon the particular subject-matter under consideration. The evidence before us does not substantiate any practice of excluding the Claimant from communications relating to UCITs work.

159 Finally, we come to the complaint that Mr Yeo 'did not promote the Claimant to the role of Head of Product in March 2019' (LoI, para 3(b)(v)). In our judgment it

is highly questionable whether a detriment is established here. We have no doubt that the Claimant, who has very clear views about his own talents and potential, strongly believes that the appointment of Mr Yik was wrong and unwarranted and that the opportunity should have gone to him. That said, given the reasoning of the senior managers behind the creation of the new post (as to which we have made findings above), we struggle to see him as having been deprived of a realistic chance. Their unanimous view was that, despite his strong technical ability, he did not have the reputation, experience or managerial and leadership skills which the position required. Moreover, they were very clear that it was 'politically' imperative that the role be filled by someone from the Singapore office who could command the trust and cooperation needed to secure an effective shift in the control and management of the Luxembourg funds to London. We accept that, given the essential criteria agreed by the decision-makers, Mr Yik was the only possible choice. Accordingly, while we accept that the Claimant felt disadvantaged by the decision to appoint Mr Yik, we do not consider that his perception was justified.

Discrimination

160 The claim under LoI, para 3(b)(ii) has failed for want of any detriment shown. In any event, it fails on the further and even more compelling ground that there is no foundation for a finding of unlawful discrimination. The posited comparison with Mr Yik (LoI, para 3(f)(ii)) is obviously an error. It was no part of the Claimant's case to suggest that there was any valid 'like-for-like' comparison between the Respondent's treatment of him on the one hand and Mr Yik on the other, save in respect of the March 2019 Head of Product appointment (LoI, para 3(b)(v)), to which we will shortly come. What basis is there for inferring that an hypothetical comparator of different nationality would have received materially different treatment from Mr Mulholland compared with that received by the Claimant? In our judgment, there is none. The particular suggestion that an imaginary comparator of Japanese or Singaporean or Far Eastern nationality would have been treated more favourably than he was is not supported by any evidence. On our primary findings, the only employee who had had the benefit of early sponsorship for ILR was a US citizen. And that individual's family circumstances were, as we have noted above, certainly exceptional.[9]

161 Under LoI, para 3(b)(iii) and (iv) we are left with a marginal finding of an exceedingly minor detriment under Allegation (1). Otherwise, we have found no detriment established. Is there any basis for supposing that Mr Yeo's minor slip in copying the email of 10 July 2017 to Mr Yik had anything to do with the Claimant's Uzbek nationality (or the fact that Mr Yik was Singaporean)? We remind ourselves that the case here rests on the broader allegation that Mr Yeo was seeking, on racial grounds, to change the Claimant's reporting line to Mr Yik. We have found no evidence whatsoever to substantiate the underlying theory. Nor is there any contextual or background evidence pointing to a practice or disposition on the part of Mr Yeo to disadvantage the Claimant in any way, let alone to discriminate

[9] Of course, it does not help the Claimant to point out that, at the end of the grievance process, Mr Rippey was persuaded that exceptional circumstances were shown in his case. As he made clear, these became apparent for the first time in the course of the investigation and had not been before Mr Mulholland.

against him on account of his nationality. In our judgment the Claimant fails to make out the first beginnings of a case of unlawful race discrimination here.

162 As to the appointment of Mr Yik to the Head of Product role (LoI, para 3(b)(v)), we have explained that we are not persuaded that an arguable detriment is shown in the circumstances. In case we are wrong about that, we have gone on to consider whether any arguable complaint of discrimination is made out in respect of that appointment. We are satisfied to a high standard that none is. The Claimant cites Mr Yik as his comparator but we find the comparison invalid. The circumstances of the two cases were materially different in at least two vital respects. First, the Claimant's experience and reputation within the organisation were not in any sense comparable to those of Mr Yik. Secondly, by virtue of having been based there for a significant period, Mr Yik was capable of commanding the trust and confidence of the Singapore office, which was crucial to the success of the project to move the 'centre of gravity' of the Luxembourg funds to London. By contrast, the Claimant had no comparable connection with the Singapore office.

163 Treating the claim as resting on a comparison with an hypothetical comparator, we see no warrant for an inference that, had he been of different nationality, the Claimant would have been appointed to the Head of Product role. The logic of the senior managers' reasoning argues compellingly the other way. Likewise if one asks whether, had Mr Yik not been Singaporean (or of any other Far Eastern nationality), he would have been chosen for the appointment. Quite simply, we are satisfied that he was appointed because he was judged to be comfortably the best candidate on merit (indeed the only appointable candidate on merit) and because he was seen to have the necessary connection with the Singapore office. Those reasons seem to us both credible and rational. In our judgment they provide an entirely plausible explanation for the Respondent's action and one which excludes discrimination in any form.

Race discrimination – summary

164 For the reasons stated, we have concluded that only one (exceedingly minor) detriment is demonstrated and that, in any event, there was no discrimination in any of the matters to which the claims relate.

165 We have set out our reasoning above in respect of each of the allegations of direct race discrimination in turn, because different considerations and different evidence apply to each. But we have been careful to step back from the detail to survey the whole and to look carefully at all of the evidence (including 'background' matters) when considering whether any pattern pointing to discrimination based on nationality is demonstrated. This exercise has only confirmed our view that the Claimant's theory of race discrimination is misplaced.

Race-related harassment

166 The claims under this head are noted in the LoI, para 7(a)(i) and (ii).

167 We are satisfied that both claims are untenable. Although we are prepared to assume in the Claimant's favour that both acts relied on were 'unwanted', he fails in each case to make out the other essential ingredients of the tort of harassment.

168 As to the first complaint (communicating the cost of a visa on 30 September 2015), we do not consider that the 'related to' connection with the Claimant's protected characteristic of Uzbek nationality is established. There was certainly a contextual link in the sense that the communication arose as a consequence of a transaction necessitated by the fact of his Uzbek nationality but that, on our reading of the law (see the reference above to *Unite the Union v Nailard*), is not enough. There is, in our judgment, no evidence to make out what is required, namely that the conduct complained of was itself related to the protected characteristic.

169 In case we are wrong on the 'related to' point we are in any event satisfied to a very high standard that the treatment of which the Claimant complains comes nowhere near to being capable of amounting to actionable harassment under the 2010 Act, s26. There is no basis for supposing that Mr Mulholland intended to violate the Claimant's dignity or subject him to an environment to which any of the powerful adjectives in 26(1)(b)(ii) could sensibly be attached. Nor could the treatment reasonably be judged to have had such an effect. To uphold this claim would be to 'cheapen the significance' of the statutory language in precisely the way warned against in *Land Registry v Grant* (cited above), among other authorities.

170 Our reasoning in respect of the second harassment claim (Mr Mulholland asking the HR team to point out that the Claimant was free to proceed with his ILR application early, at his own cost) is identical to that explained above in respect of the first. In short, the 'related to' requirement is not made out and in any event the act complained of fell a long way short of being capable of amounting to harassment.

Race-related harassment – summary

171 Both complaints of harassment comprehensively fail. Neither rests on treatment 'related to' race and neither was of sufficient gravity to be capable of constituting actionable harassment.

Disability-related discrimination

The Respondent's knowledge of the disability

172 We remind ourselves that the parties agree that the Claimant has been affected by FND since 17 April 2019 and that the condition has throughout amounted to a disability.

173 As we have recorded above in our primary findings, the Claimant repeatedly refused the Respondent's requests for medical evidence. His medical notes and

records were not disclosed until 21 April 2021, more than four months after his employment had ended.

174 We have also noted in our primary findings the Respondent's unavailing attempts to agree with the Claimant a workable means by which an OH specialist might be instructed to examine him and prepare a report to assist in managing his sickness absence and making suitable decisions about any possible return to work.

175 On the other hand, we have also noted that, on 7 October 2020, the Respondent received a copy of the first claim form, by which it was first made aware of the Claimant his having been diagnosed with FND.

176 In these circumstances, we find that the only medical information available to the Respondent until it was served with the first claim form was the set of 'fit notes' issued by the Claimant's GP following the commencement of the sickness absence. As we have recorded, these referred to symptoms such as abdominal pain, headaches, sleep disorder and latterly anxiety, but the constant thread through all of them was the repeated reference to stress. None made any reference to FND or even suggested the possibility of any significant mental health and/or neurological condition.

177 On this material, we are satisfied that the Respondent was not aware of the Claimant's condition of FND before 7 October 2020. We have reminded ourselves under the 2010 Act, s15(2), the 'knowledge' defence is for the employer to make out. As to actual knowledge, we are satisfied that the burden on the Respondent has been discharged.

178 That brings us to constructive knowledge. Has the Respondent also shown that it could not reasonably have been expected to know that the Claimant had the disability (namely FND)? In addressing the question of constructive knowledge we have reminded ourselves of the EHRC Code of Practice on Employment (2011), which considers the proper application of the 2010 Act, s15(2) at paras 5.13-5.16. At para 5.15 it states:

> **An employer must do all [it] can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.**

179 In our judgment, this part of the defence is established in respect of the period up to 7 October 2020. We have had regard in particular to the following factors. (1) Prior to going on sick leave on 17 April 2019 the Claimant had an excellent attendance record. In fact, on his case, he took not a single day's sick leave during the entirety of his employment up to that date. There was nothing to point to any vulnerability to any psychiatric or neurological disorder. (2) After learning of the decision to create the Head of Product post and appoint Mr Yik to it, the Claimant repeatedly voiced his vehement opposition to that course of action, claimed that it would severely prejudice his career and signalled that if the

Respondent did not change direction he would have to 'consider his options'. He did not argue or suggest that his health would be imperilled. (3) On commencing sick leave, and over the many months which followed, the Claimant shunned contact from the Respondent, rebuffed its many requests for medical evidence and obstructed its repeated attempts to set up an OH examination by putting forward unreasonable and unworkable conditions. (4) In these circumstances, and given the content of the 'fit notes', the Respondent had no foundation on which to base any reasonable assessment of the Claimant's likely medical condition (if any). It is, in our judgment, impossible to say that it ought reasonably to have known that he was subject to *any* mental health/neurological condition. On the contrary, we are satisfied to a high standard that the Respondent *could not* have known before 7 October 2020 that he had any such condition, let alone that he had the particular condition of FND.

180 As to the period from 7 October 2020 onwards, we see the matter differently. On that date, the Respondent had sight of the first claim form, in which the Claimant stated in terms that his condition had been diagnosed as FND. Mr Smith contends that, in the absence of supporting medical evidence, that amounted to mere assertion and was insufficient to fix the Respondent with the requisite knowledge (actual or constructive). We disagree. It seems to us that, at least in most circumstances, a statement by an employee to an employer, 'I have been diagnosed with [condition]' is sufficient to defeat a denial of actual knowledge of the condition. Of course, this statement does not by itself compel the employer to accept that the individual has the relevant condition, much less to concede that he or she is, in law, disabled. But that is a separate matter.

181 And if we are wrong about actual knowledge, we find in the alternative that revelation of the diagnosis on 7 October 2020 was certainly sufficient to render the Respondent's denial of constructive knowledge untenable. In the ordinary case, an employer informed of a diagnosis will not establish that it could not reasonably have been expected to know that the employee had the relevant condition, at least until it has investigated the matter carefully and reached an objectively defensible conclusion that the stated diagnosis has not been made or is wrong. Until that point, absent very special circumstances, the employer would not act reasonably in simply disregarding the information which the individual had supplied. Are there special circumstances here such as might have entitled the Respondent to decline to take at face value what it read in the first claim form? In our judgment the answer to that question must be no. The assertion of the diagnosis of FND was very clear. It was not inherently implausible. There was no suggestion on the part of the Respondent that the Claimant was an unreliable historian generally, much less so unreliable that a straightforward factual statement of the kind made in the claim form could safely be dismissed as false or mistaken.

182 For these reasons, we are satisfied that the Respondent is fixed with knowledge (actual, alternatively constructive) of the Claimant's FND as at 7 October 2020.

183 So much for actual and constructive knowledge of the *condition*. We have not overlooked the fact that the defence under s15(2) is directed to knowledge of

the disability. Does that make a difference? Perhaps in some circumstances it might, but we do not think that it can here. We accept that FND is not (unlike certain conditions) inherently a disability. But here it is common ground that the form of the condition which affects the Claimant is, and has at all relevant times been, a disability. Accordingly, it seems to us that knowledge (actual or constructive) of the condition must be equated with knowledge (actual or constructive) of the disability.

The 'something arising'

184 As we have already stated, the 'something arising' relied on for the purposes of the claim under the 2010 Act, s15 is framed in the LoI, para 6(a)(i) in this way:

> **The Claimant asserts that his disability makes it difficult to think in multiple layers, deal with unclear responsibilities and uncertainty of his allocated roles. The uncertainty is compounded when misrepresentation takes place.**

The case so advanced seems, on its face, unpromising - certainly where one reads the most significant instance of 'unfavourable' treatment (dismissal) alongside this formulation of the 'something arising'. But its general meaning is clear. It conveys a complaint of a series of allegations of unfavourable treatment all of which are said to have been applied to the Claimant because of his difficulty with complex reasoning and managing uncertainty about his responsibilities and roles.

185 In his closing submissions, para 31, Mr John, referring to the agreed formulation of the 'something arising', said this:

> **That attempted formulation, whilst not incorrect, was made by [the Claimant] when a litigant in person and when under an acknowledged mental disability. The tribunal is invited to take a fair and sensible approach to the full extent of the '*things arising*' from the disability which led to the unfavourable treatment of dismissal. It is submitted that the actual features of [the Claimant's] condition are quite plainly the 'something arising' causing his inability to work.**

In other words, Mr John was seeking very deftly to amend the LoI in order to rely, in respect of the dismissal-based claim, on a repackaged 'something arising'.

186 Not surprisingly, Mr Smith strongly opposed the Tribunal permitting the Claimant to rely at the end of a multi-day trial on a different formulation of his case. The LoI had been constructed by the Tribunal on the basis of the 'pleadings' and representations of both parties in the course of an inordinately lengthy case management process. The Claimant's attempt to vary it had been refused by the Tribunal and that refusal had been upheld by the EAT. And at the start of the trial before us, through his counsel, he had abandoned any residual ambitions to widen, or alter in any way, the scope of the case as defined in the LoI. It would be unjust and contrary to principle to allow him in closing argument to advance a new case.

187 We are satisfied that the submissions of Mr Smith are to be preferred. The Tribunal has performed its proper function of defining the dispute in the light of the

formal documents and the contributions from both sides. It was not its function to advise the Claimant as to how to put his case. The 'something arising' ultimately settled upon and adopted by the Tribunal was not logically incoherent or obviously unsustainable. It would have been open to the Claimant to rely on more than one 'something arising' but he did not elect to do so. He is a conspicuously articulate and intelligent individual and the statutory language is not complicated. Moreover, long before instructing Mr John, he had had the benefit of legal advice, certainly when his appeals were pending in the EAT. He appears to have raised no complaint before the EAT about the formulation of the 'something arising' in the LoI, and if we are wrong about that any complaint on the matter found no favour with Michael Ford KC. At the start of the hearing before us the only doubt about the LoI mooted on behalf of the Claimant was as to whether it was defective in not including a complaint of failure to make reasonable adjustments. But, as we have noted above, on instructions Mr John abandoned any such submission. The hearing then proceeded on the basis of common ground that the LoI properly defined all claims and issues for decision. By that point, at the very latest, the Tribunal was entitled to treat the scope of the case as settled and firmly decline any further attempt to reopen the question. In our judgment, it would be unjust to the Respondent and contrary to the interests of justice and the overriding objective (which have at their heart the need to ensure finality and proportionality in all stages of litigation) to entertain Mr John's submission. For these reasons, we refuse it.

188 Did the (only) applicable 'something' arise in consequence of the Claimant's disability? Having regard to our primary findings concerning his FND condition and its effects upon him, we are satisfied that it did.

Unfavourable treatment (i) – the handling of the second grievance

189 The first alleged instance of unfavourable treatment, namely the refusal of Mrs Marks in or around April to May 2019 to conduct the Claimant's second grievance in writing, appears in the LoI, para 6(a)(i).

190 Given our primary findings set out above, we are driven to the inevitable conclusion that the unfavourable treatment of which the Claimant complains did not happen. Mrs Marks did not 'refuse' to conduct the grievance in writing. She did suggest that holding a grievance meeting would be beneficial. The Claimant was not persuaded and Mr Cruise then dealt with the matter in writing in accordance with his wishes. They Claimant was not treated unfavourably, by Mrs Marks or anyone else.

191 We are not surprised that Mr John did nothing (or next to nothing) to press this claim in his closing submissions.

Unfavourable treatment (ii) – failure to contact the Claimant when on sick leave

192 The second complaint of unfavourable treatment (LoI, para 6(b)(ii)) accuses Mrs Marks of failing to contact the Claimant during his first six months' absence on sick leave (which, as we have recorded, commenced on 17 April 2019).

193 Here again, we are satisfied that the complaint does not bear scrutiny when measured against the facts as we have recorded them in our primary findings. There was ample contact during the relevant period, particularly in relation to the Claimant's second grievance and the GIP application. In circumstances where he had returned his work mobile phone, stipulated (by necessary implication) that contact on his private mobile phone should be limited to urgent matters and insisted that email contact must be on his work email address, we cannot accept that Mrs Marks can be faulted for failing to make additional contact with him purely for the purposes of offering support and sympathy in connection with his stated medical unfitness to work which, on the information made available to her, derived wholly or mainly from work-related stress. It was not in dispute that all communications from Mrs Marks were courteous and that she did on occasions asked after his health and wish him well in his recovery. Objectively viewed, we consider that the style and level of contact between Mrs Marks and the Claimant was not at all unfavourable and that, had she sought to engage with him more frequently, she would have faced the obvious risk of being accused of subjecting an unwell employee to oppressive and needless communications.

Unfavourable treatment (iii) – mishandling of the GIP application

194 The complaint as finally pursued is that Mrs Marks and Mr Worrall mishandled the GIP application on behalf of the Claimant between August and September 2019, in three respects (LoI, para 6(b)(iii)(1), (2) and (5))[10]. We will consider them in turn.

195 Before doing so, we should make one preliminary point. Although these allegations are directed at Mrs Marks and Mr Worrall, there is no evidence that Mr Worrall played any part in the material events relevant to Allegations (1) or (2) during the relevant period. Accordingly, we consider those Allegations only in so far as they are directed at Mrs Marks.

196 Allegation (1) contends that Mrs Marks deliberately delayed the start of the GIP process in circumstances where the Respondent was contractually required to commence it in May/June 2019.

197 On our primary findings, there was no deliberate delay. We accept Mrs Marks's evidence that she and Ms Ronco took advice from the Respondent's broker and were guided by it. There was no contractual obligation to commence the claim in May or June 2019. That contention has not been pursued before us. The paltry medical evidence available to Mrs Marks (the 'fit notes') did not point to the Claimant being unlikely to be fit to return to work before the end of the deferred period. In any event, there was no unfavourable treatment. The timing of the initiation of the GIP application did not prejudice the Claimant in any respect. The claim was issued before his sick pay expired.

198 Allegation (2) complains that Mrs Marks misrepresented the Claimant's medical condition to Zürich. On our primary findings, that allegation is untenable. In

[10] Allegations (3) and (4) were abandoned in the course of the hearing before us.

our judgment, it is quite unfair to characterise Mrs Marks's interactions with Zürich as including any representation about his clinical condition. For want of any medical evidence, she was in no position to offer any opinion on that. She did express the view that the *origin* of his indisposition appeared to be workplace stress. But that: (a) was not to exclude the possibility of a medical condition *caused by* stress, (b) was precisely what the 'fit notes' appeared to say and (c) corresponded exactly with what the Claimant himself told Zürich.

199 Allegation (5) asserts a failure to investigate the Claimant's complaint of 30 September 2019 that the decision of Zürich was wrong and the result of its having been misled by the Respondent. It might be said that since this complaint falls under the umbrella of LoI, para 6(b)(iii) it should be seen only as alleging a failure to investigate the complaint of 30 September 2019 on the day it was received (the last day of the two-month period within which these allegations are said to fall). We decline to apply such a technical reading to the LoI, and we rest our conclusions on the primary findings made above which cover the period up to Mrs Marks's departure on maternity leave on 18 October 2019.

200 As we have said, Mr Worrall did have some involvement in events relevant to Allegation (5). This was between very late September and mid-October 2019. As we have noted in our primary findings, in that period Mr Worrall proposed a phone (or video) call, to which the Claimant did not respond, and forwarded to him some documents which he had requested. Then, on 16 October 2019, the grievance process commenced, in which his complaint about the handling of the GIP claim was fully examined.

201 In our judgment, it cannot be said that there was any failure by Mrs Marks or Mr Worrall or anyone else on behalf of the Respondent to take up the Claimant's challenge to the decision of Zürich to reject the GIP claim. Mrs Leen in particular pursued his interests with notable skill and energy. As we have recorded, by the time the process was exhausted, the Claimant had received seven adjudications on, or arising out of, the claim[11]. Nor can it be said that the rejection of the claim resulted from any misrepresentation by Mrs Marks, Mr Worrall or anyone else on behalf of the Respondent.

202 For these reasons the complaint of unfavourable treatment under Allegation (5) is, in our judgment, entirely groundless.

Unfavourable treatment (iv) – pressure in relation to an OH assessment

203 This complaint (LoI, para 6(b)(iv)) accuses Mrs Marks and Mr Worrall of pressurising the Claimant from December 2019 onwards to attend an OH assessment with a consultant of their choice.

204 On the strength of our primary findings above, we are satisfied that no unfavourable treatment is established. We consider that the Respondent's

[11] These were: Zurich's decision on the claim, Zurich's decision on the appeal, Zurich's decision on the complaint, Mr Cruise's decision on the grievance, Mrs Leen's decision on the grievance appeal, the ruling of the LOS adjudicator, and the decision of the Ombudsman.

approach was entirely reasonable and that, unfortunately, the Claimant's was anything but.

205 The Claimant did not at any time dispute the appropriateness of obtaining an OH assessment. The difficulty throughout resulted from his insistence on dictating terms under which such an assessment might be arranged with which the Respondent could not reasonably have been expected to agree. As we have recorded, at the capability meeting on 11 December 2020, following well over a year during which the Respondent had repeatedly made concessions and put forward compromise proposals, the Claimant's position remained that any OH assessment (for the cost of which the Respondent would be liable) must be carried out by a practitioner (a) to be chosen by him alone; (b) whose identity would not be divulged to the Respondent until the report was served on it; and (c) with whom the Respondent would be prohibited from having any contact. The central purpose of an OH assessment is to secure independent medical evidence to assist an employer to discharge its functions and obligations appropriately in light of an employee's medical condition and its consequences. No employer could reasonably be asked for a referral to be conducted on its behalf by a practitioner over whose selection it had no control and with whom it was prohibited from communicating. The Claimant supplied no justification for the bizarre procedure upon which he was insisting. Nor could he.

206 Did the Respondent 'pressurise' the Claimant? Certainly, Mrs Leen and, after October 2020, Mrs Marks did make repeated efforts to persuade the Claimant to agree sensible arrangements to enable an OH referral to be made. These overtures were expressed in courteous language and rightly made the point, repeatedly, that it would serve his interests to cooperate. We are satisfied that in so far as pressure was applied to the Claimant it was both necessary and proportionate.

207 To the extent that pressure was applied to the Claimant in respect of an OH assessment, almost all of it came from Mrs Leen, against whom he makes no allegation of unlawful conduct. There was no material difference in the tone or content of Mrs Marks's communications on the same subject following her return from maternity leave in October 2020.

208 In summary, we are satisfied that the complaint here is about conduct by the Respondent which was practical, rational and entirely unobjectionable. There was no unfavourable treatment.

Unfavourable treatment (v) – dismissal

209 It goes without saying that here (LoI, para 6(b)(v)) the Claimant establishes unfavourable treatment.

Was any unfavourable treatment 'because of' the 'something arising'?

210 To recapitulate, our reasoning so far has eliminated all alleged instances of unfavourable treatment bar one, the dismissal.

211 For the reasons which we have explained, the sole question here is whether the Claimant was dismissed because of the 'something arising' identified in the LoI, para 6(a)(i), namely his difficulty in thinking in multiple layers and dealing with unclear responsibilities and uncertainty about his allocated roles.

212 In our judgment, the answer to that question must be no. There is no basis for supposing that Mrs Marks rested her decision to dismiss on her perception of the Claimant's cognitive functions and/or any uncertainty he might feel about his functions and responsibilities. She did not have any reason to doubt his cognitive capacity or to wonder whether he was clear about his functions and responsibilities. Moreover, she had no reason to turn her mind to these questions. They did not arise. She dismissed the Claimant on capability grounds. The main factors on which her decision was based were that he had been away from work for an extended period; there was no apparent prospect of that period coming to an end; his long-term absence had prejudiced the Respondent's business and threatened, if continued, to cause it further prejudice; and the Respondent had not been provided with any evidential basis on which to consider any alternative to dismissing him on capability grounds.

213 Accordingly, since the only unfavourable treatment was not applied to the Claimant because of the 'something arising', the claim under the 2010 Act, s15 necessarily fails.

Justification: a proportionate means of achieving a legitimate aim?

214 For completeness, we have gone on to consider whether, if we had reached a different decision on Mr John's request to amend the LoI to specify a different 'something arising' in respect of the dismissal-based claim (or, as he would prefer to put it, simply to apply a generous reading to the formulation as it stood), the result would have been the same.

215 The starting point here is that we would have found, on this approach, that the unfavourable treatment was indeed 'because of' the 'something arising' for which Mr John contended. There was nothing between the parties on this: they agreed that the reason for the Claimant's dismissal was the fact that he was judged to be medically unfit to perform his duties. Accordingly, the outcome would have turned on the proper application of the 2010 Act, s15(1)(b), which places upon the employer the obligation of showing that the treatment was a proportionate means of achieving a legitimate aim.

216 As to aims, the Respondent relied on three relevant to the decision to dismiss: managing its resources in an efficient and effective manner; employing employees in roles which they are capable of performing (and, conversely, not continuing to employ employees in roles which they are not capable of performing); and providing an efficient and effective service, including in respect of product development and management (LoI, para 6(e)(vi), (vii) and (viii)). We accept that the Respondent had and has those aims and that they were and are legitimate.

217 As to means, we are clear that the measure of dismissal was, in all the circumstances, a proportionate means of achieving the Respondent's legitimate aims. Our main reasons are the following. (1) At the time of the decision to dismiss, the Claimant had been absent from work for a very long time – almost 21 months. (2) His contractual right to sick pay had long since expired. (3) The GIP application, appeal and complaint had been fully considered and determined, as had the related (second) internal grievance and appeal and the two-stage FOS complaint. (4) Neither at the time of the capability hearings, nor in the proceedings before the Tribunal, was it any part of the Claimant's case to argue that his dismissal would be, or was, unlawful as being in breach of his contract (for example by virtue of contravening an implied term of the sort recognised in *Aspden v Webbs Poultry and Meat Group (Holdings) Ltd* [1996] IRLR 521 HC). (5) Despite numerous requests to do so, the Claimant had refused to provide any medical evidence to the Respondent or to answer questions concerning his medical condition. (6) Despite the sustained efforts of Mrs Marks and Mrs Leen, the Claimant had unreasonably refused to engage with their proposals aimed at agreeing arrangements for an OH referral, with the result that the Respondent was denied the opportunity of an independent assessment of his condition and how any return to work might be achieved. (7) There was no realistic possibility of the Claimant returning to his role save, perhaps, on terms, to which the Respondent could not possibly agree, involving reversing the structural changes of March 2019 and restoring his status and reporting lines as they had stood immediately prior to that date.[12] Self-evidently, he had no right to dictate terms to his employer and there was no question of the senior management entertaining what he proposed. (8) Absent medical evidence or any OH input, it was not practicable to inquire whether any alternative role might be suitable for the Claimant. (9) The Claimant's absence had caused prejudice to the Respondent's business and would inevitably cause increasing prejudice the longer it continued. (10) The Claimant was made aware that the capability process might lead to dismissal. (11) The Claimant made no practical contribution at the first capability meeting. (12) The Claimant declined to attend the second capability hearing.

218 Finally, we turn to the argument which seems to have been raised for the first time during the trial before us, that the Respondent was at fault, and acted unlawfully, in proceeding to dismiss without first, in light of the revelation of the FND diagnosis on 7 October 2020 (upon receipt of the first claim form), (a) unilaterally resuscitating or renewing the GIP claim (or perhaps presenting a fresh one), or at least (b) prompting or encouraging the Claimant to take such steps. The logic appears to be that this alleged failure defeats the Respondent's case on proportionate means (for the purposes of the s15 claim) and entitles the Claimant to succeed on his parallel claim for unfair dismissal.

219 Although the argument was attractively presented by Mr John, we are clear that it must be rejected, for numerous reasons. We start with proposition (a). As

[12] The Claimant had told Mrs Leen in terms that reversal of the March 2019 changes was a 'pre-requisite' to his return to work. His case at trial, however, appeared to be that there had never been any possibility of a return to work in any event. His evidence (witness statement, para 3) was that he had been unfit to undertake work of any kind since April 2019 and remained wholly incapable of working.

was common ground throughout, membership of the GIP scheme was a contractual benefit which it was open to the Claimant to invoke or not, as he chose. It would not have been proper for the Respondent (let alone its legal duty) unilaterally and without his authority to press Zürich with a fresh claim on his behalf. A case so put[13] would be obviously untenable.

220 Proposition (b), while, unlike (a), not obviously wrong in principle, is, in our view, clearly unsustainable given the relevant facts and circumstances. We have a number of grounds. (1) The Respondent had been aware since 20 November 2019 (the date on which the appeal outcome was given) that the Claimant had, on 13 November 2019, supplied his medical records to Zürich (although he had declined to make any disclosure to the Respondent). (2) The Respondent had been given no reason to suspect that the disclosure, extending to a date many months after the start of the Claimant's sick leave, might not fully and accurately document his medical condition. (3) The first claim form referred to the FND as having started in April 2019 and was not worded in such a way as to suggest that the diagnosis was recent at the date of issue of the claim form (17 May 2020). Rather, the wording suggested that the diagnosis had followed shortly after the onset of the condition. (4) The Claimant's behaviour after 17 May 2020 had not been consistent with the diagnosis having been recent on that date. If it had been recent, it would have been natural for him to draw attention to it at the time, as relevant to the Respondent's management of his ill-health absence generally and/or to Zürich's treatment of the GIP claim and. He did not do so. (5) Nor did he, at any time up to his dismissal, say or suggest to the Respondent that Zürich had been, or might have been, unaware of his FND. (6) In the circumstances, the natural inference from the Respondent's perspective was that Zürich had been in possession of the medical evidence, including that relating to the FND, by 13 November 2019. (7) On 16 November 2020, before the commencement of the capability procedure, the Respondent had been made aware of the FOS adjudicator's decision rejecting the Claimant's complaint. There was no reason for Mrs Marks to doubt that the Claimant had put before the adjudicator any evidence which might help his complaint. That evidence could reasonably be assumed to include medical evidence (if any) generated *after* the medical records were disclosed to Zürich on 13 November 2019. (8) In the course of the capability process, it was open to the Claimant at any time to raise the question of the diagnosis and its timing (if the timing was a relevant factor) and argue that they warranted revisiting the GIP claim, but he did not do so. On the contrary, at no point between the failure of the GIP appeal in November 2019 and the dismissal did he signal any departure from his line unequivocally stated in correspondence with Mrs Leen that the Zürich claim was closed and he would not contemplate pursuing it further. (9) As we have recorded, the Claimant had consistently and repeatedly (before and after 7 October 2020) refused to provide the Respondent with *any* medical evidence or to co-operate to enable it to commission evidence through an OH referral, and there was no realistic prospect at the time of the dismissal that his attitude on that matter would change. (10) In all the circumstances, throughout the period from her return to work (in mid-October 2020) up to the dismissal, Mrs Marks had no reason to

[13] We are not entirely sure whether Mr John put his case quite so high (see *eg* his submissions, paras 59, 60).

consider pausing the capability process in order to initiate a further examination of the Claimant's condition or its implications.

Discrimination arising from disability – summary

221 Claims (i) and (ii) fail for want of knowledge (actual or constructive) on the part of the Respondent that the Claimant had the disability of FND.

222 All claims bar (v) (based on the dismissal) fail on the ground (or further ground) that no unfavourable treatment is shown.

223 The dismissal-based complaint (claim (v)) fails because the Claimant was not dismissed because of the 'something arising' as framed in the LoI, and the attempt on behalf of the Claimant to re-formulate it in closing submissions is refused.

224 Accordingly, all claims under the 2010 Act, s15 fail.

225 Had the Tribunal permitted the Claimant to amend the 'something arising' in the manner proposed, the Tribunal would have held that the dismissal was because of the 'something arising' so substituted, but the claim would nonetheless have failed on the basis that the dismissal was a proportionate means of achieving a legitimate aim.

Victimisation

Protected act

226 The only protected act now relied upon is the informal grievance of 27 September 2017 (LoI, para 8(a)(ii) and Annex 3). The parties disagree as to whether it satisfies the requirements of the 2010 Act, s27(2). Specifically, the argument focused on s27(2)(d). Here, we prefer the submissions of Mr Smith. It seems to us that, on a fair, objective reading, the two isolated references in the grievance to 'discriminatory' treatment and 'discrimination' do not allege discrimination in a form made unlawful under the 2010 Act, but rather raise complaints of generalised unfairness. It is significant that the opening paragraph specifies that the grievance is about 'unfair treatment'. As we understand the Claimant's case, it is that the grievance raises an allegation of race discrimination in some form, but no protected characteristic is specified. No comparator is identified (real or hypothetical). And the reference in the third paragraph to Mr Mulholland 'playing around with my condition' seems, if anything, to suggest treatment based on something other than the Claimant's race, namely his (as he saw it) insecure immigration status. While immigration status may be said to be a 'function' of race, it cannot be equated with race. It follows that discrimination against a person 'because of' his or her immigration status does not constitute direct race discrimination and is not proscribed under the 2010 Act.[14] On the authority of *Waters* (cited above), an allegation of discrimination so put would not identify treatment capable of contravening the statute and accordingly would not

[14] *Taiwo v Olaigbe & another* [2016] UKSC 31.

qualify as a protected act. While acknowledging that the Tribunal must not construe the grievance in an unduly narrow or technical way, we are mindful of our duty to guard against reading into it an allegation which it does not contain. It is for the Claimant to demonstrate that he has done a protected act. In our judgment he fails to do so.

227 For want of a protected act, the complaint of victimisation falls at once. But in case we are wrong on the threshold question, we will go on to consider the other elements of the claim.

Detriments

228 Of the original eight detriments relied on, seven are pursued. We will retain the original numbering (LoI, para 8(b)(1)-(8), excluding (3)).

229 Allegation (1) complains about the handling of the grievance of 27 September 2017 and the 'false and defamatory' remarks concerning the Claimant's behaviour in the 'grievance appeal outcome' dated 29 November 2017. In fact, there was no grievance appeal. Rather, there was an informal stage followed by the formal grievance determined by Mr Rippey. His decision was not the subject of any further appeal.

230 In our judgment, the Claimant fails to demonstrate any detriment under Allegation (1). Having reminded ourselves of our primary findings above, we are satisfied that the decisions of Mrs Marks at the informal stage and Mr Rippey at the formal stage were fair, balanced and rational. And procedurally, the handling of the entire grievance exercise was reasonable and unobjectionable. As to the allegedly 'false and defamatory' remarks, in our view Mrs Marks was restrained in her use of language and it was entirely proper for her to remind the Claimant of the need to maintain a professional standard of behaviour. If he harbours a genuine sense of grievance about any aspect of Allegation (1), he is not justified in doing so.

231 Allegation (2) accuses Mrs Marks and Mr Worrall of subjecting the Claimant's to detrimental treatment by 'strongly objecting' in December 2017 to a change in his corporate title from VP to SVP. Based on our primary findings above, we are again satisfied that no arguable detriment is shown. In the end, rightly, the Claimant's case was not put on the basis that he ought to have been promoted mid-year, rather than (in accordance with the Respondent's standard processes) at the year end (*ie* in March/April 2018). And, as we have noted, he was indeed promoted to SVP with effect from 1 April 2018. The only alleged detriment lies in the undisputed fact that Mrs Marks and Mr Worrall joined Mr Ikegaya in expressing reservations about the appropriateness of promoting the Claimant at that stage, given the widespread concerns about aspects of his behaviour towards those around him. But that was no detriment. There was a debate among senior managers, who held widely divergent views. Those views each way were entirely permissible. And Ms Drews prevailed, with the consequence that the Claimant was rewarded with promotion at the earliest date possible under the Respondent's procedures.

232 Allegation (4) states that, in February 2018, Mrs Marks and/or Mr Worrall 'claimed that the Claimant had formally commenced his own ILR application without authorisation from HR'. The alleged detriment is somewhat elusive. In any event, the case as framed in the LoI does not correspond with the facts as we have found them. What happened was that, most presumptuously, the Claimant approached Magrath directly concerning his anticipated ILR application, without seeking the Respondent's authority. We have no doubt that he knew perfectly well that he had no business to make that contact behind his employer's back. Not surprisingly, when made aware of it, Mrs Marks wrote to him to say that the application would be run by the HR team at the appropriate time and that he should not contact Magrath directly. Her message was firm but not discourteous. Here again, the Claimant raises nothing about which sensible complaint can be made.

233 Allegation (5) makes the complaint that, in February 2018, Mrs Marks and/or Mr Worrall 'deliberately delayed' the commencement of the ILR application process. Again, there was no detriment. As our primary findings above record, the Respondent received legal advice that the earliest possible date for making the application was variously: (a) 5 March 2018, (b) 13 March 2018 and (c) an unspecified 'earlier' date. It was not until shortly before 26 February 2018 that Mrs Marks was made aware that an application could be initiated at once. Accordingly, on that date, she issued instructions to Magrath to launch the application. There was no delay, much less deliberate delay.

234 Allegation (6) relates to the 'Promotions Expectations letter' sent by Mr Worrall to the Claimant on 16 April 2018 (Annex 4 to the LoI). The Claimant says that the sending of the letter cost him a detriment because 'each and every comment about his conduct' was false and defamatory. The letter congratulated the Claimant on his promotion to SVP. It went on to say that the promotion would carry with it 'an increased set of expectations' about how he would represent the firm internally and externally and the standards which he would set as a senior member of the organisation. It continued:

> **Junior staff will increasingly look to you for guidance in the way that we deal with each other and as a role model and the levels of professionalism and integrity we should aspire to.**
>
> **I am aware that over the last eighteen months there have been a number of instances where there have been some problematic interactions in these areas, and that we hope will not be repeated.**
>
> **You are clearly performing the technical aspects of your role well, so I hope that the focus you have on this part of your role is increasingly transferred to the behavioural and leadership aspects of your broader SVP role …**

In our judgment the Claimant identifies no arguable detriment. Mr Worrall's remarks were couched in careful and restrained language. They were, we find, sincere and evidenced-based. They reflected genuine concerns shared widely across the senior management (including Ms Drews, the Claimant's most consistent champion). It is not a detriment for an employee in a hierarchical organisation to receive advice from above concerning his or her conduct and

attitude in the workplace, even if it is unwelcome. And an employee who resents advice for want of the self-awareness to appreciate that it is apposite cannot rely on that deficiency to convert a perfectly proper comment into a potentially actionable detriment.

235 Allegation (7) was framed in the LoI as raising complaints about the annual performance scores of 4 in March 2018 and 3 in March 2019 but by the end of the hearing the Claimant relied only on the latter. The LoI notes that the Claimant holds Mrs Marks and Mr Worrall responsible for the score complained of.

236 Here again, we find no detriment. As we have noted, 3 is a satisfactory score. The expectation is that a large proportion of the Respondent's employees will be scored at 3. In the relevant year, 39 out of 66 employees received that score. The score related to the Claimant's first year at SVP level. There is no evidence before us to suggest that he was disadvantaged in receiving a score of 3.

237 The claim is, in any event, unsustainable because there is no evidence of Mrs Marks or Mr Worrall having played any part in the selection of the Claimant's score. It is clear on the evidence that the score was arrived at by agreement between Mr Ikegaya and Mr Yeo and that Mrs Marks and Mr Worrall had nothing to do with it. The Claimant makes no complaint of detrimental treatment at the hands of Mr Ikegaya or Mr Yeo.

238 Allegation (8) complains of detrimental treatment in the form of the decision not to 'promote' the Claimant to the position of Head of Product, for which he holds Mrs Marks and Mr Worrall responsible.

239 Once more, we find here that the detriment relied on is not established. It was not a detriment for the Claimant not to be appointed to a role to which, given the key criteria set by the senior managers, he was not appointable. He had neither the necessary expertise, reputation and leadership skills, nor the requisite connection with the Singapore office. We think that he was and is genuinely aggrieved by the treatment complained of but we do not regard his sentiment as justified.

240 Moreover, as we have recorded in our primary findings, the decision to second Mr Yik to London was taken by the senior managers whom we have identified. They did not include Mrs Marks or Mr Worrall. In so far as any detriment was experienced by the Claimant, neither of those individuals played any part in it.

Was any detriment done because the Claimant had done the protected act?

241 Since we have found that the Claimant has failed to demonstrate a protected act or any detriment, we might be forgiven for moving on at this point. But in deference to the careful submissions of both counsel, we will complete the analysis.

242 In our judgment, there is simply nothing pointing to any connection between the (alleged) protected act and the (alleged) detriments. We detect no pattern of

disadvantageous treatment applied to the Claimant following the (alleged) protected act. We have been shown no documentary evidence suggestive of any intention to disadvantage him because of the grievance of 27 September 2017 (or anything done or said by him in the course of the grievance procedure which followed).

Victimisation – summary

243 The complaint of victimisation fails because: (a) no protected act is shown; and (b) no detrimental treatment is established; and in any event (c) in some instances, neither Mrs Marks nor Mr Worrall played any part in the treatment concerned; and (d) in so far as any relevant detriment was suffered, it was not 'because of' the (alleged) protected act.

Jurisdiction – the 2010 Act claims

244 Our reasoning thus far that all claims fail on their merits faces us with a new question. Was there 'conduct extending over a period' such as to enable the 2010 Act, s123(3)(a) to bring any claim presented outside the primary three-month period (as extended by the Early Conciliation provisions) within time? In our judgment, there was not. The word 'conduct' must be taken to mean unlawful conduct and we have found that there was none.

245 That does not of itself dispose of the jurisdictional point. The Tribunal has a residual power to substitute for the three-month period 'such other period' as it thinks 'just and equitable' (the 2010 Act, s123(1)(b)). But it would plainly be idle and anything but 'just and equitable' to exercise a discretion to bring within time any claim which has already been found to be without substance.

246 It follows that all claims presented outside the primary period (as extended by the early conciliation provisions) fail for the further reason that, on time grounds, the Tribunal has no jurisdiction to entertain them.

Unfair dismissal

247 We have reminded ourselves of our primary findings of fact and our secondary findings and conclusions in respect of the discrimination arising from disability claim. We will not repeat those here.

248 What was the reason or principal reason for dismissal? We are quite satisfied that it was the perception of Mrs Marks that the Claimant was not medically capable of performing his role and there was no practicable alternative to dismissing him on capability grounds. That was a reason relating to capability and, as such, a potentially fair reason to dismiss.

249 Did the Respondent act reasonably or unreasonably in treating the reason as a sufficient reason to dismiss? Given that we have found that, had the question arisen, the Respondent would have made out a good defence under the 2010 Act, s15(2), it seems to follow almost inevitably that, with no burden either way, it must

succeed in resisting the unfair dismissal claim. In any event, for the reasons given above in respect of the claim under s15, we find that the decision to dismiss, taken by Mrs Marks at the end of a fair process, was reasonable and fell very comfortably within the range of permissible options open to her in the circumstances.

250 It follows that the complaint of unfair dismissal fails.

Outcome and Postscript

251 For the reasons given, all claims fail and the proceedings as a whole are dismissed.

252 In arriving at our conclusions on the claims under the 2010 Act, we have not had recourse to the burden of proof provisions. They would have added nothing in circumstances where we have most certainly been in a position to make all necessary primary and secondary findings. But for the avoidance of doubt we can say that, had we applied the provisions, we would have found that the Claimant had entirely failed to make out a *prima facie* case and that, even if the burden (on any matter) had passed to the Respondent, we would have found it amply discharged.

253 We regret this litigation, which has been hugely wasteful, not only of financial resources but also of the energy of many talented people (on both sides). We hope that the Claimant will learn some lessons (however uncomfortable) about judgement and self-awareness. Although successful, the Respondent should also learn certain lessons, especially about the value of publishing, updating and abiding by policies to inform the workforce and guide decision-making in important areas such as visa and ILR procedures, promotion rules and protocols, management of ill-health cases (particularly those involving mental health conditions) and operation of the GIP scheme.

Employment Judge Snelson

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07/11/2023

Judgment entered in the Register and copies sent to the parties on : 07/11/2023

..... for Office of the Tribunals