Case No: 2414434/2021
2205507/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr N Romney

Respondent: BUPA Insurance Services Ltd

Heard at: Manchester **On:** 17-21 July 2023

(18-20 September 2023, in Chambers)

Before: Employment Judge Eeley
Mr I Taylor

Representation
Claimant: In person
Respondent: Mr S Proffitt, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The claimant's complaints of harassment related to race (section 26 Equality Act 2010) are not well-founded and are dismissed.

3. The claimant's complaints of direct race discrimination (section 13 Equality Act 2010) are not well-founded and are dismissed.

4. The claimant's complaints of victimisation (section 27 Equality Act 2010) are not well-founded and are dismissed.

REASONS

Background

1. By claim forms presented to the Tribunal on 8 November 2021 and 1 August 2022 the claimant brought claims of race discrimination, victimisation and unfair dismissal against his former employer, the respondent.

2. The issues for determination by the Tribunal at the final hearing were as set out in the list of issues appended to the case management order of Employment Judge Howard dated 26 January 2023 which was to be found at page 123 of the agreed hearing bundle.

3. The Tribunal received written statements and heard oral evidence from the following witnesses:

    a. The claimant, a former Healthcare Consultant for the respondent.
    b. Davinder Gill, Service Team Manager, Specialist Business Customer Services.
    c. Nicole Sinclair, Head of Small Corporate Account Management.
    d. Leanne Jackson, Sales Team Manager, Consumer New Business.
    e. Christopher Mabbutt, Sales Team Manager, Consumer New Business
    f. Louisa Lawrence, Senior New Product Development Manager
    g. Rachel Wrigley, Service Provider Operation Manager.
    h. George Wilding, Healthcare Consultant.
    i. Michael Whitehouse, Healthcare Consultant.

    We also received a written witness statement from Laura Hargrave (Customer Service Manager, Consumer Retention) who was unable to attend the hearing to give oral evidence. Her statement was therefore treated as hearsay evidence and given more limited weight as was appropriate in those circumstances (where the evidence it contained had not been tested in cross examination.)

4. The Tribunal was referred to an agreed hearing bundle consisting of 1095 pages and we read those documents to which we were referred by the parties. References to numbers in square brackets are references to pages within the hearing bundle unless otherwise indicated. During the course of the hearing the respondent produced a written summary of the call audit table in relation to the claimant and his two named comparators, Mr McCaffrey and Mr Renshaw. The respondent also produced a cast list and helpful chronology, which we considered. We also received written and oral closing submissions on behalf of both parties, for which we were grateful.

Preliminary Matters

5. The final hearing was listed to be heard by a full Tribunal panel of three members. Unfortunately, one of the members of the Tribunal was taken ill and was unable to attend. The Tribunal explained the various options to the

parties and both parties consented to the case being determined by a panel of two members. They signified their consent in writing.

6. At the outset of the hearing the Tribunal heard and determined the claimant's outstanding applications for strike out of the respondent's response to the claim and his application for specific disclosure. The Tribunal's decision and reasons in relation to these applications was given to the parties orally at the hearing. The reasons are also set out in writing in the section below.

Claimant's strike out/disclosure application

7. The basis of the application by the claimant is set out in various emails and documents. In addition to listening to both parties' representations during the hearing, we have looked at the email from the claimant of 17 July at 8.15am which referred to the rule 37 strike out application. We have also looked at the letter of the same date (17 July) entitled "Respondent violations and email evidence to support this." We have reviewed the email of 14 July 2023 which was sent by the claimant at 17:51. There is a letter (also dated 14 July 2023) entitled "Still outstanding from previous orders", and then there is a further letter of 11 July 2023 entitled "Respondent list of violations." That was the set of documents that the Tribunal had to consider in determining the claimant's application.

8. The basis of the application is rule 37 of the Employment Tribunals Rules of Procedure 2013. The claimant relies on rule 37(1)(b) and (c). Thus, the Tribunal needs to consider whether the respondent's conduct has been scandalous, unreasonable or vexatious, and also whether there has been a failure to comply with an order of the Tribunal.

Relevant Legal Principles

9. In relation to the conduct of the proceedings, the word "scandalous" has a particular meaning in this context. It is not just "shocking" in the standard (or lay person's) sense. It means irrelevant and abusive of the other side (such as misuse of the privilege of legal process in order to vilify others or giving gratuitous insult to the court in the course of the legal process) (Bennett v Southwark London Borough Council [2002] ICR 881.) 'Vexatious' behaviour is behaviour that is not pursued with the expectation of success but rather to harass the other side or out of some improper motive. The term is also more widely used in terms of an abuse of process.

10. In order for a Tribunal to strike out a claim or response for unreasonable conduct (or indeed scandalous or vexatious conduct) it must be satisfied either that the conduct involved deliberate and persistent disregard of required procedural steps, or it has made a fair trial impossible. In either of those circumstances, striking out must be a proportionate response. That is the test in James v Blockbuster Entertainment Limited [2006] IRLR 630 where the Court of Appeal confirmed that it would take something very unusual to justify striking out a claim on procedural grounds when the claim had arrived at the point of trial. We must look at whether a fair trial is still possible. (I refer of course to De Keyser v Wilson [2001] IRLR 324 in that regard.) The case law makes it clear that deliberate flouting of a Tribunal order can lead directly to the question of a strike out but that in ordinary circumstances neither a

claim nor a defence can be struck out on the basis of a party's conduct, unless the conclusion reached is that a fair trial is no longer possible. We would need to look at the factors set out in Bolch v Chipman [2004] IRLR 140. We would look to see whether there has been unreasonable, vexatious, or scandalous behaviour and look at the appropriate remedy for that behaviour. We have more recent guidance in Emuemukoro v Croma Vigilant (Scotland) Ltd [2022] ICR 327. That case says that you do not need to look at whether a 'fair trial' is possible solely in 'absolute' terms. The Tribunal may also have to consider whether a fair trial is possible within the allocated trial window.

11. In relation to a strike out application based on a breach of a Tribunal order, the Tribunal again has to consider the application in the context of the overriding objective of dealing with cases fairly and justly. The Tribunal has to consider all the relevant factors including the magnitude of the non-compliance; whether the default was the responsibility of the party or of his/her representative; what disruption, unfairness or prejudice has been caused; whether a fair trial would still be possible and whether some lesser remedy would be an appropriate response. I also refer to the Presidential Guidance on Case Management in relation to this and we apply the principles therein to the situation in this case.

12. We first have to identify whether there has there been a breach of an order in this case. The relevant case management orders are in the bundle for the final hearing. At [36] we have Judge Leach's Order of 12 May 2022. At [70] we have the order of Judge Whittaker of 23 August 2022 (that is relevant only insofar as paragraph 4.1 refers to disclosure of documents for the preliminary hearing to take place in November 2022). Finally, we have the case management order from that hearing in November. At [114] we see the judgment of Judge Howard dated 15 November 2022. Our first task was to consider the requirements of the case management orders in order to see if what the claimant alleges actually amounts to a breach of the orders.

13. There were four main breaches alleged. They related to disclosure. In relation to item 1, the claimant says that he should have had the full disciplinary history of his comparators including all DAPs, PIPs, coaching feedback, end of year reviews, investigations, first written warnings etc. covering a 12 month period for both of the main comparators. In his submissions the claimant says that this was ordered by Judge Leach. However, if one looks at [38] paragraph 23 this makes it clear that Judge Leach was making no specific disclosure orders because standard disclosure had not yet taken place by that stage in the proceedings. The order at paragraph 4 [40] gives a deadline for standard disclosure of 17 June (by list and copy documents.) In those circumstances, any failure to disclose documents referred to by the claimant at item 1 cannot be a breach of Judge Leach's Order.

14. Judge Howard was dealing with the case at a later stage and was specifically determining the specific disclosure applications that had been made by the claimant. Some were granted, others were refused, and there is a discussion of what had taken place at paragraphs 12-20 of the case management summary [116-117]. The Tribunal's actual order is at paragraphs 3 and 4 [118-119].

15. In short, the request covered by the claimant's first item is not covered by the order that Judge Howard made. The closest thing within the order is the order to disclose the investigatory and disciplinary procedure against Marc Renshaw. The claimant's current request is wider in scope than the case management order previously made. The order made as a result of the November hearing has been complied with. The respondent has not acted in breach of it. As far as the Tribunal can see, the claimant is widening the scope of the disclosure that he is requesting. This may be relevant to other parts of the application in due course but does not assist us in finding that there has been a breach of an existing Tribunal order. This Tribunal finds that there is no such breach in relation to item 1.

16. The second item requested by the claimant is confirmation of the total monthly number of complaint calls in the Consumer New Business Department between 31 January 2021 and 31 January 2022. This was not part of any of the case management orders relating to disclosure. The respondent cannot be in breach of an order if it has failed to provide this information. There is no discernable breach of a Tribunal order in this regard.

17. Item 3 was a request by the claimant for the full investigation notes, findings and outcome of Akeem Mahmood's grievance from 2021. It was said to show systemic discrimination. The case management order in relation to this grievance is much narrower in scope. It requires disclosure of the evidence given by the claimant during the investigation of the grievance raised by Akeem Mahmood in 2021, including any reference to his evidence in the findings or outcome to the grievance. The claimant accepts that he has received a copy of his own witness evidence (which he provided for the purposes of this grievance) but he says that he has not seen the full documentation/ file regarding the grievance. However, that is not what the order for disclosure actually included. The only requirement was for the respondent to disclose things that referred to the claimant's evidence in the conclusion. The respondent has not disclosed anything further. That may well be because no reference has been made to the claimant's evidence in the grievance findings and outcome. This is something on which we are going to request further clarification in due course. But even if there has been a breach in relation to the second part of that order, it is not sufficiently serious to render a fair trial impossible. Any breach can be rectified in fairly short order, if indeed there has been a beach. We will come back to this in a moment.

18. Item 4 that the claimant requested is the full details of the grievance by multiple female colleagues against Dan Scanlon. There is no reference to this at all in any of the case management orders. Thus, the respondent cannot be in breach of an order in failing to disclose it.

19. The claimant, in one of his other emails of 17 July, sets out items 1-13 in numbered format, which we have also considered in coming to a conclusion on the application.

20. Item 1 referred to the alleged breach of Judge Leach's standard disclosure order. It refers to the breach of a deadline and the claimant's email dated 24 June. The further submissions that we heard on this indicated that the claimant had misinterpreted the wording in the standard disclosure order. He thought that the list referred to was his own list of documents, in other words,

that the respondent had to disclose all the items that were on the claimant's list of requests. Unfortunately, that is not the correct interpretation of the case management order. It is a standard order for standard disclosure whereby the respondent was to provide its list of documents relevant to the issues in the case (and copies of the same.) So, it is the respondent's list that is relevant for these purposes, not the claimant's list. We can see that standard disclosure has clearly taken place in this case, hence the specific disclosure orders made at the next hearing. We cannot see that the respondent has breached Judge Leach's order. In any event, the proceedings have moved on significantly from that point such that there would be no impact on the prospects of having a fair trial in any event. This relates to a matter that was more than a year ago. Since then the parties have prepared for the final hearing.

21. Item 2 referred to by the claimant was the breach of the order regarding a bundle in Judge Leach's case management order. What we note about this is that provision of a bundle cannot take place until disclosure has been completed and agreed between the parties. The fact is that, after Judge Leach's order, there was a series of specific disclosure applications which then had to be dealt with in November 2022. This shows that the provision of the final hearing bundle was actually overtaken by subsequent events. Although (technically) the respondent may well be in breach of the deadline, there is a good reason for that, which was that the parties had not got to the stage where it was possible to agree a final hearing bundle. So, at most, it was a technical breach caused by the ongoing debate between the parties about the appropriate scope of disclosure. It certainly has no impact on the fairness of the trial which is due to take place this week.

22. Item 3 (referred to by the claimant) was the failure to provide the call history for Messrs. Renshaw and McCaffery. This was not ordered by the case management order. The respondent says that it has complied with the first bullet point of the case management order from November (paragraph 3, page 118). That is what it was required to do. Anything further is not a breach of the order.

23. Item 4 was a failure to comply with the disclosure order for the preliminary hearing on 15 November 2022. If there was a breach it is not mentioned by Judge Howard anywhere in the relevant case summary. It related to providing documents and a bundle ready for the preliminary hearing in November which would deal (amongst other things) with specific disclosure. There is no indication on the face of the record that either the Tribunal or the claimant were prevented from conducting the hearing properly. No adverse consequences were evidenced. Furthermore, this was some considerable time ago and we cannot conclude that it has an impact on the fairness of the hearing listed to take place this week.

24. The claimant (in that part of his email) refers to an email chain of his own surrounding 8 November 2022. This seems to be part of the email chain at [99] onwards in the bundle. Taken as a whole it appears from that correspondence that the hard copy bundle had been sent by the respondent before 9 November and was emailed in electronic form on 9 November. So again, to the extent that there was a breach (and it is hard to see that on the

face of the record), it was dealt with at the November hearing and has no ongoing adverse effect on the fairness of the trial this week.

25. At item 5 the claimant says that a different bundle was provided by the respondent at the hearing on 15 November (as compared to the bundle he had previously received.) Again, there is no record of this in the case management summary and on that basis, we are not able to say that it happened as alleged. In any event, even if it did happen, it must have been resolved at the preliminary hearing because the claimant went ahead with the hearing and his application was determined. Furthermore, any disadvantage is not ongoing and does not impact on the fairness of the hearing this week.

26. The claimant's item 6 refers to a reluctance to provide disclosure in relation to the comparators. Having reviewed the contents of paragraph 6 we conclude that what is referred to is a normal process of correspondence about what falls within the scope of standard disclosure, determination of the specific disclosure application by the Tribunal and then compliance with that specific disclosure order. It does not disclose unreasonable behaviour or behaviour which is in breach of a case management order.

27. Item 7 refers to conduct regarding call number 1 at the preliminary hearing in November 2022. This seems to have been remedied and is the subject of a specific disclosure application and order (rather than constituting unreasonable conduct.) The remedy for this (if necessary) would be to order disclosure rather than to strike out the defence to the claimant's claims.

28. Item 8 refers to 12 months of call audit history for Mr McCaffery. The suggestion made is that the respondent only sent six months, leaving out a large gap in the comparator's call audit history. The documentation indicates that the history disclosed is for the last 12 months of the individual's employment with the respondent. That is set out in their table at page 134. There does not appear to have been a breach. The respondent cannot provide disclosure for a 12 month period if that is not a period which forms part of the individual in question's period of employment.

29. Item 9 is an allegation that the respondent "only sent a trickle of call feedback notes and investigation notes and not the full 12 months' disciplinary history of both my comparators as agreed at the last preliminary hearing". The case management order does not order the full 12 months' disciplinary history of both comparators. There is no breach of the case management order and no unreasonable conduct in relation to item 9.

30. Item 10 alleges that the respondent initially said that there was no record of the claimant's involvement in the Akeem Mahmood grievance and that, after he challenged this, the respondent suddenly produced the evidence. We have no way of knowing if that is correct or not. However, the reality is that, as we sit here now any problems of that nature have been resolved. There may be many reasons why a representative at a previous hearing did not accept that involvement but any defect has now been remedied. It is not unreasonable conduct, and it does not have an impact on this week's hearing.

31. Item 11 refers to the letter from Judge Howard (or on her behalf) of 16 January 2023. The claimant characterizes this as an email expressing her

frustration with the respondent's non-compliance which caused further delays. If one goes to the text of the said letter (which was written on Judge Howard's behalf by the Tribunal administration) it points out that the agreed List of Issues had not been sent to the Tribunal by the parties following the preliminary hearing in November and so Judge Howard had been unable to promulgate the case management order. There is nothing on the face of that to indicate what caused the delay or who caused the delay, or indeed who was to blame for that. What I can see from the Tribunal's record is that, by 27 January 2023, Judge Howard was able to promulgate the case management order. So, the List of Issues must (by necessary implication) have been sent in by no later than 27 January 2023. On that basis (and on the basis of what the records show) that is not unreasonable conduct and in any event has no adverse effect on the fairness of the trial this week.

32. Item 12 is a repetition of item 11 and so it is dealt with in the same manner (see my comments above).

33. Item 13 relates to modification of the final bundle. The deadline was for a bundle to be dealt with in March and the claimant asserts that on 25 April the respondent had added some documents and that these provided an incomplete and inaccurate impression of a particular issue in the case. The observation we make in relation to that is that, for the purposes of the strike out application, these modifications were made 12 weeks ago. To the extent that the claimant needed time to consider the documents that have been added, he has had that time and that in itself would not prevent the trial going ahead and being a fair trial. However, if the need for further disclosure arises from this late change to the bundle, then that is a matter that should be dealt with by specific disclosure rather than a strike out. It would not be proportionate to strike out for late additions to the bundle in these circumstances. That is more properly dealt with by looking at whether the bundle, as now presented, is fair and adequate for the purposes of the final hearing.

Conclusion

34. Drawing the threads all together and applying the relevant test, nothing that we have been referred to indicates unreasonable, vexatious or scandalous conduct by the respondent. It is unfortunately often the case that, in the course of litigation, deadlines are missed, and matters do not proceed as intended at the outset. That is long way away from saying that there has been a persistent or deliberate flouting of the rules or unreasonable conduct by the respondent or the respondent's representative. To the extent that there have been minor breaches of the case management orders (and they *are minor* breaches), I have dealt with them factually above. In essence, they have been overtaken by events in that many of them related to the November 2022 hearing and cannot prejudice the fairness of this final hearing. A fair trial is still very much possible. The parties have prepared a voluminous bundle and witness statements and a fair trial can happen this week. Strike out of the respondent's response would, therefore, be grossly disproportionate in all the relevant circumstances, and on that basis the Tribunal refuses to strike out the response to the claimant's claims.

Specific Disclosure Application

35. Following the claimant's application to strike out the response, we treated his documents (in the alternative) as an application for specific disclosure. We heard some further submissions from the parties after giving our decision on the strike out application. These are our conclusions on the disclosure issue. I will refer to the same four items requested as requested in the documentation.

36. The first of those is the full disciplinary history of the comparators, including the DAPs, the PIPs, the coaching feedback, etc. The claimant noted that what he has received relates to Mr Renshaw but not to Mr McCaffery. We asked for clarification as to why the disclosure only related to one of the comparators, and we heard some submissions on that. We note also that the respondent has complied with the order made by Judge Howard.

37. The respondent's position in relation to this was that, if one looks at the detail of the applications which were made by the claimant and determined by Judge Howard, it is important to bear in mind the principle that we should not reopen a disclosure application that already been heard and determined. The Tribunal was referred to the case of Serco Ltd v Wells [2016] ICR 768. I have gone back to that and to surrounding case law and I note the following principles: that in practice it is rare to revisit an order unless there has been some material change of circumstance since the order was made or, in the absence of such a change, an exception can be made entitling a party to argue a potentially significant point in connection with the order that could have been advanced (but was not) before the order was made. So, for example, where the order had been based on a material omission or misstatement, or some other substantial reason necessitating interference with the order. The Tribunal was referred to Hart v English Heritage [2006] ICR 655 , Parekh v London Borough of Brent [2012] EWCA Civ 1630 and Goldman Sachs Services v Montali [2002] ICR 1251. We are advised to follow the principles in the Civil Procedure Rules that, in principle, a Tribunal should not be revoke or vary orders in the absence of a material change in circumstances since the order was first made.

38. The starting point is that we should not be reopening things that have already been determined. The point about that is that there is an interest in finality of decision making. Serco Ltd v Wells indicates that we should be sparing, we should look at what is necessary in the interests of justice, and that needs to be looked at and interpreted narrowly. A material change of circumstances is one of those situations where it may be in the interests of justice to reopen matters.

39. We have applied those principles to item 1 to see if it is necessary to reopen the issue in the interests of justice. Has there been a material change of circumstances? Is it in the public interest in relation to finality of determinations and also proportionality? We went back through the documents. Page 83 includes the table, which is the application that Judge Howard heard and determined. The application referred to both comparators and the suggestion before us is that Judge Howard heard full argument on the point and made the order that she did in full knowledge of *both* the named

comparators. So, in the absence of anything to the contrary, we have to take that at face value.

40. Has there been a material change of circumstances? The claimant has queried at points whether the Judge forgot to add the other comparator or whether there was an error that needed to be corrected. He sent in an email which we have seen at page 137 in the bundle. Absent the suggestion from the claimant that there has been a mistake, there is nothing on the face of the file to suggest that it is a mistake rather than a deliberate decision based on the arguments made at the hearing. We have looked at the following emails including an email at [142] where the Tribunal administration tells the claimant essentially, "don't copy in the Tribunal in unless you're asking us to refer an application to a Judge". The claimant does respond on 1 February (email at top of [142]). Viewed generously, that might suggest that there is an application (that is on 1 February.) However, I have then gone back and reviewed the file (both paper and electronic). It looks as though that was referred back to Judge Howard who then asked for the respondent's comments, and the trail goes cold at that point in relation to that particular point. Any correspondence thereafter (and there is a lot of it – about 50 entries on the electronic database) is following up on the other issues. Nowhere can we see the claimant asking whether his document at [137] has been referred to Judge Howard. Nowhere do we see the reiteration of, "There's been a mistake, she has omitted to accurately record in her order the decision that she gave on the day, at the hearing."

41. On balance we conclude, given how active the correspondence trail is, that the claimant probably would have done this if this was genuinely central to his case. We note that there was a series of correspondence about preliminary hearings. That preliminary hearing was listed to deal with the length of the final hearing. It was cancelled at the request of the claimant (who could not attend), relisted and then cancelled again because the parties could not attend, and then the parties and the Tribunal ran out of time before the case arrived at the final hearing. One would expect, if there was an error that needed to be referred back to Judge Howard, that somebody would have said this and chased up the response to page 137. There is nothing to that effect here.

42. So, taking that review of the case into consideration, we have to conclude on balance that there has been no material change in circumstances. The application was heard as drafted, was fully argued before the Judge and was determined. There is no evidence on the record that the Judge has forgotten or made a mistake. There is no reason to suggest that the case management summary was in itself erroneous. The only delay in promulgation of the case management order was due to the parties failing to file the agreed List of Issues. It is not our task to re-hear and re-decide previous decisions unless something has changed. If this matter were so central, if the claimant genuinely thought it was an error, we would expect this to be apparent and for him to have followed it up before now. Instead, the focus has changed to the length of the hearing and also to the strike out application which in itself (although it asks for wider documentation) does not suggest again that the Judge has made an error. It is not in the interests of justice to reopen the application, and it is not proportionate to derail the hearing in order to do so. The claimant has had a significant amount of disclosure on this issue. The

witnesses deal with it and it can be proportionately and fairly dealt with on the documents which are available and in cross examination. Thus, the 'correction' (as the claimant would have it) to add any other comparator is refused, and likewise the widening out of the request to include matters of capability, PIPs and the like would effectively circumvent the earlier decision made about disciplinary process. We are not prepared to derail the case in order to reopen that particular line of argument. The disclosure is proportionate and is what is necessary to do justice between the parties.

43. Item 2 was the confirmation of the total monthly number of complaints into the Consumer New Business Department. The claimant wanted to see the overall number of complaints. He did not ask to see anything more than the dates, the name of the adviser and the numbers, essentially. We considered whether that would assist the claimant in pursuing his claims before the Tribunal – whether it was relevant and necessary, in the circumstances, to do justice in the case. We looked firstly at the discrimination claim and we concluded that the document he is actually requesting will not assist him any further in showing how he has been treated compared to comparators, any more than the documents that he already has. The claimant has two named comparators. One of them, he says, has 66 complaints. In any event, there is a document dealing with some of the complaints, and that is the basis on which he has chosen to pursue the discrimination claim based on the two named comparators.

44. If we were to order disclosure of the whole complaints log, that would just be raw figures and it would not show the nature of the complaint, whether it was justified, or the circumstances of the complaint- it would just show the numbers. Also, it would not show what was raised with the individuals concerned, what further action may or may not have been taken in relation to the complaint. And so, it would not assist the claimant. At most it would open up further lines for enquiry. We have also seen that there is some witness evidence to suggest that some complaints are more related to the respondent as a whole rather than the actions of the individual concerned. For example, if the respondent does not offer the policy that the customer wants, that complaint may be registered as being against a particular employee. This does not necessarily mean that it is a complaint about the employee themselves. So, if we order disclosure of the data that the claimant has asked for, it is not going to assist in the way that he contends. In essence, it is a fishing expedition in order to identify a further comparator as some sort of 'insurance policy' if the currently named comparators prove to be problematic for the claimant's case. Likewise, with the unfair dismissal claim, the number of complaints is only one relevant factor. In order to determine the unfair dismissal claim we will have to consider not only the *number* of complaints but the *nature* and *severity* of the complaints. Disclosing the raw figures in relation to the whole department is not going to assist the claimant or the Tribunal in addressing the 'band of reasonable responses' test. It is not proportionate or necessary and relevant to open up these elements of disclosure at this stage in the proceedings.

45. Item 3 is in relation to the Akeem Mahmood grievance. First, it is relevant to note there was an order made in relation to this. It was made following a full argument by the parties at an earlier hearing. We can see from the table in question ([84]) that the claimant clearly asked not only for the outcome to the

grievance, but also for the full notes of interaction with HR. He has said to us today that what he is looking to demonstrate is that there is effectively a 'cover up' and that HR will manipulate things behind the scenes before an outcome is issued to an employee. From the application it looks as though the claimant has already argued this point before Employment Judge Howard, and she has made a determination against him. There is nothing to suggest that there is a material change of circumstances or that we should go behind that decision. The order that was made did give the claimant what was required in relation to the victimisation complaint, namely disclosure of his evidence to the investigation (which he has received) and also disclosure of any references to him in the grievance outcome. We have had confirmation from the respondent that they have checked (and doublechecked) and that the outcome letter merely says that the claimant gave evidence to the investigation, it makes no further comment. That check has been carried out by the respondent's solicitor. Whilst I appreciate that the claimant may not trust the respondent's solicitor, the Tribunal has to operate on the basis that solicitors have professional duties to the Tribunal not to knowingly mislead us or the claimant, and on that basis if they assure us that there is no such reference in the outcome letter, we are satisfied that the grievance outcome is not caught by the order that has already been made. To order anything further, therefore, would be to go behind the order that has already been made. It would not be proportionate, necessary or relevant in dealing with the victimisation claim (and indeed it is the victimisation claim which is the relevant claim for the purposes of the Akeem Mahmood grievance, rather than the direct discrimination claim.)

46. Item 4 relates to the grievances against Mr Scanlon from various female members of the workforce. We have concluded that that is not relevant to the issues in these proceedings at all, and certainly not necessary for the fair determination of the case. What is being requested does not relate to the claimant's case. The grievances in question are not of race discrimination, they are sex related (as far as we can determine). The claimant has confirmed that he had no involvement in the grievances pursued by the female members of staff. Unlike with the Akeem Mahmood case, the claimant did not give evidence in those grievances or attend their grievance hearings, so there is nothing to tie him to those grievances or to suggest that something he has done during the course of those grievances has effectively made him into a 'marked man' as far as Mr Scanlon was concerned. This is essentially a fishing expedition. The claimant has been unable to point to any reason why anything that would be disclosed as part of this request would have any relationship to the claimant or show a particular attitude towards him or towards his race. On that basis it is not necessary or relevant to disclose the documents and we refuse that application.

47. The issue of item 7 on the 12 item list (which was call number one) is no longer pursued. The relevant documentation has been disclosed in that regard. The submissions in regard to that element of disclosure were made in relation to the strike out application rather than in relation to specific disclosure.

48. Item 8 in the 12 item list has also been dealt with. The answer to this is in box 1.1 on page 134. The respondent has given the last full 12 months of each employee's records. Because the individuals left employment at

different times, that explains why the dates in the order do not match the dates in the disclosure. It is not a breach – it is compliance with the substance of the order in the circumstances of those individuals' leaving dates.

49. The last bit of the disclosure application relates to the 'late' amendment of the bundle to add some further documents. This was done on 25 April. The claimant has essentially said that the email chain at page 1090 through to 1095 (at the back of the bundle) was added without consent or discussion. It relates to the respondent's internal communications following the police request for disclosure of a call recording. The claimant says that if the respondent is going to add these documents without his consent and after the date for completion of the bundle, he wants to see the police request for the recording and the record of the chaser emails that he sent about this issue. The Tribunal has looked at what we have and we have asked ourselves: is it relevant and necessary to do justice in the case? Firstly, the police request for the recording is in the bundle (it is at page 1092.) We have got the pages showing the internal 'toing and froing' on this issue. We have got the email chaser from the claimant to Alex Perry about this issue. What the claimant is asking for is confirmation of any additional email chasers that he has sent to Nicole Sinclair. The relevant question is how that actually helps the Tribunal with the issues in the case. The relevant issue in this part of the case is paragraph 3.1.4 of the List of Issues, namely: when the claimant was racially abused by a customer on or about 2 May 2019, did the respondent fail to properly investigate the complaint within a reasonable time period and fail to adequately support the claimant? That is the pleaded issue that this may be relevant to. It is slightly less on all fours with that than might have been anticipated. What the claimant is saying is that the respondent did not want to disclose the document to the police, although it appears to be accepted that the document was disclosed to the police (but after a delay.) The email chain that we have got shows what was going on. It shows what prompted it. We have got at least one email chaser from the claimant. We are at a loss to know what any further email chasers are going to add to this, other than to show that the claimant was asking for things to be speeded up. The respondent in its evidence (that we have read so far) indicates that they wished to comply as soon as possible but had issues to overcome, and that is the reason for the disclosure of the email chain. The email chain shows what they were doing and why. Therefore, the respondent says that we already have the adequate timeline of the evidence. On reviewing the available information we have concluded that the requested further disclosure is not material to the issues in the case and we therefore we refuse to order specific disclosure in that regard.

50. Having determined the claimant's preliminary applications, the Tribunal took time to hear and consider the relevant evidence in the case before making the findings of fact which are set out below.

Findings of fact

51. The claimant commenced employment with the respondent as a Healthcare Consultant on 7 November 2016. The claimant is a black man. The

respondent is a healthcare company and provider of health insurance throughout the UK. In the course of his employment the claimant interacted with health insurance customers by telephone and electronic communications in order to sell and set up appropriate health insurance cover for said customers. Good standards of communication and customer service were a core part of his role.

52. On 1 November 2018 the claimant was placed on a performance improvement plan following concerns around meeting key performance metrics [772-777].

<u>Security and headgear</u>

53. On 8 January 2019 there was a security incident at the claimant's workplace in that an unauthorised individual was allowed to enter the premises. The individual concerned was wearing headwear which covered their face so that they were not properly detected on CCTV. As a result of this security breach the respondent decided to change its security protocols. Those on the front desk at the premises were tasked with asking everyone who entered the building to remove any headgear which obscured their face. Thus, those wearing a hat with a peak were likely to be asked to remove it. Although there had been a change in the security directive from higher management, this change was not widely communicated to the workforce at large. Rather, those working at the front desk who were charged with maintaining security were actually informed of the change of policy.

54. On 30 January the claimant arrived for work in the usual way. He went to enter the building along with another member of staff called Akeem Mahmood. Both of them were wearing headgear. The claimant was wearing a woolly hat with a peak. Both of them were asked to remove their hats before they were permitted to enter the workplace. The claimant asked why this was required when he was a well-known member of staff. He noted that he and his companion were both of black or other minority ethnicity. He was concerned that only those of minority ethnicity were being challenged in this way and that white people were being allowed to proceed through the security gate without challenge. As a result of these concerns, the claimant raised a grievance later the same day [264]. In his grievance he described being challenged by Jermaine Robertson and Nicole Gibb and being told to take his hat off. He said that he then went to the reception desk and asked why there was an issue with him wearing the hat. He alleged that Jermaine Robertson said that "*you can't wear a hat into the building.*" He alleged that he asked Mr Robertson and Ms Gibb for further clarification and was told, *"because you look suspicious and the camera needs to pick up your face."* The claimant says that he took offence at this comment, particularly as he and Akeem were the only two people stopped whilst others with similar hats walked along without being harassed in the same way. The claimant maintained that his face would have been clearly visible to any camera. He also noted that, due to his length of service with the respondent, he would have been a familiar face within the building. He asked three people at the reception desk if they could send him an email showing where it stated on BUPA policy that a person cannot enter the building with a winter hat. At the time that he raised his grievance he had not received a response to the request. The claimant alleged that this was a case of harassment, direct

discrimination, and racial profiling and that he would be taking legal action regarding the matter as it not only violated the respondent's stated values but was also illegal. He also noted that when he went back downstairs to get the names of the individuals concerned, Nicole Gibbs was extremely rude and hostile saying: *"I don't know why you are making a fuss over a little hat…"* along with other dismissive comments. He concluded by noting that he had been in the lobby for a few minutes after the incident and had personally counted around nine people pass with similar hats (including a man wearing bike gear and a helmet) and they were not stopped and had no issues in entering the building. The claimant believed that camera logs and recordings would confirm this. He indicated an intention to raise an internal grievance and then take legal steps to make an external complaint either via the courts or the Employment Tribunal.

55. Davinder Gill was assigned to hear and determine the claimant's grievance. He is a manager of Asian ethnicity who had transferred to work in Manchester from the respondent's Staines office. He had only been working in the Manchester office for about two to three weeks prior to being assigned the claimant's grievance. He continued to work in the Manchester office once he had delivered the outcome to the grievance.

56. The claimant attended a grievance hearing with Mr Gill on 5 February 2019 [272-274.] During the course of the hearing the claimant was asked to provide his version of events. The claimant explained what had happened and explained that those he had dealt with were aggressive and rude. He described the impact that it had had upon him psychologically and that he no longer wore the hat. It was affecting his morale. The claimant indicated that he had been advised to ask for the CCTV footage. He wanted the footage for 30 January and the day beforehand in order to see if anyone else was stopped. He indicated that he felt like he was being treated like a criminal in his own workplace. Mr Gill indicated that he would contact the facilities managers and obtain the relevant information. He indicated that he would have formal meetings with Akeem, Jermaine and Nicole and then contact the claimant with details of his findings. The claimant was asked what his desired outcome was. He indicated that Jermaine, Nicole (and whoever the third manager was) needed to be held accountable. They needed to be followed up with some form of training so that it wouldn't happen again. He said that if the policy was that staff should not be wearing hats indoors than this should be communicated to everyone and that it needed to be fair and enforced with everyone. He wanted a written acknowledgement from the respondent that this was not right, together with an apology from them.

57. Mr Gill met with Mr Mahmood on 6 February [275-276]. Mr Mahmood confirmed that he and the claimant walked into work together. Mr Mahmood had a cap on and the claimant had a woolly hat on. Jermaine asked them to take their hats off so Mr Mahmood thought it was a natural thing, apologised, and took it off. He was scanned through. He noticed that the claimant stopped and questioned where it said this in the policy. He noted that Jermaine said something and another woman said something but he did not hear what was said as he was already through the barriers. He did not wait to hear the discussion. He said, *"to me I seen this as a funny thing if it's a rule it's a rule I did not take this personally."* He confirmed that he was not offended in any way. He said that he knows Jermaine and feels that he is a bit "to the point"

so he did not take any offence to this. He felt that the claimant did not like this and felt it was ridiculous. He was asked whether he had seen anyone walking past with a hat on at the time. Mr Mahmood's response was to say that he felt it was pointless taking his hat off but that that was the rules. He indicated that he has a pass, that people at reception know him and he couldn't understand why it would be different if he had a hat on. However, if it's one rule for all then it's the same for all. He did not confirm that others were allowed to go through the security gate without taking their hats off.

58. Nicole Gibbs was also interviewed on 6 February [277]. She indicated that the claimant had come across to ask why he had been asked to remove his hat. He also came back down to reception later to ask for the names of the people on reception. Ms Gibb confirmed that she had advised the claimant that there was a guy who had got into the building and that the staff on reception had been told that they needed to remove baseball caps and advise people of this, due to the camera being unable to see the faces of those wearing hats. She confirmed that the claimant's manner was fine but that she was 'wound up,' as she had dealt with the security breach earlier in the week. However, she maintained that she was just explaining the situation. She concluded the meeting by saying that she was upset and that she did not want the claimant to feel that she was singling him out as they (on reception) do not have time. She didn't know why it had got this far. She said that she had had an incident on the Monday which was about the hat and that she was sworn at.

59. Nicole Leach was also interviewed and confirmed that there had been a security breach where a homeless man had entered the premises and was in the washroom. From then on, the idea was that anyone who was wearing a cap (so they could not see the face) was being asked to remove them. Rachel Winter was also asked for her version of events.

60. Jermaine Robertson confirmed that he had stopped them and asked them politely to move their hats. When asked why, he explained the reason and told them about the homeless guy and that this will be the policy going forward. He confirmed that his colleague then 'stepped in' and explained more. He had referred specifically to baseball caps. He was shocked that the complaint had been pursued to this extent as he felt that the issue was not dealt with inappropriately and there was no aggression. Since the incident with the claimant, the policy regarding hats had not been enforced as Mr Robertson wanted a wider communication to be sent out to the workforce before he was asked to intervene again with individuals who were wearing hats.

61. Mr Gill followed up with further questions of some of the witnesses. Nicola Leach confirmed that the policy related to hats with a peak that would obscure someone's identity. Hence the reference to both. In relation to the CCTV footage we heard that Mr Gill was able to review it himself, including the footage of the incident and also covering a period of time around the incident (i.e. earlier and later.) He observed that several people were asked to remove their hats and these included white members of staff. He concluded that this was consistent with the stated rationale behind the policy, namely, to prevent someone entering the building with their face obscured.

62. The claimant had requested access to the CCTV for a period of three days, including the date of the incident. He was refused personal access for this period for data protection reasons.

63. Mr Gill met with the claimant in order to provide an outcome to the grievance on 18 March 2019 [294]. He explained what he had done to investigate the grievance. He went through each allegation and paused to allow the claimant to raise objections. The claimant asked for the date of the alleged security breach which had triggered the change in the security protocol. At the conclusion of the hearing the claimant thanked Mr Gill for his time and for the investigation but indicated that he would be taking the case further to an Employment Tribunal. He maintained that he saw other members of staff wearing peaked caps and bike helmets which would have obstructed the view of the security cameras. He maintained that they were not asked to remove these. He felt that the respondent was withholding evidence in the form of the CCTV footage that was requested (but not released). The claimant was told how he could appeal and the timeframe in which he would have to do so. No further questions were asked.

64. An outcome letter was issued claimant (also dated 18 March 2019 [295].) In that letter Mr Gill summarised the claimant's grievance. Mr Gill's decision set out who he had spoken to and confirmed that he had recently viewed the CCTV footage for the incident. He indicated that he had observed the incident and the subsequent conversation that the claimant had with Jermaine and Nicole. He said that he did not observe any behaviour indicating that this was a heated conversation. He summarised the evidence that he had gathered during the course of his investigation. His own observation of the footage was that he could not see that anyone else with a peaked hat had gone through the security barrier unchallenged. As a consequence, Mr Gill did not uphold the claimant's allegation that he was subject to racial profiling or discrimination. He also did not uphold the allegation that Jermaine Robertson was aggressive and rude to him. He noted that Nicole Gibbs had said that she was 'wound up' that day (due to a different incident at the security desk) but that she believed that she had tried to explain this to the claimant. Mr Gill therefore partially upheld this point in his reasons. He explained that Ms Gibb had explained that she believed that she had tried to speak calmly to the claimant but that, due to the impact on her of the earlier incident, she may not come across as she intended. He also noted that Nicola Leach advised her team not to reply to the claimant's second email. Rachel Winter had already responded to the first email. Mr Gill, therefore, did not uphold the allegation that the claimant did not receive a response. However, he could see that the claimant did not receive a *satisfactory* response. From his investigation Mr Gill concluded that the front of house facilities team were only advised to stop employees who were wearing peaked hats/baseball hats/hats with a visor that would cover or obscure parts of the face. It was therefore true that some individuals wearing other types of hats did enter the building without being challenged and asked to remove their headwear. From his investigation the security team highlighted that, following two incidents of individuals being asked to remove headwear with peaks on 30 January, a decision had been made not to ask other individuals to remove peaked hats. Jermaine made Mr Gill aware that he had not asked any other individuals to remove headwear. Mr Gill therefore did not dispute that the individual mentioned by the claimant wore a hat all day on Saturday 2 February as, at that time, the security team

had decided not to continue with the new procedure of asking employees to remove headgear when entering through the barriers. Mr Gill noted that the claimant had asked to be provided with CCTV footage for the 29 and 30 January and 2 February 2019 so that he could share this with his legal representatives. The claimant explained that he felt he had the right to ask for this footage. The respondent had considered the request. Mr Gill explained that CCTV footage contained personal data and in general could not be disclosed to others in normal circumstances. The respondent was unable to release the footage for the periods of time requested for the purposes that the claimant requested it.

65. As a result of his decision Mr Gill made a number of recommendations. He recommended that feedback and coaching be given to Nicole Gibbs around how she handled the conversation with the claimant. He recommended that feedback be given to the facilities team on the impact of not responding to the claimant's follow-up email and recommended that they consider their procedure in responding to emails. He indicated that feedback should be given to the facilities team on the impact of introducing a change in procedure without communication. Finally, Mr Gill indicated that he would recommend to Facilities that clear guidance be issued on how they intended to implement the procedure of removing headwear before moving through the security barriers at the premises. Mr Gill's letter concluded by setting out the claimant's right of appeal.

66. On 19 March the claimant emailed Mr Gill confirming his disappointment at the outcome and his disagreement with the decision. However, he stated that, *"on careful reflection (and after speaking to my solicitor) I have decided not to pursue an employment tribunal claim on this occasion. The burden of proof placed on the claimant is extremely high and the discrimination incident wasn't directly from BUPA as a company itself but from a member of the reception desk. I'll leave it for now, also taking into account the fact that you investigated the matter as best you could. I will keep the notes and records of the incident in case another issue arises in the future."*

67. During cross examination at the Tribunal hearing the claimant accepted that there had potentially been an earlier security breach and that there may have been a new policy brought in by the respondent as a result. However, he maintained that he was not told about this change in policy and that it was not enforced against white colleagues. The claimant also alleged that he stayed in the vicinity and watched multiple white colleagues not being challenged. However, he did not raise this with security at the time and we are not sure why he would refrain from doing this. Why not point out the evidence of differential treatment then and there if it existed?

68. There was evidence about the security breach in the internal emails [at 259-262]. There was also evidence that the nature and existence of the policy was explained to the claimant at the time [e.g.283].

69. Given the evidence collated during the course of the investigation and the evidence provided during the course of the Tribunal hearing, we accept that the claimant was asked to remove his hat as part of the implementation of a change of security protocol. The decision was to require removal of hats which partially obscured the wearer's face, given the earlier breach of

security. There is evidence to suggest that not all hats would 'fail' this test but that the hats worn by the claimant and Mr Mahmood did 'fail' the test. We find as a fact that this policy was the reason why the claimant was asked to remove his hat. It had nothing whatsoever to do with the claimant's race. If the claimant had been white and wearing the same hat, then he would have been asked to remove it. This is confirmed by the fact that Mr Gill observed CCTV footage of white employees being asked to remove their hats too. Whilst the protocol may not have been perfectly enforced (or explained), there was evidence of enough incidences involving white employees for the Tribunal to be satisfied that race was not the reason why the request was made in the claimant's case.

<u>Call recording for the police</u>

70. On 22 May 2019 the claimant received a call from a customer during which he alleged that he suffered racial abuse from the customer. This formed part of a subsequent formal grievance raised by the claimant on 15 June 2021 [481]. In that part of his grievance he alleged that he was subjected to racist abuse during a customer phone call and that various departments within the respondent made every effort to frustrate the process of getting the call recording released to the police. He said that this exacerbated his distress. This culminated, said the claimant, in the claimant writing an email to the CEO (Alex Perry.) The claimant repeated these allegations in the witness statement to the Tribunal. The claimant maintained that the respondent refused to send the recording to the police. Instead, he alleged that they protected the racist caller. He maintained that throughout this period Nicole Sinclair was very dismissive to him when he asked her to provide the evidence to the police. He maintained that she was sometimes downright hostile. He asserted that she often ignored his emails and stated that if it was affecting him, he should speak to "Healthy Minds". He alleged that this was said in a condescending manner. He asserted that the subtext was that this was 'not a big deal' and that he should just 'get over it.' He maintained that, far from having a zero tolerance approach to racism, the respondent was refusing to cooperate with the police when dealing with allegations of racism. He maintained that the respondent continued to do 'business as usual' with the racist abuser. (He did not provide evidence to substantiate this assertion.) He alleged that the ordeal lasted several months and that, at first, the respondent only released the audio without any details of the customer so that the police could not contact her. We were not directed to any evidence to substantiate this particular assertion.

71. We heard that the claimant reported the incident to the police and Leanne Jackson listened to the recording of the call. The Tribunal was provided with a chain of email communications setting out the process undertaken to release the recording to the police [1090-1094]. The first email from Nicole Sinclair was dated 24 May 2019 at 16:48 and confirmed that the police had contacted her asking for a recording of the call that took place plus the contact details of the customer. She asked specifically whether this was something that the respondent could share with the police. A legal manager within the respondent responded on 28 May indicating that, in the first instance, this was a question for the Data Privacy Team. She further advised trying to send the query to Debbie Feeney in the first instance.

72. Leanne Jackson then emailed Debbie Feeney on 28 May asking for assistance. She explained that she was being asked to send customer details and call recordings regarding an incident to the police. She was concerned about breaching data protection and what she could or could not forward on. She asked for guidance. Later on 28 May, Debbie Feeney responded and asked whether the police had provided their request in writing. She indicated that they should be told to make an official data protection request via the data protection mailbox. Leanne Jackson's response was to forward the email received from the police officer on 24 May and to indicate that she could not get the call off the respondent system to allow Ms Feeney to listen to it. Debbie Feeney's response came on 29 May. She confirmed that what had been received from the police was not enough. The respondent needed a formal data protection request from the police in order to release the information. Debbie Feeney indicated that she would take control of the situation from there.

73. The next email in the exchange is dated 3 June 2019 and is from Nicole Sinclair to Debbie Feeney and Leanne Jackson. Nicole Sinclair indicated that Leanne was on annual leave and that she (Nicole) had been out of the office the previous week. She confirmed that the claimant had come to her that day asking if the respondent had provided the details to the police yet as he had escalated it to Alex Perry. Mr Sinclair therefore asked Ms Feeney to confirm where the respondent was up to with regard to contacting the police so that she could update the claimant. On sending that email to Debbie Feeney, Ms Sinclair received an 'out of office' message. She therefore sent a message to Darren Miles confirming that Debbie Feeney was out of the office until 10 June. She wanted clarification as to whether the call had been sent to the police. She indicated that she had had conflicting information from the respondent's legal team who had said that the respondent didn't need the request in a formal process in the same way that Debbie Feeney had suggested.

74. On 4 June Darren Miles responded to ask who in the legal department had said that a formal request was not required. Ms Sinclair responded with the requested information on 4 June and later the same day (at 13:48) Darren Miles emailed Nicole Sinclair to say that he had a copy of the recording and the formal request and that he would share it with the police.

75. The delay in releasing the recording therefore spanned the period 24 May to 4 June 2019.

76. The claimant had indeed raised a complaint to Alex Perry regarding the alleged incidents of racial abuse. His letter was dated 3 June and was responded to by Mr Perry on the same day [433-436]. Mr Perry confirmed that, whilst there was no issue in releasing the call to police, the respondent's team had to work through the potential data protection implications of doing this. He confirmed that the call would be released by the privacy team once they received the data protection form from the police. He further explained that Nicole was not in the office on Friday to receive the claimant's email but had responded to the claimant on 3 June.

77. Having reviewed the available evidence we have concluded that only the argument that there was a delay in releasing the call recording has been

established. The reasons for that delay are set out in the chain of correspondence. The claimant did not pursue the argument with Ms Sinclair that she was dismissive towards him about this allegation of criminal behaviour on the part of a customer. He did not address it in cross examination at all. There is no evidence to suggest that there were any further problems once the recording was released or that the information was released in a piecemeal fashion. There is no evidence that the respondent refused to co-operate with the police or that it sought to protect its customer. Rather, there was a GDPR concern on the respondent's part. The respondent's managers wanted to make sure that they complied with their data protection obligations and that they followed the respondent's processes in this regard. To that end, they sought authorization from the relevant internal department and there was a relatively short delay whilst this was obtained. We find that the respondent's reasons for the delay were genuine. They had no particular reason to frustrate the police enquiry. The explanations disclosed by the internal email correspondence are consistent with the reasons given to the Tribunal. The claimant says that he had to threaten to go to his MP to get a result but there is nothing in the evidence before us to confirm this. He certainly did not put this allegation to the witnesses in cross examination and give them an opportunity to respond to the allegation. Furthermore, the claimant, when asked, did not name someone within the chain of correspondence who had a racial motivation for their actions. He emphasised a 'cultural' attitude to race within the respondent's organisation. He did suggest in oral evidence that Debbie Feeney was the 'controlling mind' in this regard. However, there is no evidence to suggest that she had ever met the claimant or would have any particular 'axe to grind' in this regard. This assertion lacks credibility and was not made prior to the Tribunal hearing. There was no evidence that the respondent had any further dealings with the racist abuser. We cannot conclude that they continued doing business with them after the claimant raised his complaint or that they had business reasons for wishing to suppress the claimant's police complaint.

<u>Performance procedures and grievances</u>

78. Between 26 June and 17 July 2019 the claimant was off work on sick leave. On 12 October 2019 the claimant was placed on a Performance Improvement Plan ("PIP") following concerns around meeting key performance metrics [786-797].

79. The claimant raised the second formal grievance alleging that he had been systematically targeted by the Quality Assurance team on 28 November 2019 [304-307]. From 2 January 2020 to 20 January 2020 the claimant was signed off work on sickness absence. On his return to work he went through the grievance process with a hearing in relation to his second grievance on 11 February 2020. An outcome to the grievance was prepared on 20 March 2020.

80. On 1 June 2020 a Development Action Plan ("DAP") was issued for the claimant to support his return to the sales team from the loyalty team [798-805]. On 17 June the claimant was signed off on sickness absence until 6 July. On 1 July 2020 the claimant was placed on a PIP following concerns around meeting quality assurance metrics. This was discussed and agreed with the claimant on his return from absence.

81. On 7 July an individual stress risk assessment was completed for the claimant [808-812]. A letter of concern was also issued to the claimant following high levels of absence [813-814].

82. On 31 July 2020 the claimant's PIP was reviewed and extended to 31 August 2020 due to concerns around meeting quality assurance metrics [882-899].

83. On 16 September 2020 the claimant attended a capability meeting.

84. On 18 September 2020 the claimant raised a third formal grievance alleging bullying from the notetaker during the capability meeting on 16 September.

85. On 25 September 2020 the outcome to the second grievance was delivered following the investigation into the substance of the grievance [317-320].

86. An investigation report in relation to the third grievance was prepared on 13 October 2020 and the outcome to the third grievance was delivered on 15 October 2020 [339-340]. The claimant appealed against the outcome to the third grievance on 22 October 2020. The appeal hearing in relation to the third grievance was held on 4 November 2020. The outcome to that appeal was delivered on 17 November 2020 [347-349].

87. On 16 November 2020 the claimant was placed on a PIP following concerns around meeting the performance metrics following the capability hearing on 16 September [778-782].

88. The claimant was signed off work on sick leave from 7 to 10 December 2020. He was also absent on sick leave from the 4 to 7 May 2021.

89. On 10 May 2021 the claimant was invited to a capability hearing regarding high levels of absence. That meeting took place with Leanne Jackson on 17 May 2021 [902-906]. As a result, the claimant was issued with the first written warning for absence levels on 18 May 2021 [907-908].

90. On 27 May 2021 an investigation meeting took place with the claimant in relation to misconduct allegations relating to customer service standards and breach of the BUPA code. An investigation summary was produced on 7 June. The claimant was invited to a disciplinary hearing in relation to this allegation on 14 June.

91. On 15 June the claimant raised a fourth formal grievance alleging bullying, distortion of performance figures, a culture of racism and favouritism and a poor response to the alleged racist call in May 2019 [481-483].

92. The claimant attended a disciplinary hearing on 17 June 2021. An invitation to his fourth grievance hearing was sent to the claimant on the same day.

93. On 18 June 2021 the claimant was given the outcome to the disciplinary case. He was issued with a first written warning [430-431].

94. On 23 June 2021 the fourth grievance hearing took place with the claimant. It was conducted by Laura Hargrave [487-492].

95. On 6 August 2021 a Sales Quality Audit notification flagged unacceptable complaints levels for the claimant [571]. There was also an informal investigation and discussion with the claimant regarding his conduct customer complaints [9 to 12 August 2021]. An informal letter of concern regarding conduct was issued to the claimant on 25 August 2021.

96. On 31 August 2021 the claimant commenced ACAS Early Conciliation.

97. On 1 September the claimant's performance improvement was reviewed following the first written warning [909-910].

98. The outcome to the claimant's fourth grievance was delivered on 16 September 2021 [578-584]

99. The claimant's ACAS Early Conciliation certificate was issued on 8 October 2021.

100. On 14 October 2021 there was a Sales Team meeting at which the claimant alleges racist comments were made in relation to a new team member called Gigi Tse. She was coming from Hong Kong to join the respondent company.

101. On 18 October 2021 there was a customer call with the claimant which led to a complaint from the customer alleging unacceptable behaviour by the claimant. This formed 'allegation one' of the index disciplinary allegations which we consider later in these written reasons. On 29 October 2021 there was a further customer call involving the claimant which led to a complaint from said customer alleging unacceptable behaviour from the claimant. This formed 'allegation number two' in the index disciplinary allegations. On 4 November 2021 there was a third customer call involving the claimant leading to a complaint from the customer alleging unacceptable behaviour by the claimant. This formed 'allegation number three' in the disciplinary allegations.

102. The three customer complaints relating to calls on 18 October, 29 October, and 4 November, triggered a disciplinary investigation. The investigation was carried out by Daniel Scanlon, who was another Sales Team Manager within the Consumer New Business Department. He was the claimant's former line manager prior to 2019 and is no longer employed by the respondent. He did not provide witness evidence to the Tribunal at the hearing.

103. An initial investigation meeting was conducted with the claimant by Daniel Scanlon on 8 November 2021 [592-601]. On the same date the claimant raised a formal grievance alleging that racist comments were made during the team meeting on 14 October 2021. The claimant's first Employment Tribunal claim form was also submitted on that date.

104. An initial draft of the disciplinary investigation summary was produced on 12 November 2021 but was not sent out to the claimant at that stage.

105. On 22 November 2021 the claimant was invited to a fifth grievance hearing. The disciplinary investigation was held in abeyance whilst the grievance was dealt with.

106. On 1 December 2020, the claimant withdrew his fifth formal grievance. However, the respondent decided to deal with the grievance informally in any event. Nicole Sinclair confirmed that she was concerned about the seriousness of the claimant's allegation and therefore wanted to explore the matter further on an informal basis. She noted that the claimant had mentioned that there were some serious issues that needed addressing and therefore she wanted to arrange a time to discuss these with the claimant. On withdrawing the formal grievance the claimant had indicated that he was concerned that the incident which formed the basis for the formal grievance would be likely to create a lot of distress for the new colleague (Gigi) and might put her in an unfair spotlight straight away. He also noted that it might lead to further stress and anxiety for himself as well.

107. There was an informal grievance conversation with the claimant conducted by Nicole Sinclair on 8 December [623-624]. The outcome to the informal grievance was delivered to the claimant on 13 January 2022 [632-634].

<u>October 14th Team Meeting</u>

108. We have reviewed the available evidence in relation to the events of the meeting on 14 October because many of the claimant's factual allegations in his discrimination claim relate to that meeting. We can see that as part of that investigation Nicole Sinclair spoke to all of the available witnesses to establish what took place. Ms Sinclair had meetings with the following witnesses: Michael Whitehouse; Leanne Jackson; Lucy Goodwin; Andrew Pilling; Sarah Potter; George Wilding; Brooke Bellingham. We have reviewed the notes from those meetings.

109. Leanne Jackson held the meeting in question on 14 October with her direct line reports via Teams. Part of the agenda was to announce that a new employee would be coming to join the team to replace Michael Whitehouse. That new colleague was named Gigi Tse and she came from Hong Kong. The new colleague was not present at the meeting. The claimant was the only employee from a black or minority ethnic background present during the meeting.

110. The claimant's first allegation as part of these Tribunal proceedings is that Leanne Jackson said, *"her name sounds like a racehorse."* The claimant repeated this allegation in his witness statement for the purposes of the Tribunal hearing.

111. Leanne Jackson gave evidence to the Tribunal. In the course of that evidence she explained the context of the conversation. She maintained that it was a routine operational meeting. She further maintained that she did not say *"her name sounds like a racehorse."* She explained that the group had got sidetracked into talking about the famous supermodel with the same first name so Ms Jackson had said something to the effect of, *"the name reminds me of the horses, and I would bet on [Ms Tse] because she will be brilliant."* Ms Jackson maintains that this comment was not connected to Gigi being from Hong Kong. Nor did it relate in any way to her race. Ms Jackson immediately made the connection between the name Gigi and the well-known slang term for racehorses, the "Gee-gees". Her comment was intended to be a light-hearted comment indicating that the new employee would be an

excellent fit for her new role and how much she was looking forward to welcoming her to the team. Ms Jackson maintained this position during her oral evidence to the Tribunal. It was also consistent with the recollections of the witnesses who were interviewed as part of the investigation. For example, Lucy Goodwin remembered that someone made a comment about horses but she couldn't remember who and what it really meant. She recalled that it had something to do with making a bet.

112. The Tribunal is satisfied, based on the evidence that we have heard, that Miss Jackson did not make precisely the comment alleged by the claimant. Rather, we accept that the comment made was actually as recalled by Ms Jackson. We accept the context in which the comment was made and that it referred to racehorses. We accept that the comment Ms Jackson made contains no reference, either direct or indirect, explicit or implicit, to the employee's race or national origin. We also find that the name Gigi is not specifically a name of Chinese origin or which has Chinese associations. In making a joke in relation to the name Gigi, Miss Jackson was not implicitly making a joke about Chinese or Hong Kong nationality/ethnicity or people from Hong Kong or China. The same joke could be made about any employee of that name no matter what their ethnicity. The joke had no racial overtones. The Tribunal considers that this was, and would have been, obvious to all of the participants in the meeting. Whether they found it amusing or not, they would have realised that the reference was to horses rather than to race. The claimant maintained during the course of the Tribunal hearing that he was previously unaware of the slang term "gee-gees" used to refer to horses and betting on horse races. It is possible, therefore, that at the time that the meeting took place, he did not understand the joke that was being made. He may not have realised there was a reference to horses implicit in the new employee's first name. Whilst this has since been explained to the claimant, even if only in the course of these Tribunal proceedings, the claimant is still reluctant to accept that this is genuinely what Ms Jackson meant by the comment that she made.

113. The second factual allegation made by the claimant as part of these proceedings is that during the meeting, George Wilding said: *"what is she doing coming to the UK"… "She doesn't belong here".* He also alleged that George Wilding commented, "*why come all the way from China?"* In his witness statement for the Tribunal the claimant maintained that Michael Whitehouse and George Wilding mocked the idea that Gigi would not fit in in the UK as she was of Chinese ethnicity. In his statement he reported George's comment as *"why is she even coming here, she's not English."*

114. In her witness statement to the Tribunal Ms Jackson said that, to the best of her recollection, Mr Wilding did not make the comments that are alleged. She commented that it was rare for Mr Wilding to participate proactively in meetings or to make comments about anything unless he was specifically asked to. He preferred to sit back and listen and did not tend to actively join in the conversation without being prompted. Ms Jackson comments that, had he made those comments, it would have stood out to her as extremely unusual and she would have intervened. She would have flagged this up as an issue to HR if he had said anything along the lines of "she doesn't belong here", so Ms Jackson is certain that he did not. Mr Wilding also gave evidence to the Tribunal and maintained that, to the best of his recollection, he did not

say the comments which are alleged. He recalled that the only thing he said about the new employee joining the team was that it was nice because he always looked at the job pages for places like Australia because he would like to move to another country one day. He is clear that this was in no way related to the new employee's race and he was unclear as to how the claimant could have construed it that way. Mr Wilding and Ms Jackson's evidence on this point is consistent with the notes of the investigation interviews which were conducted with the other employees on the call.

115. Taking the evidence in the round, the Tribunal is not satisfied that Mr Wilding made the comments which the claimant alleges. It is notable that Ms Jackson was prepared to admit to the comment that *she* made during the course of the meeting (regarding the racehorses) but was clear that Mr Wilding did *not* make the comments alleged by the claimant. The fact that she was prepared to admit to her own comments but was clear that George Wilding did not make the alleged comments suggests that this denial is accurate. Based on all the evidence available to us, we find that Mr Wilding did not make the comments which the claimant has alleged as part of his claim.

116. The claimant also alleged, as part of these proceedings, that during the same meeting Michael Whitehouse made a comment, *"it's like me going to Egypt and working in a call centre there."* Again, Mr Whitehouse denies that he said this. His recollection was that his only comments were in relation to whether the name Gigi was short for anything as it put him in mind of the famous model, Gigi Hadid. Again, this was not a comment about the employee's race. His recollection of his comments about the model is supported by Ms Jackson's evidence and the notes from the grievance meetings with the other employees involved in the meeting. The Tribunal is not satisfied that Mr Whitehouse made the comments that the claimant attributes to him. The claimant has failed to prove the factual allegation.

117. According to the notes from the grievance interviews there is the suggestion that someone asked whether Gigi spoke English (given that she was coming from overseas). However, this is not the allegation pursued by the claimant as part of his harassment complaint. Furthermore, none of the other participants made any form of complaint or indicated that they thought the contents of the conversation were in anyway problematic or inappropriate. The claimant did not raise his complaint about this meeting until the day he was interviewed as part of the disciplinary investigation by Mr Scanlon (8 November 2021, see below.)

118. On 17 January 2022 there was a further customer call involving the claimant which led to a customer complaint alleging unacceptable behaviour by the claimant. This formed 'allegation number four' in the disciplinary case. On 18 January there was a further customer call leading to a complaint of unacceptable behaviour by the claimant. This formed 'allegation number five' in the disciplinary allegations.

119. As the disciplinary investigation had not been formally closed and completed prior to the claimant raising his fifth grievance, the complaints relating to calls on the 17 and 18 January were added to the issues to be investigated as part of the disciplinary investigation. There was, therefore, a further disciplinary investigation meeting with the claimant on 19 January 2022 [640-644].

<u>The claimant is stopped from taking customer phone calls.</u>

120. The claimant alleges that on or about 18 January Dave Scanlon told the claimant to stay logged onto his phone at his workstation but that he was not allowed to take any phone calls. The claimant alleges that this was done in order to cause him humiliation and intimidation. The claimant further alleges that when he asked why he had been taken off the phone, Mr Scanlon was aggressive and demeaning in his response.

121. We heard evidence from the respondent's witnesses about this decision. The respondent's position was that the claimant was told not to deal with customer calls and that the reason for this was because he had been the subject of customer complaints which were still under disciplinary investigation at the time. Asking the claimant not to take customer calls was seen as a proportionate way of ensuring that there was no risk of further complaints before the disciplinary allegations had been properly assessed. This measure was seen as a more proportionate response than suspending the claimant from work entirely. Nicole Sinclair confirmed that it was standard practice for a manager to ask employees who had reached a certain level of complaints (of any type) to refrain from taking customer calls temporarily whilst a member of management looked into the concerns further and clarified the level of risk to the business, the individual, and/or any other employees. The respondent witnesses confirmed that during the relevant period of time there would have been other work tasks for the claimant to get on with. He would be able to do online training and do work on his pipeline. He would not have been left sitting at his desk with nothing to do. Nor would it have been particularly obvious to others in the workplace that he was not working normally. We also heard that, due to shift patterns etc, the claimant would only have been present in the workplace working under these restrictions for about 1 ½ days before he was suspended. The claimant did not give any evidence about the humiliation caused by this measure. He did not tell us about any questions or comments from his colleagues about the fact that he was not taking calls, for example.

122. From all the available evidence we drew the conclusion that the claimant was stopped from taking phone calls for about 1 ½ days and that he had other work tasks to do during this time. There is no evidence that anyone really noticed what had happened or that he was subjected to embarrassing or humiliating questions or comments. The respondent had a good reason for taking this step whilst the disciplinary investigation was ongoing. This measure would have prevented further complaints and, in that sense, would actually have protected the claimant. There was no evidence to suggest that, when asked why this decision had been made, Mr Scanlon had responded in a demeaning or aggressive manner towards the claimant. The claimant did not give details of this alleged behaviour by Mr Scanlon. We were unable to find this allegation proved.

123. The claimant was on annual leave on 21 January 2022.

<u>Suspension</u>

124. On 24 January 2022 there was a meeting with the claimant and he was placed on suspension [653]. The decision was made by Nicole Sinclair and she conducted the suspension meeting. During the suspension meeting Ms Sinclair confirmed that suspension is neither a disciplinary nor a capability sanction and that it did not imply that any decision had been made about the claimant's case.

125. The letter confirming the suspension was sent to the claimant dated 25 January 2022 [656-657]. The Tribunal heard further evidence about the reasons for the suspension and why it was timed in this way. In essence, the relevant managers at the respondent became aware that there had been further customer complaints about the claimant in January 2022 when the claimant already knew that he was under investigation for the customer calls in October/November 2021. This was seen as a material change in circumstances and something of an escalation in the seriousness of the matter. The respondent wanted to prevent the claimant from having any further contact with customers until the complaints had been dealt with. Whilst telephone calls formed a large part of his customer interaction, the claimant would also be able to contact customers in other ways, e.g. by email. Whilst he was still in the workplace, he still had access to the respondent's systems and customer information. The only way to ensure that there was no further customer contact was to remove the claimant from the workplace. Given that the respondent did not move to suspend the claimant straight away but tried other, more limited measures first, this suggests that the respondent was not particularly eager to suspend the claimant. It did not jump to suspend him at the first available opportunity.

126. The letter confirming the suspension is dated 25 January 2022 and purports to be written and sent by Nicole Sinclair. She made the suspension decision. She took the view that the further two complaints indicated that there was an ongoing risk of unacceptable behaviour towards customers from the claimant. The claimant had not been able to offer any further assurances at the second investigation meeting which led Ms Sinclair to believe that the risk had been (or would be) sufficiently mitigated. He still had access to customer details and could still contact them at work by other means, such as text and email. Having consulted with the HR team and given that the allegations related to the claimant's alleged continued unacceptable behaviour towards customers, Ms Sinclair made the decision to suspend the claimant on full pay so that the allegations could be further investigated and to reduce the risk of further issues arising whilst the matter was investigated.

127. The letter set out the terms of the claimant's suspension. At numbered paragraph 4 it stated: *"You must not communicate with any of our employees, contractors or customers unless authorised by me."* It also confirmed sources of support for the claimant such as access to "Healthy Minds."

128. An updated draft disciplinary investigation report was produced on 25 January but this was not sent to the claimant in its draft state.

129. On 31 January 2022 the claimant was signed off from work on sickness absence.

130. On 7 February 2022 the disciplinary matter was referred to the internal conduct team. By 16 February 2022 the final version of the disciplinary investigation report was produced [675-684]. At the end of the report Mr Scanlon states [683], *"Based on the disciplinary policy appendix regarding gross misconduct, I believe these allegations should be considered as gross misconduct. The appendix states "Gross misconduct is a serious breach of contract and includes misconduct which, in our opinion, is likely to damage our business or reputation or permanently damage the working relationship and trust between us."* The claimant was unhappy that Mr Scanlon made this recommendation. However, we note that there is nothing in the respondent's disciplinary policy to indicate that he could not do this. Indeed, it would arguably be more problematic if the investigating officer left the level of misconduct uncategorized as the claimant would not know the level of case he had to meet at any disciplinary meeting. The claimant would want to know that he was at risk of dismissal in advance of the disciplinary meeting. Furthermore, if the investigator did not categorize the level of conduct, then this would have to be done by the disciplining manager in advance of the disciplinary hearing. This would leave the disciplining manager open to an allegation that he had pre-empted and prejudged the case before even meeting the claimant at the disciplinary hearing and listening to the defence. We heard evidence from Mr Mabbutt during the Tribunal hearing that in comparable circumstances he would sometimes give a view or opinion on the severity of the misconduct when he was tasked with an investigation. Sometimes he would not. But, either way, it would not be binding on the disciplining manager. The disciplining manager was entitled to decide that the investigator had wrongly categorised the case.

131. The claimant also maintained that the respondent acted improperly in adding the two later charges of misconduct to the earlier three. He essentially argued that by putting all five together and sanctioning him accordingly, it artificially made the case against him stronger as he was being sanctioned for five (later reduced to four) incidents at once, rather than two groups of two.

132. It is relevant for us to examine what the claimant was told by the respondent about the status of the investigation at the material time. At the claimant's second investigation interview on 19 January 2022 [640], the claimant is recorded as asking: *"How come it took so long to get an outcome of the investigation.?"* Mr Scanlon is recorded as replying, *"We still don't have an outcome now; they are other departments involved now who need to investigate the calls it isn't me holding up the process."* The claimant indicated that he understood. This exchange indicates that the case relating to the first three calls had never been closed before the second two calls were investigated. It was not a question of reopening the case and adding two more charges to it. The claimant had never been told that the disciplinary investigation had finished before the second two complaints were investigated. The second two complaints were added to the 'charge sheet' whilst the investigation was still ongoing. The claimant was not misled in any way as to the status of the investigation. We also note that the original investigation report (which dealt with the first three complaints) was a draft report and that it was not sent to the claimant. The report was never completed and sent to the claimant until after <u>all five</u> complaints had been investigated. In those circumstances, the claimant should have understood that the earlier charges were still outstanding. He had certainly never been

told that the initial investigation had been concluded or that a decision had been made about whether to refer the claimant to a disciplinary hearing. Indeed, we note that the claimant did not chase an actual outcome to the first part of the investigation process. This suggests that he realised of his own accord that the investigation was still open (pending the grievance outcome.)

133. Taken at its highest, the claimant raised a grievance whilst the disciplinary investigation was afoot. The claimant, understandably wanted to have his grievance attended to. The respondent paused its investigation in order to address the grievance. Once the grievance was resolved then it was entirely foreseeable (and reasonable) that the respondent would resume the disciplinary investigation which had been held in abeyance. If, in the meantime, further allegations had come to light, it would be unreasonable to preclude the respondent from investigating them too. It could not reasonably be obliged to ignore further complaints because of the grievance-related pause in proceedings.

134. The claimant also questioned the witnesses about the contents of Jamie Sawyer's email of 16 February 2022 [673]. He suggested that the comment at the start of the message, *"All done woop!"* was delighting in the claimant's demise. That is not the Tribunal's reading of this message. The surrounding emails put it in its proper context. Mr Sawyer was the HR employee tasked with supporting the investigation. He had evidently helped in drafting the investigation report. The message comes across to the Tribunal as Mr Sawyer expressing relief at having completed a task which had been ongoing for a considerable period of time. The celebration was in relation to completing his work, not in relation to the potential disciplinary consequences for the claimant.

135. On 28 February there was a sickness absence/well-being meeting with the claimant [687-690 and 691-694].

<u>The disciplinary</u>

136. On 9 March 2022 the claimant was invited to a disciplinary hearing. That hearing was rearranged and the invitation to the rearranged hearing was sent out on 20 May. It was rearranged because the claimant had indicated that he would not be well enough to return to work until 20 May.

137. The rearranged disciplinary hearing took place on 24 May 2022. The disciplinary hearing was conducted by Louisa Lawrence [720-725].

138. Having heard the respondent's evidence in relation to the disciplinary hearing, it is apparent that Ms Lawrence had formed a preliminary view of the claimant's conduct having heard the recordings in question for herself. Thus, when she met with the claimant her focus was on understanding how the claimant explained his conduct and provided mitigation to establish that it should not be treated as gross misconduct. In those circumstances, the Tribunal can understand why the claimant may have got the impression that she had already made her mind up and decided the case. On the other hand, this is not the sort of disciplinary case which is based on 'he said/she said' type allegations where oral evidence has to heard in order to determine what actually occurred. Rather, the tone and content of the recording speaks for

itself. On going into the hearing, Ms Lawrence already knows what the claimant has said and done on the calls. She is looking for him to put it in context so that she can calibrate the severity of the conduct and decide an outcome accordingly. That said, the Tribunal can empathise with the impression that the claimant received and notes that not much was done in the course of the disciplinary hearing to allay the claimant's concerns. However, in substance, we are not satisfied that what Ms Lawrence did was in any way improper. In reality, the issue is how the claimant subjectively experienced the process.

139. The Tribunal noted that during the disciplinary hearing the claimant mentioned the context of the allegations. He referred to the stress that he was under and the health concerns that he had. He referred to the fact that he was on medication. He did take some responsibility for his actions and 'own them' [721, 722, 723]. He recognised where the calls were 'bad calls' but rejected their classification as gross misconduct. He also alleged that the way he had been treated was not consistent with the way that other colleagues had been treated. He alleged that those colleagues had done far worse than him.

140. In discussing his health, the claimant explained that Leanne was aware of his stress levels. However, he also stated, *"Didn't want to go off sick due to didn't want to trigger stage 1 and did let them know."*

141. Ms Lawrence communicated the disciplinary outcome to the claimant orally in a meeting on 25 May 2022 [726]. However, she required more time to compose the formal outcome letter. Nevertheless, the claimant's dismissal was communicated to him on 25 May and was due to take effect on the same date. The effective date of termination was therefore 25 May 2022.

142. The Tribunal was concerned by the outcome hearing [726]. It was evidently the case that Ms Lawrence had made her decision and wanted to communicate it immediately so that the dismissal could take effect immediately. This meant that she communicated the outcome without explaining the reasoning and findings to back it up. This was exacerbated by her decision not to send the outcome letter out until some time later. A decision communicated without reasons was always likely to make the claimant suspicious. He would question whether the outcome was predetermined. If not, why was time required to come up with the reasons? Surely the evidence and the reasons should have been gathered and the letter drafted as part of the decision making process rather than after the event. The Tribunal never really received a satisfactory explanation for the speed of the outcome and the delay in the outcome letter. It would have been better for all concerned if the outcome had been delayed so that the reasons and the outcome letter were ready and waiting to be communicated to the claimant at the same time as the decision itself. We also noted the length of the delay. A short delay may have been reasonable whilst a final version of a letter was proofread and corrected. However, it should not have taken two weeks. The Tribunal was left to query whether the real reason for the respondent's actions was an intention to deprive the claimant of any further pay at the earliest opportunity.

143. There was then a delay in providing the letter and an update was sent to the claimant on 10 June regarding progress on preparing the formal disciplinary outcome letter [728]. The formal dismissal letter with the disciplinary outcome was dated 17 June 2022 [729-733].

144. The Tribunal considered whether Ms Lawrence really did any more than pay lip service to the claimant's defence and mitigation. The respondent 'covered the bases' in the outcome letter. Ms Lawrence couched the outcome properly. The letter referred to the support that the claimant had been offered and not taken. A different employer might have taken steps to dig a bit deeper, for example by contacting occupational health to get more evidence. However, this respondent did not dismiss the issue. In our conclusions below we will be mindful not to apply some sort of 'gold standard' and instead to look at the range of reasonable responses available to an employer in a case of this sort.

145. We note that the letter [top of page 731] refers to the claimant's work-related stress and that this had resulted in him receiving medical treatment. Leanne Jackson had been spoken to in order to see what, if any, support was offered to the claimant. Ms Jackson had given numerous examples of support, including a stress risk assessment, a Development Action Plan with weekly calls from the coaching team, support from Health Minds. Ms Jackson had signposted the claimant to Healthy Minds but he had not taken this up because he did not trust BUPA. Ms Lawrence concluded that there was support made available to the claimant but that he did not take this up for his own reasons. Given the available evidence, this was a conclusion which was reasonably open to her.

146. We also note the reference at the disciplinary hearing to the claimant saying that he did not want to go off on sick leave in order to avoid a stage 1 warning. We can understand the claimant's thought process. However, by not taking sick leave, the claimant was effectively signaling to the respondent that he was fit to attend work. An employee does have personal responsibility for deciding whether he is fit to work, or not. There is a limit to how far an employer can go behind any such assertion without risking an allegation that it is unfairly or unlawfully intruding into the employee's personal matters. The claimant obviously had mental capacity to assess his fitness for work and the respondent, in the end, had to accept his assertion that he *was* fit to work.

147. We note the medical evidence that the Tribunal was referred to in the course of the Tribunal hearing. The claimant had been referred for a heart appointment in March 2022 [668]. The fit note [670] indicated that he was awaiting a cardiology appointment and diagnosed stress/anxiety [670]. The claimant was invited to a Wellbeing Meeting on 28 February to see if any further support was required. This was to take place with Leanne Jackson [685]. The minutes of the meeting [691] show that his heart symptoms were discussed and the claimant indicated that he was likely to require further sick leave. The claimant did not want to be referred to occupational health as he did 'not trust the process.' The claimant did not want to use any BUPA services. A phased return to work was discussed. By March the evidence referred to the palpitations as the reason for the claimant's absence from work [698,701]. A return to work meeting was held and the record was in the

hearing bundle [702]. Reference was made to a diagnosis of tachycardia arrhythmia.

148. The hearing bundle also contained a separate section of medical evidence. However, there was nothing to suggest that this evidence was available to the respondent at the material time (vis a vis the chronology in this case.) The respondent could not take medical evidence into account when it was not aware of it. The disciplining officer indicated that if a document was 'in the pack' for the disciplinary then she reviewed it. The Tribunal therefore finds that she is likely to have seen the documents in section H of the hearing bundle. We concluded that the respondent's witnesses did not have access to the documents at section L of the hearing bundle during the relevant part of the chronology in this case.

149. The respondent did take account of the medical information that it received. It was not assisted by the claimant insofar he did not present any further medical evidence and did not want to engage with the respondent's internal processes or occupational health etc.

150. On 6 July 2022 claimant commenced a second period of ACAS Early Conciliation. The second ACAS Early Conciliation certificate was issued on the 12 July 2022.

<u>The appeal</u>

151. On 21 July 2022 the claimant appealed against the disciplinary outcome. This was initially not delivered to the correct recipient ([734-735, 741). On 27 July 2022 the claimant was updated regarding the appointment of the appeal hearing manager [742-744].

152. It turns out that the claimant was given the wrong email address to send his appeal to. The claimant suspected that this was a deliberate attempt to foil his appeal. The respondent's explanation was that the only difference between the two email addresses in question was the presence/absence of a 'full stop.' This occurred because the respondent manager typed the address manually rather than copying and pasting it into the document. The Tribunal is satisfied that the respondent is telling the truth about this as, even with the email difficulties, it did accept the claimant's right to appeal and set about organizing appeal hearings etc.

153. On 1 August 2022 the claimant submitted his second claim form to the Employment Tribunal.

154. The claimant was invited to an appeal hearing to take place on 9 August. This was later rescheduled at the claimant's request and took place on 23 August 2022. It was conducted by Rachel Wrigley [750-755]. The claimant was provided with a copy of the disciplinary policy and was reminded of his right to be accompanied at the hearing.

155. During the course of the appeal the claimant raised the issue of comparator employees being treated differently and more favourably than him. We observe that Ms Wrigley clearly listened to the points made by the claimant

during the appeal. The meeting was adjourned so that Ms Wrigley could carry out further investigation.

156. Ms Wrigley arranged to interview Ms Sinclair who was Customer Service Manager at the time. This was because the claimant had mentioned during the appeal that Ms Sinclair would know about Messrs Renshaw and McCaffery. Ms Sinclair was on annual leave initially.

157. On 30 August Ms Wrigley told the claimant that there was likely to be a delay in concluding the appeal as she needed to speak to someone who was on leave. Ms Wrigley also sought the data in relation to the comparators that the claimant had referred to. She requested complaints data for the claimant and the comparators from the respondent's internal complaints team [1088-1089.] Ms Wrigley also took time to listen to the recordings of the claimant's calls which were the subject of the disciplinary. She also reviewed all the relevant documents, evidence and policies.

158. Ms Wrigley interviewed Ms Sinclair and considered the information provided [760-762]. Initially Ms Sinclair indicated that she could not access the comparator data because the employees had already left the respondent's employment. The IT team therefore had to be approached in order to retrieve the information.

159. Ms Wrigley's own impression of the claimant's call recordings was that there was clear evidence of the claimant interrupting customers and becoming confrontational when asked not to, using an argumentative or a dismissive tone, threatening to hang up on customers, failing to apologise when an apology had clearly been necessary, unnecessarily antagonizing customers and displaying a lack of empathy towards the customer's needs. She noted that it was a pattern of behaviour which seemed to escalate over time:

    a. On 29 October when the customer asked questions about prices and the availability of discounts, the claimant simply stated that what the customer wanted was not available and promptly hung up on the customer before the customer's requests had been resolved.
    b. On 4 November the claimant repeatedly spoke over and threatened to hang up on a customer who had become distressed because there was a problem with her health insurance policy and she had not been called back as promised by another member of the team. The customer explained to the claimant that she was feeling anxious about the situation but the claimant did not show any empathy to her situation.
    c. On 17 January the customer had called to take up the offer of health insurance based on the quote they had received. The claimant interrupted the customer, told the customer not to speak to him in a condescending manner when they asked him not to interrupt them, challenged the customer to make a complaint when they expressed that they were unhappy about the way he was dealing with their call, insisted that there was no manager available for the customer to speak to without checking, was uncooperative when the customer wanted to make a complaint, repeatedly argued with the customer about the process and direction of the conversation and became more confrontational when challenged about this by the customer.

This call stood out to Ms Wrigley in particular because the customer remained polite and composed throughout but the claimant escalated the conversation and became very antagonistic unnecessarily after being asked by the customer not to interrupt him.

d. On 18 January the claimant asked the customer a question and then challenged her about why she did not know the answer originally when she subsequently found the information. He responded disrespectfully when the customer attempted to correct some of her personal information that he had got wrong and then accused the customer of being rude to him for doing so. The claimant then refused to transfer the customer to another member of staff and instead suggested that she just hang up, further challenged the customer when she tried to explain her personal circumstances and also when she mentioned that she would like to complain about the way that he was speaking to her. He responded in an antagonistic manner with "that's your personal opinion" when the customer mentioned that he was being rude. Again, Ms Wrigley found that the customer remained reasonable and polite throughout even when asking to raise a complaint and despite the claimant's belligerent approach.

160. Ms Wrigley felt that the disciplinary process was clear about what constitutes gross misconduct and that this includes being disrespectful to customers. She also noted that there is no requirement to give prior warnings before dismissing employees and that the stages of the process can be omitted depending on the seriousness of the matter. Where there is gross misconduct, no prior warning is necessary. Ms Wrigley concluded that the approach taken at the disciplinary stage was appropriate in this case and that Ms Lawrence had found that there had been four instances of unacceptable behaviour towards customers leading to both proactive and reactive complaints from customers, each of which would have warranted a formal disciplinary sanction on their own. Taken together they amounted to gross misconduct which warranted summary dismissal. Ms Wrigley's view was that this decision was appropriate and was not too harsh based on the exchanges that the claimant had had with the customers.

161. Ms Wrigley noted that the claimant did have a live warning on his file when the initial allegations were raised against him in November 2021 but that, notwithstanding the warning about his behaviour, he had gone on to commit further acts of misconduct. However, the warning had expired by the date of the disciplinary decision to dismiss the claimant and so was not the reason for the dismissal. The conduct amounted to gross misconduct and warranted dismissal in any case.

162. Ms Wrigley also considered the claimant's allegation of racial bias compared to white colleagues. Having reviewed the customer complaints data, Ms Wrigley concluded that the claimant's circumstances (as compared to those of Renshaw or McCaffery) were very different. The claimant's complaints were distinct in nature and volume to those of the other two employees. Ms Wrigley observed that the complaints in Mr Renshaw's log were all instances where the customer was either unhappy about something that the respondent could not offer, or the incorrect process was followed (e.g. omitting an option for a customer or filling out an incorrect form.) They were not about Renshaw's actual behaviour towards (or treatment of) the customer. Ms

Wrigley noted that McCaffery had very few complaints on the log and those that he had were about information being recorded or communicated incorrectly. She noted that the claimant had the most complaints about him as an individual on the log by far. Whilst some of the complaints related to information being recorded incorrectly, the majority cited adviser attitude or poor service. It was also apparent that both Renshaw and McCaffery had already left the business. Ms Sinclair indicated that their performance challenges were not relating to customer complaints. Ms Wrigley therefore came to the conclusion that the claimant was not being treated differently because of his race in comparison to Renshaw and McCaffery. In her view the disciplinary action was warranted in the claimant's case given the claimant's actions.

163. In her review of the disciplinary decision Ms Wrigley noted that not all of the disciplinary allegations had been upheld and that Ms Lawrence had taken the claimant's mitigation points into account. She had looked at the only example given by the claimant of customer abuse (which was the abuse by the customer in 2019.) That had been raised with Alex Perry and the procedure followed for co-operating with the police.

164. Ms Wrigley did not find any evidence that the dismissal was part of a malicious 'witch hunt' because the claimant had attempted to expose bullying and harassment within the department.

165. At the appeal stage Ms Wrigley took the view that the claimant did not appear to recognise the severity of his actions or take responsibility for them. He had had significant training and support (including coaching on call handling) but then went on to treat customers in this way repeatedly exhibiting a pattern of behaviour which suggested that this issue was likely to occur again in the future if the employment continued. There was no new evidence presented which may have led Ms Wrigley to overturn the dismissal decision. Ms Wrigley confirmed to the Tribunal that if she had thought that race had played any part or been a factor in the decision to dismiss the claimant, she would have had no hesitation in overturning the decision.

166. It is apparent from everything which the Tribunal read and heard that Ms Wrigley was engaged in reviewing the decision to dismiss rather than undertaken a complete rehearing. She was not required to do a rehearing in the circumstances of this case. It appears that she did not look at the medical evidence again for herself so much as she considered what evidence Ms Lawrence took into account in deciding to dismiss. It is important to note that the claimant did not ask her to review medical evidence for herself and did not provide her with any new evidence. He did not suggest that further (or new) medical evidence was available for the appeal manager. Rather, Ms Wrigley had reviewed the disciplinary outcome letter to check that the evidence had been taken into account and she found that it had.

167. The Tribunal also notes that part of the delay was due to the fact that the individual originally selected to hear the appeal was unwell. It took some further time for the respondent to locate an appropriate alternative manager to hear the appeal. The appeal hearing was also rearranged at one point due to the claimant's own unavailability and then there was a further delay because Ms Wrigley was on annual leave.

168. The appeal outcome was issued to the claimant on 20 September 2022 [763-769].

Allegations regarding Mr Mabbutt

169. Part of the claimant's Tribunal case relates to an allegation that, on an unknown date prior to 15 June 2021, Chris Mabbutt (a manager employed by the respondent) spoke with the claimant in a hostile manner when the claimant had called to report that he would not be able to work that day due to sickness. The claimant alleges that Mr Mabbutt questioned whether the claimant's sickness was genuine. The claimant was unable to specify the date that this occurred and the respondent was unable to identify this either, save that the claimant raised a grievance on 15 June 2021 which included a complaint about this alleged incident. That grievance complaint does not provide any further detail [482].

170. The claimant says that Mr Mabbutt is another example of a person who he had had personal bad experiences with. He said that once (when he called-in sick) and on another occasion when he was in 'wrap', Mr Mabbutt shouted at the claimant via Skype. No further specifics of the particular allegation against Mr Mabbutt seem to have been given by the claimant in the grievance investigation meeting. Mr Mabbutt is referred to as having asked 'intrusive questions' on a call about sick leave. The outcome to that grievance [583] gave examples of the sorts of questions he was likely to have asked the claimant (such as "are you seeing a GP?" ,"what are you doing to try to get better?").The grievance investigator found that these were the sorts of questions that had been rolled out across all call centres when dealing with sickness absence management issues.

171. In his written witness statement to the Tribunal the claimant did not provide any more specifics in relation this allegation. He said that Mr Mabbutt had 'grilled and harassed' him with a series of 'hostile and inappropriate questions' about his illness despite him being in a weakened and vulnerable position. However, he did not give specific examples of the sorts of questions which he thought were inappropriate.

172. In his evidence to the Tribunal Mr Mabbutt confirmed that part of his job role was to carry out key managerial duties, such as return to work meetings following sickness absence and day-to-day people management. He did not have a great deal of involvement with the claimant on a day-to-day basis because he was not one of Mr Mabbutt's direct line reports. (The claimant was actually managed by Leanne Jackson.) Mr Mabbutt and Ms Jackson are part of a team of seven Sales Team Managers in the Consumer New Business Department. They take it in turns to be the manager 'on duty' during the early and late shifts. During early and late shifts the department generally runs with fewer staff. When performing the duty role, the managers monitor the customer call queues and the dashboards which show call statistics for each of the Healthcare Consultants across the whole team. They help to manage and allocate Healthcare Consultants to customers (if required) and try to ensure that the call queue is being well managed. The duty manager also answers any questions or deals with requests from customers to speak to a more senior member of staff, if required. They also have a shared central

mobile phone that one of the managers holds so that members of the team can call the number ahead of the shift if they are unwell and will not be coming in to work.

173. To the best of Mr Mabbutt's recollection, the incident complained of by the claimant relating to sickness absence reporting never happened. He explained to the Tribunal that when an employee calls in sick, he always asks some standard questions so that he can record the reasons for the absence and understand how long they are likely to be away from work. Mr Mabbutt confirmed that he would do this for all employees, regardless of their race or other characteristics. Questions would include: asking the reason for the absence; querying whether the employee has been to see a doctor; asking whether they are taking steps to get well (such as taking medication); and whether they would prefer to work a partial shift or have a 'shift slide' rather than a full day of sick leave. (Mr Mabbutt has found that some employees find this option helpful if they have had high levels of absence and have exhausted their sick pay entitlement.) He explained that the reason for asking such questions is to help him assess whether he needs to arrange another member of staff to cover the employee's work if the employee is likely to be absent for more than a day or two. He noted that correctly recording and managing absence in line with the sickness absence policy is important to ensure that the respondent can offer appropriate support to the employee, both during the absence and when they come back to work. He explicitly confirmed that he would not question the genuineness of somebody's sickness absence in one of these conversations (or at all) as he is not a medical professional and it is not his place to do so. He believes that other colleagues in similar managerial positions would have taken the same steps as he has outlined to the Tribunal. Mr Mabbutt's evidence in relation to this issue was not really challenged by the claimant in cross examination.

174. On reviewing the available evidence the Tribunal found Mr Mabbutt to be a clear and credible witness. We had no good reason to disbelieve his account of his working practices surrounding sick absence phone calls. He gave examples of the routine questions he would ask and we can see that there is a sound managerial reason for asking such questions to find out necessary information about the employee's reasons for absence. Whilst the claimant may have felt that such questions were intrusive, this does not mean that they were unnecessarily so. To some extent, asking any employee about the reasons for their sick leave will necessitate a degree of intrusion into what would otherwise be seen as a private matter. This does not mean that Mr Mabbutt went beyond what was reasonably required in order to carry out his management role within the business. The claimant's allegation lacks specificity or detail. There are no examples given of the sort of question he is complaining about. In such circumstances it is difficult for the Tribunal to find the factual allegation proved. Consequently, we prefer Mr Mabbutt's evidence in relation to this allegation. We are not satisfied that Mr Mabbutt acted in an inappropriate or hostile way when asking questions about the claimant's sickness absence. We do not accept that he questioned the genuineness of the claimant's sickness.

175. The second allegation that the claimant makes about Mr Mabbutt is that on an unknown date prior to 15 June 2021 Chris Mabbutt contacted the claimant and shouted down the phone and told him that he was taking too long over

administrative tasks. Again, the claimant is unable to specify the date and the respondent was unable to identify the same, save that the claimant raised this in his grievance on 15 June 2021.

176. Once again, the claimant's allegation lacks specificity. In his witness statement he just refers to Mr Mabbutt shouting over a Microsoft Teams call. In the grievance the claimant did not provide any more detail other than that when the claimant was in 'wrap' Mr Mabbutt shouted at him via Skype. At the grievance hearing no further details were provided by the claimant. In the relevant grievance outcome letter, the manager dealing with the grievance found that she was unable to locate a witness to this situation and, therefore, was unable to uphold the allegation.

177. Mr Mabbutt addressed the allegation in his witness statement. To the best of his recollection, the alleged incident did not happen. He maintained that it was not the way that he would approach a conversation with an employee in relation to their performance. Mr Mabbutt was able to give the Tribunal further context about the way the department worked. He explained that colleagues took it in turns to be the duty manager for late and early shifts. The duty manager will monitor the dashboards which show call statistics for each of the healthcare consultants in order to identify where staff may be struggling with calls and to assist them in reaching their targets. One matter this might highlight is if a member of staff is taking a long time in what the respondent calls "wrap" (i.e., the administrative actions required to 'wrap-up' a call with the customer, such as writing notes on the account, sending quotes to the customer, or logging a complaint.) Mr Mabbutt confirmed that the average target for this metric is 240 seconds over the course of the month. Each manager reviews this with each of their direct reports individually on a monthly basis and it feeds into the end of year appraisal. He asserted that this also helps to ensure reasonable service times for customers which leads to higher customer satisfaction. Mr Mabbutt explained that if a member of his team appeared to be taking too long completing these administrative tasks, his approach would vary depending on how the busy the team was at the relevant time. If consultant availability was high and there weren't many customers in the queue, he would not generally contact anyone in the team unless the amount of time they were taking was extreme. However, if they had a high number of calls in the queue and someone was taking longer than average to complete the task, he would normally send them an instant message on Teams to ask them "are you okay?", "Do you need any help?" Or "there are [number] calls in the queue, are you available to take call?" Normally he would get a quick response to tell him what was happening and he could continue to support or check-in with them as required. If Mr Mabbutt Teams messaged someone and they did not respond (or he could see that they were still completing the administrative tasks five minutes later), he would give them a call to see if there was anything wrong or if they needed any help. However, he maintained that there are no circumstances where he would shout at a member of the team for taking too long with their administrative tasks. He pointed out that he had been manager for many years and that shouting at colleagues is not appropriate, productive, or necessary. He noted that it rarely achieved anything other than making the other person feel defensive or uncomfortable.

178. Taking all the evidence into account we are not satisfied that the claimant has proven his factual allegation in this regard. There is no evidence to support his assertion that he was shouted at by Mr Mabbutt for taking too long in wrap. Given the nature of Mr Mabbutt's, role he might well have to question a number of employees about the time taken to complete administrative tasks. There is nothing improper in this. It is part and parcel of his managerial role during 'duty.' There is no evidence to suggest that he went beyond the appropriate and reasonable scope of this managerial task.

<u>The calls at the heart of the allegations.</u>

179. The Tribunal was referred to transcripts [1061] and summaries of the call recordings [590, 635].

180. Call one took place on 18 October 2021. This is the call which was ultimately disregarded by the disciplinary investigation on the basis that the customer made racist, aggressive and abusive comments as part of the call. The claimant refused to pass the customer on to talk to another member of staff. The customer apparently raises their voice.

181. Call number two took place on 29 October 2021. The claimant seeks to answer the customer's questions and queries about coverage in a quote. The claimant ends the call abruptly and without real warning when the customer is still talking and before he has addressed all the questions. It appears that the customer wanted to continue the call and finish the conversation but they were not given that option when the claimant hung up.

182. Call number three took place on 4 November 2021. The customer was already unhappy because of a call with another adviser the previous day. In the course of the call the claimant repeatedly talks over the customer and will not let them finish what they are saying. The claimant reacts to the fact that the customer was upset as a result of the call the previous day. The customer is upset and says she feels anxious but the claimant's manner does not adapt or change to acknowledge this. He repeatedly told her not to raise her voice and threatened to end the call.

183. Call number 4 took place on 17 January 2022. The claimant complains that the customer is being condescending towards him. The claimant repeatedly interrupts the customer. The customer wants to speak to a manager. The claimant puts the customer on hold, ostensibly to see if a manager is available. He does *not* check manager availability but then tells the customer that there is no manager available. The customer feels that the claimant has been condescending towards them. He becomes argumentative with the customer.

184. Call number 5 took place on 18 January and involves the claimant repeatedly talking over the customer and being rude. He would not allow the customer to correct some incorrect information. He refused to transfer the customer to another call handler and was difficult about the customer wanting to make a complaint. The claimant was rude and shouted at the customer.

<u>The comparators</u>

185. For the purposes of his Tribunal claim, the claimant relied upon two named comparators: Mr Renshaw and Mr McCaffery. We received some evidence about their particular circumstances and we make our findings as follows.

186. Mr Renshaw and Mr McCaffery were both employed to do the same job role as the claimant and he seeks to compare the way that the respondent treated him in relation to customer interactions/conduct issues with the way that the respondent treated Mr Renshaw and Mr McCaffery in what, he says, were similar circumstances.

187. In order to carry out this comparison it is necessary to describe the various performance and quality monitoring standards which were in place in the respondent's business.

188. Each employee that was undertaking the claimant's role was subject to a standardized performance assessment. The respondent had a Quality Assurance (hereafter "QA") team. The QA team undertook a series of audits of the employee's calls with customers. A selection of the employee's calls would be monitored and assessed. There was a rating system for this purpose which ranged through 'pass', 'pass with learning,' 'low customer impact,' 'medium customer impact,' and 'very high customer impact.' The reference to customer impact was a reference to the adverse impact on the customer participating in the call. A grading of "very high customer impact" meant that on listening to the call the QA team had recorded either actual or potential very high impact on the customer during/as a result of the call. Anything other than a 'pass' may involve potential or actual detriment to the customer (e.g. a quote was not sent.) The QA team did not listen to every call done by a particular employee and their review could only provide a snapshot picture of performance. If the QA team noted higher numbers of adverse customer impact rated calls, then that employee would have a higher number of calls reviewed and audited in the next review period. Likewise, the employee who performed well in one audit period would have fewer of their calls reviewed during the next review period.

189. The purpose of the QA reviews was to look at an employee's *performance* in the role. A call recorded as having a very high impact on a customer would always be a performance issue but it may or may not involve an element of 'conduct/misconduct.' The QA system was primarily a performance measurement not a conduct procedure. It would assess performance and capability and might result in further training in order to improve the quality of the calls undertaken. On occasion a call which was audited by QA might raise *conduct* concerns. This might result in separate conduct procedures being undertaken by the respondent. The evidence might suggest that a particular call fell on the 'won't' side of the line rather than the 'can't/don't know how to' side of the line for a particular employee (i.e. conduct vs capability.) Thus, we were satisfied that a call could be graded as "very high customer impact" on the audit and it might or might not also be seen as a conduct issue. It was quite possible for a customer to have a bad customer experience or receive poor customer service without that being a matter of misconduct. It might be a training and development issue, for example. Thus, when looking at audit tables it is vital to bear in mind what the data actually represents. A poor audit result is not necessarily also evidence of misconduct. Depending on the

particular circumstances of the call it may be performance/capability rather than misconduct, and vice versa.

190. The QA audit information would be fed into the respondent's other policies and procedures. The employee's QA grades would be passed on to their line manager. That line manager would review the grades and listen to the call recordings themselves. If, on hearing the call, the manager disagreed with the grade awarded by QA, the manager could appeal that grade on his employee's behalf. The grade would then be reviewed and could be changed or maintained, as appropriate. Alternatively, if the manager agreed with the grade given by QA, the record would be accepted. The QA record would then form part of the evidence used to carry out performance appraisals and would often be discussed between manager and employee at such appraisal meetings. Calls can be inadequate for all sorts of reasons without there being a customer complaint. The inadequacies highlighted by the audit might include performance/capability issues and also conduct issues. Performance issues are dealt with by performance management procedures whereas conduct issues will be dealt with via the disciplinary procedure. Issues may also be picked up outside of the audit process.

191. We find that there may be some interrelationship between the QA system and conduct proceedings but this depends on the nature and circumstances of the case in question. So, for example, in the course of a QA audit, the QA team may pick up evidence of misconduct on the part of the employee (rather than performance shortcomings). This may be referred onwards and addressed through a disciplinary process. If classified as capability it will be dealt with under the appropriate capability processes. However, not all misconduct allegations are necessarily derived from the QA audit. Another source of misconduct/disciplinary allegations may be customer complaints. Upon review of any complaints received, this may result in the need to take the employee through part of a disciplinary process.

192. In examining the evidence in this case, it was important for the Tribunal to bear in mind the different purposes of the respondent's different records, policies and procedures. It is vital that any comparisons made between the records of different employees actually involve the Tribunal comparing 'like with like'. The old metaphor of 'comparing apples with apples rather than apples with oranges' is particularly apt here.

193. The claimant alleges that Mr Renshaw has a call record which is far worse than the claimant's. He refers to both the severity and the number of bad customer interactions. He says that Mr Renshaw was not handed a similar penalty to the claimant.

194. We examined the call audit table information which was provided in relation to Mr Renshaw [984-987]. This was the QA record and *not* a disciplinary record. Each call reviewed has its own identifier. There may be more than one entry in relation to the same call. This means that there are several features of one call which are worth recording for QA purposes. It does not mean that the individual has more than one bad call recorded against his name. Further along in the table there is a summary of the issues arising and any relevant comments made upon review. The last column shows the grade received alongside each entry and not just each call. Thus the data recorded

for Mr Renshaw could be summarised as a review period of 16 January 2019 until 5 March 2020. During that period 15 calls were reviewed and this produced 70 questions/entries. The data in relation to Mr McCaffery [987-989] covered the period 26 February 2021 to 2 August 2021. During that period 2 calls were reviewed and this produced 18 entries/questions. For the claimant the data [987-988] covered the period from 6 February 2020 to 2 August 2021. During that time 3 calls were reviewed and this produced 20 entries/questions.

195. We heard evidence about specific elements of Mr Renshaw's audit record. So, for example, at the top of page 984 we saw the record relating to a call starting at 9.22 on 16 March 2019. This was graded as very high customer impact. Some elements of the problem related to not keeping adequate records, misadvising the customer about loyalty in renewal (which could lead to a customer complaint). The core problem noted was Mr Renshaw's failure to log a complaint that was made about a colleague. Although these issues were ranked as very high impact on the customer, this did not mean that they were misconduct issues. Rather, they would be capability issues where coaching and training would be required rather than a conduct disciplinary procedure. Thus, Mr Mabbutt gave evidence that he (as Mr Renshaw's line manager) would have listened to the calls identified by QA and would have determined that these were capability issues where training was required. This would then be dealt with through a different process. Initially there might be coaching, then a DAP and a review of outcomes. If this was not successful the employee might progress to a PIP (which was more formal). There were progressive stages to get to a stage 1 capability outcome. If improvement was not satisfactory then it could progress to stage 2 and then a final written warning. An employee could then be dismissed on capability grounds (rather than conduct grounds).

196. We also heard oral evidence about a call on the log for Mr Renshaw [987] about him not listening properly during a call involving a person with Parkinson's disease. There was also reference to a call where a medical condition relating to a customer's eye involved underwriting errors and where Mr Renshaw did not repeat full data protection checks when the customer's spouse joined the telephone conversation. Mr Mabbutt was Mr Renshaw's line manager and we are satisfied that he reviewed the calls at the time the audit was produced and decided that the issues were capability/performance issues rather than conduct issues.

197. Mr Mabbutt gave evidence that in Mr Renshaw's case he was progressing through capability procedures and then a conduct issue was identified regarding a data protection breach. That incident was a conduct matter rather than a capability matter. Mr Renshaw went through a disciplinary investigation but then tendered his resignation before any further disciplinary action could be taken. Mr Mabbutt's view was that Mr Renshaw was a risk to the respondent's business on capability grounds but that the data protection breach was a conduct issue. He made the point that some data breaches are capability issues (e.g. forgetting to repeat data protection checks when a call is cut off halfway and the employee has to call the customer again to finish off the conversation.) Other breaches would be conduct matters.

198. On 12 November 2019 a call took place between Mr Renshaw and a customer during which a data protection issue occurred [958-963]. The data protection issue was flagged to management following a routine quality assurance audit. It was classed as a conduct matter. It related to Mr Renshaw discussing a customer's medical matters with the customer's partner without consent or authorization. On 25 November 2019 an initial investigation report was prepared for Mr Renshaw following the data protection issue. The investigator recommended that the case be considered at a disciplinary hearing. Mr Mabbutt categorised this as a conduct issue. At this point in time Mr Renshaw had a stage II written warning capability (quality assurance audit outcomes) and a stage I written warning capability (absence) on file. On 26 November 2019 Mr Renshaw was interviewed [964-967). On 5 December 2019 Mr Renshaw was invited to a disciplinary hearing following the allegation of a breach of data protection policy [968-969]. The invitation letter referred to potential gross misconduct. It was signed by Dan Scanlon so it may have been Mr Scanlon who chose to categorise the conduct as potential gross misconduct. Mr Renshaw subsequently resigned and left the respondent before any further steps could be taken in the disciplinary process.

199. We also received separate information about customer complaints. At the appeal stage the appeals officer requested this information [1088-1089]. Ten complaints are recorded against the claimant's name. (These are apparently different complaints from the five customer complaints which formed the subject matter of the disciplinary proceedings against the claimant.) Mr Renshaw also had ten customer complaints on his record and Mr McCaffery had four complaints on his record.

The Law

Direct discrimination

200. Section 13 Equality Act 2010 states:

    (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.

201. Section 23 of the Equality Act 2010 provides:

    (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case…

202. In some cases it may be appropriate to postpone consideration of whether there has been less favourable treatment than of a comparator and decide the reason for the treatment first. Was it because of the protected characteristic? (*Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL; Stockton on Tees Borough Council v Aylott*)

203. The claimant must show that they received the less favourable treatment 'because of' the protected characteristic. In _Nagarajan v London Regional Transport 1999 ICR 877, HL_ *Lord Nicholls stated: "a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'."*

204. The judgment in R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC summarised the principles that apply in cases of direct discrimination and gave guidance on how to determine the reason for the claimant's treatment. Lord Phillips emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination. Depending on the form of discrimination at issue, there are two different routes by which to arrive at an answer to this factual inquiry. In some cases, there is no dispute at all about the factual criterion applied by the respondent. It will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on a prohibited ground, direct discrimination will be made out. The decision in such a case is taken on a ground which is inherently discriminatory. The second type of case is one where the reason for the decision or act is not immediately apparent and the act complained of is not inherently discriminatory. The reason for the decision/act may be subjectively discriminatory. In such cases it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

205. The relevant comparator must not share the claimant's protected characteristic. There must be no material difference between the circumstances relating to each case. The circumstances of the claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the claimant's treatment are the same or nearly the same for the claimant and the comparator (paragraph 3.23 EHRC Employment Code.) With the exception of the prohibited factor (the protected characteristic) all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same but they must not be materially different. (Macdonald v Ministry of Defence, Pearce v Governing Body of Mayfield Secondary School [2003] ICR 937). Whether the situations are comparable is a matter of fact and degree (Hewage v Grampian Health Board [2012] ICR 1054.)

<u>Section 26: harassment</u>

206. Section 26 states:

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

….

(4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-
    (a) the perception of B;
    (b) the other circumstances of the case;
    (c) whether it is reasonable for the conduct to have that effect.

207. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

208. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

209. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In <u>Unite v Naillard [2017] ICR 121</u> the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in <u>Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495,</u> "there must still … be some feature or features of the factual matrix identified by the tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the

characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."

210. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) *and* (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal's decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

211. As stated in Dhaliwal:

'If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

Section 27: Victimisation

212. Section 27 Equality Act 2010, so far as relevant, provides that:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act…
>
> (2) Each of the following is a protected act –
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

213. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

214. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

215. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination (see above). The protected act need not be the sole cause of the detriment as long as it has a significant influence in a Nagarajan sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Burden of Proof

216. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act. Although similar principles apply, what needs to be proved depends, to a certain extent, on the nature of the legal test set out in the respective statutory sections.

217. The wording of section 136 of the Act should remain the touchstone.

218. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

219. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

220. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.
b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.
c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.
d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.
e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.
f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the

respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

221. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

222. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation.

223. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

224. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

225. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic.

226. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

227. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected characteristic" for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that s/he was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc environment for him/her. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although s/he clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

228. In a victimisation claim where there is clear evidence of the reason for the treatment (which forms the detriment) there is no need for recourse to the shifting burden of proof in section 136. However, where the shifting burden of proof does come into play it is for the claimant to establish that he/she has done a protected act and has suffered a detriment at the hands of the employer. Applying the approach in Madarassy would suggest that there needs to be some evidence from which the tribunal could infer a causal link between the protected act and the detriment. One of the essential elements of the prima facie case that the claimant must establish appears to be that the employer actually knows about the protected act (Scott v London Borough of Hillingdon [2001] EWCA Civ 2005).

Unfair dismissal

229. The relevant part of the Employment Rights Act 1996 is section 98 which states (so far as relevant):

(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-
….
(b) relates to the conduct of the employee,
….

(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 sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

230. In line with the Employment Rights Act it is for the respondent to prove the reason or principal reason for the dismissal. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' *(Abernethy v Mott, Hay and Anderson 1974 ICR 323)*.Thereafter the burden of proof is neutral as to the fairness of the dismissal (*Boys and Girls Welfare Society v Macdonald 1997 ICR 693, EAT).*

231. In a conduct dismissal case the questions to be addressed by the tribunal are:
a. Did the respondent have a genuine belief that the claimant was guilty of the alleged conduct?
b. Did the respondent carry out a reasonable investigation into the allegations of misconduct?
c. Following the investigation, did the respondent have reasonable grounds or evidence for concluding that the claimant had committed the alleged misconduct?
d. Did the respondent follow a fair procedure in relation to the disciplinary allegation? If there is a failure to adopt a fair procedure at the time of the dismissal, whether set out in the ACAS Code or otherwise (for example, in the employer's disciplinary rules), the dismissal will not be rendered fair simply because the unfairness did not affect the end result. However, any compensation is likely to be substantially reduced (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*)

e. Did the decision to dismiss the claimant fall within the band of reasonable responses which a reasonable employer might have adopted?

(See *British Home Stores Ltd v Burchell 1980 ICR 303, EAT)*

232. In considering the so-called 'band of reasonable responses' the tribunal must not substitute its own view for that of the reasonable employer *(*Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT*;* Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA). As stated in the Jones case:

'*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
(1)the starting point should always be the words of [S.98(4)] themselves;
(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;
(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

233. The band of reasonable responses applies to the question of the procedural fairness of the dismissal as well as the substantive fairness of the dismissal. (J Sainsbury plc v Hitt 2003 ICR 111, CA*;* Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA.*)*

234. The reasonableness test is based on the facts or beliefs known to the employer *at the time of the dismissal*. A dismissal will not be made reasonable by events which occur after the dismissal has taken place *(*W Devis and Sons Ltd v Atkins 1977 ICR 662, HL.*)*

235. The claim of unfair dismissal is a statutory claim and statutory principles and associated case law guidance apply. It is not the same as the common law concept of wrongful dismissal and the same case facts may result in different outcomes under the statutory test as compared to the common law test. The question to be addressed is that posed by section 98(4) Employment Rights Act 1996. This requires the tribunal to look at the fairness of the dismissal. It does not require the employer to specifically categorise the conduct as gross misconduct entitling the employer to dismiss summarily before it can decide that the dismissal was fair within section 98(4), although the two concepts may well coincide in many cases. Dismissal for a first offence properly categorised as gross misconduct may often be assessed as a fair dismissal

within section 98(4). The question for section 98 is whether the decision to dismiss falls within the range of reasonable responses in all the circumstances. Was the conduct itself serious enough? What other relevant factors are there? Generally speaking, dismissal for a first offence will be reserved for acts of gross misconduct but there is no statutory rule to that effect.

236. If an employer categorises the actions of its employee as gross misconduct this is not the end of the matter. They still need to consider whether dismissal is the fair and appropriate sanction. Are there mitigating factors indicating that there should be a lesser sanction? (Indeed, aggravating factors may also be considered and taken into account). What is the attitude of the employee to their own conduct? Is there remorse? Will the conduct be repeated in future? There *may* be factors in any given case which take the decision to dismiss outside the range of reasonable responses even where there is said to be gross misconduct.

237. An employee may argue that he has been unfairly dismissed on the basis that the employer has treated him inconsistently as compared to other employees. Dismissal might be considered an unfair sanction because the employer has, in the past, treated other employees guilty of similar misconduct more leniently. Such a dismissal may then be unfair because it is not in accordance with equity within the meaning of section 98(4) (see Post Office v Fennell [1981] IRLR 221). However, provided the employer has considered previous situations and distinguished them on rational grounds, it will not be possible to say that the sanction of dismissal is inappropriate. In general terms, inconsistent behaviour can arise in one of two ways. First, the employer may treat employees in a similar position differently. Second, he may, in relation to a particular employee, have treated certain conduct leniently in the past and then suddenly treated it as a dismissible offence without any warning of this change in attitude. Both forms of inconsistency may render a dismissal unfair.

238. Although the employer should consider how previous similar situations have been dealt with, the allegedly similar situations must truly be similar (*Hadjioannou v Coral Casinos Ltd* *[1981] 352)*.This is likely to set significant limitations on the circumstances in which alleged inequitable or disparate treatment can render an otherwise fair dismissal unfair. Second, an employer cannot be considered to have treated other employees differently if he was unaware of their conduct. Third, if an employer consciously distinguishes between two cases, the dismissal can be successfully challenged only if there is no rational basis for the distinction made (*Securicor Ltd v Smith* [1989] IRLR 356*.)*

239. In the event that a claimant establishes that he or she has been unfairly dismissed the question of remedy will arise. In most cases the issue is one of compensation rather than reinstatement or re-engagement. The tribunal will then consider what loss the claimant had sustained in consequence of the alleged dismissal. The tribunal will then consider making a basic and/or a compensatory award (s118 ERA 1996). The tribunal will consider whether the claimant has taken reasonable steps to mitigate his loss in determining the period/amount of loss to be compensated. The tribunal may also consider whether the basic or compensatory award should be reduced pursuant to

section 122(2) and/or section 123(6) of the Employment Rights Act 1996. A reduction in the basic award may be made where and to the extent that it is just and equitable to do so based on the claimant's conduct prior to the dismissal. A reduction may be made to the compensatory award where it is found that the claimant's blameworthy or culpable conduct contributed to the dismissal.

The Tribunal's conclusions in this case

240. We addressed the agreed list of issues in determining the case and coming to our conclusions [123]. We did not consider the jurisdictional issue of time limits until we had reached our conclusions in relation to the substantive causes of action.

Harassment related to race (section 26)

241. The first allegation related to Mr Mabbutt speaking with the claimant in a hostile manner when the claimant had called to report that he would not be able to work that day due to sickness. It was alleged that Mr Mabbutt questioned whether the claimant's absence was genuine. In line with our findings of fact above, we are not satisfied that the claimant has proved the factual allegation which underpins this complaint of harassment. We have not found that Mr Mabbutt acted in the manner alleged by the claimant. In those circumstances the claim cannot succeed and it is unnecessary for us to consider further whether Mr Mabbutt's alleged actions constituted unwanted conduct, related to race and which met the definition requirements of section 26.

242. The second allegation was that Mr Mabbutt contacted the claimant and shouted down the phone at him telling him that he was taking too long over administration tasks. In line with our findings of fact above, we are not satisfied that the claimant has proved the factual allegation which underpins this complaint of harassment. We have not found that Mr Mabbutt acted in the manner alleged by the claimant. In those circumstances the claim cannot succeed and it is unnecessary for us to consider further whether Mr Mabbutt's alleged actions constituted unwanted conduct, related to race and which met the definition requirements of section 26.

243. The next few allegations related to the comments allegedly made by various members of the team during a meeting on 14 October 2021. The first allegation was that Leanne Jackson had said *"her name sounds like a racehorse."* In line with our findings of fact above, we do not find that Leanne Jackson said precisely what is alleged. She said something similar. We found that she said, "the name reminds me of the horses, and I would bet on [Ms Tse] because she will be brilliant."

244. Taking the comment that we have found proven we have considered whether it constitutes harassment within the meaning of section 26 Equality Act 2010. We considered whether the comment could be said to be related to race and

came to the conclusion that it could not. The reference to racehorses was a play on words (or pun) relating to the colleague's first name, Gigi. That first name is not intrinsically related to any particular nationality or race. A woman of any race could have that name. The fact that this particular colleague was coming from China does not mean that any reference to her first name is automatically and intrinsically a reference to her race. The comment did not relate to her second name (Tse) which might more obviously be applicable to a particular nationality or racial origin.

245. Secondly, it is evident that Ms Jackson did not make the comment with the purpose of violating the claimant's dignity or creating the necessary intimidating, hostile, degrading, humiliating or offensive environment for the claimant. She made the comment in order to move the discussion on to other matters and 'draw a line' under this topic of conversation.

246. We have considered whether, notwithstanding Ms Jackson's purpose, the comment had the necessary effect on the claimant (as set out in section 26(1)(b) Equality Act). We have taken the claimant's subjective perception into account, along with all the surrounding and relevant circumstances of the case, including whether it was reasonable for the comment to have that effect (section 26(4)). On balance, we are not wholly convinced that the comment had the subjective effect for the claimant that he suggested. The only way that he could have misunderstood the comment and inferred that it was offensive is if he did not know the slang term for racehorses- "gee-gees." It is perhaps unlikely that the claimant would be unaware of this slang term. In any event, even if we accept that the claimant found it subjectively offensive because he did not understand the terminology or the pun which was intended, we do not accept that it was reasonable for the comment to have the section 26(1)(b) effect in all the circumstances. It was not reasonable for the claimant to consider the comment offensive, hostile, degrading or humiliating etc. The evidence we heard was that the claimant had a good relationship with Leanne Jackson at that time and the context of the comment was the introduction of a new member of staff. Furthermore, the comment itself is actually complementary to the employee in question, suggesting that she will be really good at her job. If the claimant was offended then he was, unfortunately, displaying a degree of hypersensitivity. He was looking to find offence in his manager's comments.

247. In light of the above, we are not satisfied that Leanne Jackson's comments constituted race related harassment when properly examined applying the legal test in section 26. This part of the claimant's claim therefore fails.

248. In line with our findings of fact set out above, we are not satisfied that Mr Wilding or Mr Whitehouse made the comments which are attributed to them by the claimant. The claimant has therefore failed to prove the factual allegations which underpin those complaints of harassment at paragraphs 2.1.3.2 to 2.1.3.4 of the List of Issues. Accordingly, those allegations of section 26 harassment fail and are to be dismissed.

249. At issue 2.1.4 the claimant alleges that on or around 18 January 2022 Dave Scanlon told the claimant to stay logged onto his phone but did not allow him to take any calls at this station, in order to cause the claimant humiliation and intimidation.

250. In line with our findings of fact, we accept that the claimant was required to stay at work but precluded from taking customer phone calls for a period of approximately 1 ½ days. However, we cannot see that the instruction related in any way to the claimant's race. Rather, it was intended to be a proportionate way of responding to the disciplinary allegations pending the investigation and any disciplinary outcome. The same decision would/could have been made in relation to any employee, regardless of race, assuming that they faced the same or similar allegations. Nor do we accept that the instruction not to take calls had the necessary harassing purpose or effect within the meaning of section 26(1)(b). The decision was taken for managerial reasons, as found above. It was not intended to humiliate the claimant or make him feel uncomfortable in any way. Nor is there any evidence that anyone noticed it or commented to the claimant about it. There is nothing to suggest that it was remarked upon in any way. It would not have been obvious to a bystander that anything particular was going on, particularly as the claimant would have other tasks to do at work apart from take phone calls and given that the instruction was only in place for about 1 ½ days. It is not apparent that anyone would have had time to notice what was happening with the claimant's work practices during that time.

251. In the circumstances it would not be reasonable for the claimant to conclude that his circumstances had been noticed by his colleagues, still less that they would deduce that he was the subject of misconduct allegations. In all the circumstances it is unlikely that the conduct had the necessary section 26(1)(b) effect, either subjectively or when considered objectively taking into account all the circumstances of the case.

252. In those circumstances the necessary components of an act of harassment as required by section 26 are not found in this case. This allegation of harassment therefore fails and is dismissed.

253. The allegation at paragraph 2.1.5 is that the claimant asked Dave Scanlon why he had been taken off the phone and that in response Dave Scanlon was aggressive and demeaning. In short, the claimant led no evidence at Tribunal in relation to this allegation. He did not describe this alleged event in the course of his evidence. He has not supplied the evidence on which we can find it proven. The allegation is therefore dismissed without need to consider whether it would have constituted harassment if it had happened in the manner alleged.

254. Paragraph 2.1.6 of the List of Issues addresses the suspension. It is a matter of record that the claimant was suspended for the remainder of the disciplinary investigation. There is nothing to suggest that this was connected to race in anyway. Rather, the business reasons for deciding to suspend the claimant and deciding to implement a suspension at this stage in the chronology are set out above. We accept the respondent's rationale for the suspension. It is genuine. It had nothing to do with race. The suspension letter is also referred to above in the findings of fact. We quote the portion where the claimant is instructed not to contact colleagues during the suspension. Whilst this could be seen as rather heavy-handed, we can see that this is intended to preserve the integrity of the disciplinary investigation. It would

have been done in any similar disciplinary case, irrespective of any issue of race. Whilst the claimant would not be happy about it, we do not accept that he would have been reasonable in finding it offensive, hostile, degrading intimidating etc. He would need to view the instruction within the context of the disciplinary investigation and noting that he could seek permission to contact individuals, if required. It was not a blanket prohibition without prospect of amendment. Any reasonable employee (and indeed the claimant) must have realised why this instruction was given and that it was nothing to do with his own personal protected characteristics but rather the consequence of the chronology of events, the nature of the allegations against him and the need to preserve the integrity of the disciplinary process.

255. In light of the above we do not consider that the allegations at paragraph 2.1.6 can be considered to be harassment related to race within the meaning of section 26. Those complaints fail and are dismissed.

256. The claimant alleges, at paragraph 2.1.7, that the respondent delayed the disciplinary and appeal process. We have set out the timeline of events above. Any delays therefore need to be viewed in context and taking account of the relevant circumstances and explanations. The delay in concluding the investigation was largely because the claimant issued another grievance which had to be properly dealt with before a disciplinary hearing could go ahead. The dismissal decision was communicated quickly to the claimant (albeit he should not have had to wait for two weeks to get the outcome letter and reasons.) There were good legitimate reasons for the delays in the conclusion of the appeal. The respondent was following up appropriate lines of enquiry and there were some unavoidable delays when relevant people were away from work and could not provide necessary information and assistance. Furthermore, a number of meetings were delayed at the claimant's own request.

257. Thus, the overall picture is that there were some delays to the process but there were good and necessary explanations for those delays. Furthermore, delay is a relative concept in the context of disciplinary processes. Looked at dispassionately, the delays in this case were by no means unreasonable. They were not deliberate and the claimant was not disadvantaged by them.

258. The explanations for the delays also indicated that the delays were in no way related to race. They occurred for other reasons. This aspect of the statutory test is not met. Nor do we consider that the delays had the necessary harassing purpose or effect, applying the language of section 26(1)(b).

259. At paragraph 2.1.8 of the List of Issues the claimant alleges that the respondent failed to provide the claimant with a copy of his investigation notes with his disciplinary outcome until he requested them several times. Given the evidence that we have heard, it appears that it was the notes from the disciplinary hearing which were in fact delayed. (The notes of the investigation meetings were contained in the investigation report and the claimant received a copy of these at the relevant time). It appears that the claimant did not get the minutes of the disciplinary hearing with the outcome letter and only received them at the appeal stage [737]. He received them on 21 June. There is no evidence before the Tribunal to suggest that the claimant had requested a copy of this document several times.

260. Clearly, the claimant should have got a copy of those disciplinary hearing notes earlier than he in fact did. However, we are not satisfied that the delay was in any way related to race rather than to administrative oversight. Nor can we accept that this had the purpose or effect of creating an offensive, hostile, degrading, humiliating, intimidating etc environment for the claimant within the meaning of section 26(1)(b). To conclude otherwise would be for the Tribunal to endorse an unreasonable level of hypersensitivity. The claimant certainly received the document in good time to make any necessary use of it for the purposes of his appeal. That is the practical and material reason for providing the notes and the claimant would have been able to use them for that purpose, as intended. There was nothing about the way that this was done or the way that the claimant was communicated with about this that would render the experience offensive, humiliating etc. This aspect of the claimant's harassment claim therefore fails to meet the section 26 test and is dismissed.

Direct race discrimination (section 13)

261. The claimant largely repeated the factual allegations for the harassment claims within the framework of a direct discrimination claim. Thus some of our findings of fact have the same relevance here as in relation to the section 26 complaints.

262. At paragraph 3.1.1 of the List of Issues the claimant alleges that he was refused entry to the building in January 2019 until he removed his hat even though white employees, wearing hats, were allowed to enter the building. In line with our findings above, it is apparent that the claimant and his colleague Akeem were both asked to remove hats before being allowed into the building. However, other white colleagues were also asked to remove their hats before entry, as observed by Mr Gill. This was due to a change in policy at the respondent due to an earlier security breach. The respondent wanted to ensure that no headgear obscured the face of the individuals on entry. Whilst it was not properly communicated to the workforce, there was a good security based reason for this. We accept the respondent's evidence explaining the reason why employees were asked to remove their hats.

263. The evidence we have heard indicates that white comparators were also asked to remove hats and headgear if they obscured the face of the staff member. The claimant's hat had a peak on it and therefore was classed as partially obscuring his face. Whilst there may have been cases where white people were not stopped, there were also recorded cases where they were stopped. There was therefore no differential treatment as between the claimant and the comparator(s). He was not treated less favourably than the white comparator in similar circumstances (section 23) was or would be. Both employes would be asked to remove headgear. Nor can it be said that the claimant was treated this way because of race. The Tribunal heard clear and consistent evidence that the reason for the request was the security policy around hats obscuring faces. That policy consideration applied across the board. This allegation of direct discrimination therefore fails to meet the test in section 13 and must be dismissed.

264. The factual allegations at paragraph 3.1.2 and 3.1.3 of the List of Issues have not been proven. They are the same allegations about Mr Mabbutt as the claimant made in relation to his section 26 claim (see our findings as set out above). As the necessary facts have not been proven, these allegations of direct discrimination must therefore fail and are dismissed.

265. At paragraph 3.1.4 the claimant alleges that when he was racially abused by a customer on or about 2 May 2019, the respondent failed to properly investigate the complaint within a reasonable time period and failed to adequately support the claimant. This incident predates the disciplinary allegations against the claimant (and is separate to the racial abuse involved in call number 1 of the calls relied on for the disciplinary procedure). It resulted in a criminal prosecution which seems to have started in May 2021.

266. The only part of the allegation really addressed in the claimant's evidence to the Tribunal related to the respondent's alleged failure to release the call recording to the police in a proper and timely manner. No wider faults on the respondent's part were really pursued by the claimant in his own evidence or in his cross examination of the respondent's witnesses. In the absence of evidence to substantiate the wider complaint of an inadequate investigation and inadequate support for the claimant, we cannot find the wider allegation proven.

267. In relation to the release of the call recording (and as set out above) the respondent intended to release the call recording but was aware of potential GDPR implications. Those employees dealing with the request therefore sought guidance from the appropriate GDPR team within the respondent business. There was a particular process which needed to be followed and which required a particular type of written request from the police. The paper trail shows that the employees did their best to release the recording promptly and it shows the reasons for the delay. The delay, although regrettable, was not of inordinate length.

268. Given the available evidence, we are satisfied as to the reasons for the delay and the respondent's actions regarding the call recording. We are satisfied that this had nothing whatsoever to do with race. Whilst it may have been frustrating, and the claimant may have thought it unnecessarily prescriptive, the delay did not occur because of his race. Put another way, if a similar complaint and request had arisen in the case of another employee, whether white or of an altogether different ethnicity, the same delays would have been encountered for the same reasons. Only once the correct paperwork was received from the police would the respondent have released the recording. There was no less favourable treatment of the claimant than of a suitable comparator.

269. The allegation does not meet the section 13 test and so must be dismissed.

270. Paragraphs 3.1.5 and 3.1.6 are duplicates and refer to the disciplinary suspension. Clearly the claimant was suspended. He compares himself to Renshaw and McCaffery in this regard, or to a hypothetical comparator. Mr Renshaw and Mr McCaffery were not in comparable circumstances regarding customer complaints. They would not be appropriate comparators on that

basis. Further, the performance audit data relates to performance/capability concerns rather than conduct matters. That is not the correct comparison to make with the claimant. He was suspended for disciplinary conduct reasons. There is no evidence of any conduct/disciplinary concerns regarding Mr McCaffery. It is therefore not surprising that he was not suspended. His situation was different and he is not suitable comparator.

271. Mr Renshaw was different in that he had had performance concerns raised with him and had been taken part of the way through capability/performance management procedures and had received a warning as a result. He then faced an allegation of gross misconduct. There is no evidence to confirm whether or not he was suspended but we do see that he was invited to a disciplinary hearing but resigned and left employment before the disciplinary process could go any further.

272. Thus, whilst the claimant's case has some similarities with Mr Renshaw's, it is by no means the same. The allegations against them were both disciplinary allegations of gross misconduct but they were not the same type of gross misconduct. Furthermore, Mr Renshaw's disciplinary case related to one particular alleged data protection breach. The claimant's case related to four separate customer calls and focused on customer complaints arising from the claimant's attitude and manner towards customers. Furthermore, the claimant was not suspended initially but only once further allegations came to light. Those later allegations arose in relation to a period of time when the claimant was aware that he was under investigation. There is an element of escalation in the claimant's case which was not present in Renshaw's case. The respondent had taken steps short of suspension by taking the claimant off calls but there were further problems and the claimant still had access to customers via other means. In order to protect the claimant and the business it was advisable to remove him from the workplace to prevent further problems or complaints. That element of repetition/escalation was not present in Mr Renshaw's case.

273. In light of these differences we are not satisfied that Mr Renshaw is an appropriate comparator for the claim.

274. We have considered whether a hypothetical white employee facing the same allegations as the claimant and facing the same sort of evidence would have been suspended. We have found that they would have been. There was therefore no less favourable treatment of the claimant than of a suitable comparator.

275. Furthermore, the suspension was not because of race. It was because of the need to protect the claimant, customers and the business from further complaints pending resolution of the outstanding disciplinary allegations. It was done as a last resort when it became apparent that action short of suspension would not provide the necessary protection to all interested parties.

276. In light of our findings this allegation of direct discrimination fails and is dismissed.

277. Paragraph 3.1.7 of the list of issues asserts that the claimant's dismissal was an act of direct discrimination. The claimant again relies on Renshaw and McCaffery and a hypothetical comparator. We repeat and rely upon are earlier findings as to the suitability of the two named comparators. Mr McCaffery did not have disciplinary conduct issues against him and, in any event, left the business. Mr McCaffery did have an allegation of gross misconduct made against him. However, he did not wait to see if he would be dismissed but chose to resign first. We have no way of knowing whether he would have been dismissed for gross misconduct had the disciplinary process taken its course. We therefore do not consider him to be a suitable comparator. We also cannot say that he was treated more favourably than the claimant. If he had not resigned, he may well have been dismissed too.

278. Finally we have considered whether a hypothetical comparator would have been dismissed in the same or similar circumstances. We have no evidence from which to deduce or infer that a hypothetical white comparator would not also have been dismissed in the same circumstances. We cannot find that there was (or would have been) less favourable treatment of the claimant then of the comparator. Nor can we see any basis for deciding that the dismissal was in any way tainted by race. Given the nature of the allegations, the evidence against the claimant and the nature of the respondent's business (particularly the importance of good customer service) we are not satisfied that race had anything to do with the decision to dismiss. We are also not satisfied that the claimant managed to shift the burden of proof to the respondent in the circumstances. In any event, we are satisfied that the respondent had sufficient evidence to discharge any burden of proof which did shift to it.

279. In light of the above the claimant's claims of direct race discrimination fail and are dismissed.

<u>Victimisation (section 27)</u>

280. The respondent accepted that the claimant did the protected acts listed at paragraph 4.1 of the list of issues save that the parties agreed that the protected act at paragraph 4.1.6 took place on 11 June 2021.

281. At paragraph 4.2 the claimant cites a number of alleged detriments:

    a. Informing the claimant in October 2021 that his conduct was being investigated in relation to certain customer calls.
    b. Investigating the claimant's conduct.
    c. Suspending the claimant
    d. Dismissing the claimant.

    These facts have been established.

282. We are not satisfied that the necessary causal connection between the protected acts and the detriments has been established.

283. The protected act at paragraph 4.1.4 (raising a grievance about harassment at the 14 October 2021) post-dates the start of the disciplinary investigation

into the claimant's conduct (as does the Tribunal claim issued on 8 November 2021 – protected act number 5). The chronology does not assist the claimant in making the necessary causal connection in that regard. The respondent cannot subject the claimant to a detriment because of a protected act which takes place after the detriment complained of.

284. The first protected act relates to the grievance the claimant raised about the hat incident in 2019. This considerably predates the detriments, the earliest of which is in October 2021. There is also no apparent link in the personnel between the two so as to make any causal link likely. In reality, the proximate cause for the investigation, suspension, and dismissal, is the customer complaints and the associated disciplinary investigations. The respondent had no control over those customer complaints. They have been made by independent third parties at a time of the third party customer'(s) choosing. There is nothing to suggest that they have been fabricated in order to allow someone at the respondent to subject the claimant to a detriment because of his earlier protected acts.

285. Put another way, once such complaints have been made by customers, given the nature of the respondent's business, the respondent is duty to bound to investigate the complaints and take action in relation to any conduct issues identified. In the absence of some evidence to show that the protected acts caused the detriment, it would be wrong to effectively preclude the respondent from looking into customer complaints against an employee just because that employee happens to have done a protected act or acts. This would unfairly tie the hands of an employer to prevent it investigating disciplinary complaints in the case of an employee who has done a protected act whereas it would no doubt investigate such complaints (and would be free to do so) in the case of an employee with no protected acts on the record.

286. Likewise the second protected act (the grievance about the racial abuse by the customer) pre-dated the detriments by a considerable period and there is nothing in the available evidence to link the two. The protected act raised criticisms of those involved in data protection processes within the respondent business, rather than those in the claimant's chain of management or department. The protected act related to one area of the business whereas the detriment related to another area of the business. The same point can be made about the proximate and real cause of the disciplinary process and dismissal as set out at paragraphs 284 and 285 above. The respondent did not create the customer complaints and had to follow them up appropriately once they were made. The fact that the complaints related to an employee who had done a protected act was coincidental.

287. We heard some evidence about the sixth protected act, which was the claimant giving evidence on behalf of his colleague Akeem in relation to complaints of racial harassment and discrimination made by Akeem. The evidence indicates that the claimant gave evidence but did not receive a copy of Akeem's outcome letter because the claimant's evidence was not mentioned in the outcome. Mr Mabbutt was cross examined about this matter too. He was Akeem's manager but there was nothing in his evidence to suggest that he bore any hostility towards the claimant because he had assisted in the grievance. In cross examination he denied having the sort of

emotional response to such circumstances that the claimant attributed to him. He explained that he maintains a level of detachment about such matters and that he did not have any feelings about the claimant providing evidence in relation to Akeem's grievance. He had no concerns about the grievance outcome and so had no feelings about the claimant being involved in a grievance. We accept his evidence as credible and honest. Furthermore, it is important to note that Mr Mabbutt had no real involvement in the disciplinary procedure which culminated in the claimant's dismissal. He certainly did not instigate it. His only involvement was in obtaining various data from the respondent's system for the purposes of the investigation because he was better placed to do this (i.e. he actioned someone else's request for information.) He had no real involvement in any of the things relied upon by the claimant as detriments for the purposes of his victimisation claim. Nor was he the claimant's line manager. We are satisfied that Mr Mabbutt certainly does not provide the necessary causal link between the protected acts and the detriments for the purposes of the victimisation claim.

288. In short, the evidence does not establish that the claimant was in any way subjected to a detriment because of the protected acts. The claimant has been unable to demonstrate a link between the individuals involved in the protected acts and the decision makers in the disciplinary process. Why would they have been motivated to discipline and dismiss the claimant because of the protected acts, rather than because the claimant had complaints made against him which were found to constitute gross misconduct? We have found no evidential basis to sustain such a conclusion. Consequently the claim of victimisation fails and is dismissed.

Unfair dismissal

289. We are satisfied that the effective date of termination in the claimant's case was 25 May 2022. That was the date when the decision to dismiss the claimant was communicated to him orally with immediate effect. He knew that he had been dismissed as of that date even though written confirmation was only produced at a later date.

290. The Tribunal is satisfied that the reason or principal reason for the dismissal was the claimant's conduct. We are not satisfied that it was the fact that the claimant had previously raised grievances or given evidence in support of a colleague's grievance. Indeed, the fact is that the claimant had raised a total of five grievances during the chronology we were provided with. Each of those had been addressed, either formally or informally, at the claimant's request. The first formal grievance was in January 2019 and the outcome was given in March 2019. The second grievance was raised in November 2019. The third formal grievance was raised in September 2020. These were a long time before the disciplinary procedure in question. It is hard to see why dismissal would not have taken place sooner if it was in any way caused by these grievances.

291. The claimant raised his fourth grievance in June 2021 *after* he had been invited to a disciplinary hearing regarding misconduct. Again, if there is any causal relationship between the two, the order of events would suggest that the grievance was triggered by the disciplinary invitation rather than the other

way around. This pattern is repeated in relation to the fifth grievance which is raised *after* the claimant has been put under disciplinary investigation.

292. We have examined the fairness of the dismissal within the meaning of section 98(4) Employment Rights Act 1996. We have reminded ourselves that we are to apply the 'range of reasonable responses' test and not substitute our own view for that of a reasonable employer. We seek to avoid the 'substitution mindset.'

293. We have concluded that a reasonable investigation was carried out in all the circumstances. All the relevant documents and witnesses were considered. The calls themselves were a matter of record. The claimant was given the opportunity to put forward his defence and to provide any relevant evidence, such as mitigating or medical evidence.

294. The conduct itself was a matter of record (i.e. what was said or done on the customer calls in question.) It follows that the respondent had a genuine belief in the claimant's guilt which was based on reasonable grounds.

295. The claimant was subjected to a reasonable and fair process. He had the opportunity to attend investigation, disciplinary and appeal hearings. He was permitted to put forward his defence and any evidence, in full. He was informed of his right to be accompanied at the hearings. Hearings were postponed and rearranged at the claimant's request. He was provided with a copy of the evidence against him prior to the disciplinary hearing and he was warned that dismissal was a possible outcome. There was a delay in providing the detailed dismissal outcome letter. That delay was longer than it should have been. However, it was not an inordinate delay and did not take the overall fairness of the procedure outside the range of reasonable responses. Likewise, there was a delay in giving the claimant the minutes of the disciplinary hearing. However, the claimant did receive them prior to the appeal and so was not disadvantaged by this. Likewise the provision of the incorrect email address for the appeal was an administrative error and was rapidly corrected. It did not substantively disadvantage the claimant. Whilst the procedure was by no means perfect, that is not the test to be applied in a claim of unfair dismissal. The procedure fell firmly within the band of reasonable responses available to a reasonable employer.

296. The real issue is whether the conduct was reasonably seen as gross misconduct and whether the sanction was too harsh and outside the range of reasonable responses. We have reminded ourselves of the context of the business. The claimant was dealing with customers who were calling about health insurance. Some of them could have been vulnerable, depending on the circumstances. It was core to his role (and to the business of the respondent) that he provided a satisfactory level of customer service and was suitably courteous, even with 'difficult' customers. The evidence disclosed four incidents of unacceptable conduct by the claimant. It was not a 'one off'. It was not a 'heat of the moment' scenario. For example, the claimant chose not to let the customer speak to another manager. This left the customer with 'nowhere to go.' The claimant put a customer on hold ostensibly to obtain a manager and then did not check the manager's availability. He misled the customer in this regard. This was a calculated decision. Nor was the respondent required to ignore the first two allegations because the second

two allegations arose later and separately. It would not be reasonable to require an employer to apply separate procedures and sanctions to two groups of incidents merely because there was a pause in the process because the claimant raised a grievance in the middle of the disciplinary investigation. The respondent was entitled to uphold the necessary standards of behaviour.

297. The nature of the conduct was also relevant. It was attitudinal. It was not a matter of performance or for further training. It was a conduct issue and the respondent was entitled to treat it as such. Although the claimant acknowledged that the calls were 'bad' he did not provide any real reassurance that such incidents would not happen again in future. His expression of remorse was limited and provided very little reassurance. The Tribunal should not substitute its own view for that of the reasonable employer in deciding how much weight should have been given to any remorse or suggestions that this would not happen again. Nor was this an issue where further coaching or training would adequately address the problem. Nor do we accept, for the reasons set out earlier, that the claimant was treated inconsistently with other employees in similar circumstances. Renshaw and McCaffery did not constitute appropriate comparisons.

298. The Tribunal heard evidence that the claimant's previous disciplinary warning was still live at the time that the index misconduct took place but had lapsed and expired by the time that the respondent made its disciplinary decision to dismiss the claimant. The Tribunal is satisfied that the respondent did not 'tot up' the index misconduct with the previous conduct/warning to as to arrive at the decision to dismiss. The claimant was dismissed for the four customer calls in question which were permissibly categorised as gross misconduct on their own. He was not dismissed for a combination of the later charges and the earlier misconduct. The only relevance that the earlier disciplinary warning may have had was to show that the claimant understood the standards which were expected of him and so could be expected to know what he needed to do to avoid disciplinary proceedings. The fact he had had similar warnings before might also be relevant to assessing risk of repetition of misconduct. All in all, we are satisfied (based on the evidence we have heard) that the respondent did not place impermissible reliance on the claimant's earlier disciplinary warning.

299. We have also considered whether the claimant's mitigation was such as to take the decision to dismiss outside the range of reasonable responses. The reality is that the respondent's decision makers did not ignore the claimant's health concerns. However, they did not think that they provided a complete answer to the allegations. However stressed the claimant was, he had signed in as 'fit to work.' He had been signposted to sources of support and had chosen not to take them. He was reluctant to go to occupational health and did not trust the respondent. In those circumstances the respondent was unable to give as much weight to medical mitigation as might otherwise have been the case. It is a question of the amount of weight to be given to the medical information. In such circumstances it is important not to slip into the substitution mindset and find that the Tribunal would have given this information greater weight than the respondent did. The question is whether the respondent's decision to dismiss in the circumstances and in the context of the claimant's mental health/stress levels was outside the range of

reasonable responses. We are unable to find that it was and so we dismiss the claim of unfair dismissal.

Employment Judge Eeley

Date: 10 November 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 November 2023

FOR EMPLOYMENT TRIBUNALS