EMPLOYMENT TRIBUNALS

Claimant: Mr Binu Raveendran

Respondent: Chicken Cabins Ltd (1)
Darren Smith (2)

Heard at: Leeds **On:** 2, 3, 4, 5 and 9 October 2023

Before: Employment Judge Miller
Ms L Fawcett
Mr G Corbett

Representation
Claimant: Mr U Ramamoorthy (claimant's wife)
Respondents: Ms G Kennedy-Curnow (litigation consultant)

RESERVED JUDGMENT

1. The complaints of direct race discrimination are not well-founded and are dismissed.

2. The complaints of harassment related to race are not well-founded and are dismissed.

3. The complaints of victimisation are not well-founded and are dismissed.

4. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent as a restaurant general manager at the first respondent's Harehills restaurant. The first respondent operates a chain of restaurants as a franchisee under the KFC brand. The second respondent, Mr Smith, is a regional coach (manager) (RC) for the first respondent.

2. The claimant's employment started on 12 September 2012 and he was promoted to a Restaurant General Manager (RGM) in 2015. The claimant resigned on 16 December 2022 with effect from 18 December 2023 after a disciplinary process and a grievance process. The claimant undertook early conciliation with ACAS from 4 January 2023 until 26 January 2023 with the first respondent and from 8 February 20203 to 10 February 2023 with the second respondent. The claimant presented a claim for race discrimination, constructive unfair dismissal and a failure to provide a written statement of main terms of employment on 23 February 2023.

3. There was a preliminary hearing on 2 May 2023 before Employment Judge Flanagan at which the issues to be decided at this hearing were identified. They are set out as an appendix to this judgment. Although it is not set out in the list of issues, it is clear that the claimant is also claiming that the respondent failed to provide a written statement of employment particulars.

This hearing

4. The hearing was conducted over 5 days, the last day being predominantly in chambers for deliberations. The parties had each produced a separate file of documents for use at the hearing – although they appeared to be predominantly the same. There was also some late disclosure of documents from both sides during the hearing. This included, surprisingly, disclosure by the first respondent of grievance and disciplinary investigation notes. There is absolutely no good explanation why these documents were produced so late.

5. The claimant produced a witness statement and attended and gave evidence.

6. The second respondent provided a witness statement and attended and gave evidence. The respondents also produced witness statements from:

    a. Mr Shahzada Khurram – Area Coach and investigating officer

    b. Mr Syed Mobeen Shah – Area Coach and claimant's line manager

    c. Ms Caroline Plumpton – Area Coach and second investigating officer

    d. Mr Kevin Payne – Regional Coach and grievance officer

    e. Ms Leigh Saghir – Area Coach and disciplining manager

    f. Ms Anne Cooper – Operations Director and Grievance Appeal Officer

7. All witnesses attended and gave evidence except Ms Cooper. After the claimant agreed that the conduct of the grievance hearing could not have affected his decision to resign, as it happened after his resignation, the respondent decided not to call her.

8. We are grateful to everyone who attended and assisted the Tribunal. Both parties were ably represented and we particularly acknowledge the calm and measured way that Mrs Ramamoorthy, who is not legally qualified, represented her husband.

9. We acknowledge the time it has taken to produce this judgment and we apologise to the parties for the delay.

Findings of fact

The start of the claimant's perceived difficulties with Mr Smith

10. We make such findings of fact as are necessary for our decision. Where facts are disputed, we have made our decision on the balance of probabilities.

11. The claimant was employed by the first respondent (hereafter respondent) from 12 September 2012, initially as a team member and most recently as a restaurant general manager (RGM). The claimant's relationship with the second respondent (hereafter Mr Smith) appears to go back to 2015 when Mr Smith was an Area Coach (AC) (a level below regional coach) and was the claimant's line manager. Although it is not one of the claimant's allegations, it is relevant to record that there was an issue between the claimant and Mr Smith in July 2018 when Mr Smith was still the claimant's line manager.

12. At that time, the claimant managed the Harehills restaurant and was, he says, verbally offered a role managing a larger restaurant at Colton Mill which carried with it a pay rise. He says this offer was made by a Mr Shane Field who was at that time RC and Mr Smith's line manager.

13. The claimant says that Mr Smith told him at that time that he did not want the claimant at that store, he wanted the then Colton Mill assistant manager, Mr Callum Kinsella, to become the restaurant general manager, and that he was happy to let the claimant leave the employment of the respondent. The claimant also said that Mr Smith had wrongly told Mr Field, that the claimant had said he did not want that job. The claimant told Mr Field about this, who then spoke to Mr Smith, and the claimant was appointed to the Cotton Mill restaurant.

14. Mr Smith says in his witness statement that in fact he was responsible for the claimant's promotion and in oral evidence that the claimant wanted an increase in salary which is why the move to a bigger store was facilitated.

15. The claimant had applied for a job at the time at a KFC restaurant operated by a different franchisee. There is a requirement – it is not clear who the requirement is imposed by but it was agreed nonetheless – that if an employee of the respondent wants to move to work for a different KFC franchisee, they must have the permission of the respondent to do so.

16. The claimant says that this was the start of the discrimination by Mr Smith. He says he was treated badly at Colton Mill including being taken to task for being late when other managers were not and Mr Smith undermining the claimant in his management role. Specifically, the claimant relies on this period and the allegations of Mr Smith's conduct during this time as evidence of discriminatory behaviour. In evidence, the claimant said that Mr Smith wanted to appoint Callum Kinsella to Colton Mill, and gave him preferential treatment, because he was white.

17. We find that Mr Smith did facilitate the claimant's transfer to Colton Mill at this time. He was the area manager and responsible for that. We find that Mr Smith was prepared to let the claimant leave, but we accept his explanation that this was because he did not want to stand in the way of the claimant's progress. By 'letting him leave', we find that Mr Smith was in fact prepared to consent to the claimant's move to another KFC franchisee. It would have been unreasonable for Mr Smith to withhold permission for the claimant to move to a different franchisee of KFC without a good reason.

18. The claimant says that during his time at Colton Mill he was unsupported by Mr Smith, that he was taken to task about his time keeping in a way that Mr Kinsella was not, and that Mr Kinsella undermined the claimant. He made an informal compliant to the then Regional Coach, Mr Shane Field.

19. Mr Smith's evidence to the Tribunal was that he had in fact spoke to Mr Kinsella about his time keeping – Mr Smith said it was related to clocking in and out appropriately rather than actually working enough hours – and we accept his evidence of that.

20. The claimant subsequently moved back to the Harehills store in around April 2019 as RGM there and Mr Kinsella was appointed as RGM at Colton Mill. The respondent was unclear and inconsistent in their response form about the dates, but Mr Smith's oral evidence was consistent with the draft letter appointing the claimant to Harehills from 8 April 2019. The claimant says he asked to move back to Harehills, whereas Mr Smith said that he moved the claimant back because of his performance issues. However, in oral evidence the claimant did say that at every meeting it was mentioned (we think by Mr Smith) that the claimant could not manage Colton Mill. The claimant then seemed to accept that he found it difficult at Colton Mill but that the reason for this was that he did not get enough support from Mr Smith.

21. The claimant remained on the higher salary at Harehills that he had been paid while at Colton Mill.

22. We prefer Mr Smith's evidence that the claimant was moved back to Harehills because of concerns about his performance. It is consistent with the claimant's evidence, albeit that the claimant and Mr Smith say there were different reasons for the claimant's difficulties.

23. We think it is likely that there was some conflict or disagreement between Mr Smith and the claimant. There was an informal discussion with Mr Field and there is some evidence that Mr Smith tried to move on from previous disagreements with the claimant. However, we have not heard anything to persuade us that any of these issues from 2018/2019 were in any way connected with race generally, or the claimant's nationality or ethnicity specifically. The claimant asserted that Mr Kinsella was treated more favourably than him because he is white. The claimant is British Indian.

24. Firstly, there is no evidence of differential treatment. We have found that Mr Smith did speak to Mr Kinsella about timekeeping and Mr Kinsella was moved between stores in a similar way to the claimant. In fact, the claimant

also kept his pay rise when moving back to Harehills, so it is wholly possible that in fact he was in this respect treated more favourably than Mr Kinsella.

25. However, and in any event, there is no evidence, beyond the claimant's assertions and his suspicions, that Mr Smith's actions were at this time in any way connected with the claimant's race. The claimant was given an opportunity in oral evidence to explain why he believes these events were related to the claimant's race and he did not do so.

26. When the claimant moved back to Harehills the respondent produced a letter setting out his new terms of employment in so far as the differed from his contract. The claimant says he did not receive them, and they did not, in any event, include a reference to different holiday and sick pay entitlement. We find, on the balance of probabilities, that the claimant did receive this letter. That letter sets out some specific terms about the role – including salary, hours, bonus ad objectives and says "All other terms and conditions remain unchanged as per your existing contract". This last sentence was also set out in the letter appointing the claimant to the Colton Mill role.

27. The claimant has not provided any specific evidence about what changes to his contract he says were not referred to in that letter. He said in oral evidence that sick pay and holiday pay were different in the different roles. In the absence of anything more specific, however, and in the absence of an contemporaneous documents or complaints about the allegedly incorrect letters, we find, on the balance of probabilities, that the letters appointing the claimant to the Colton Mill role and then back to the Harehills role accurately reflect the claimant's terms and conditions of employment at the time.

The conference in Liverpool

28. The first substantive allegation relates to the claimant's attendance at a conference event in Liverpool on 23 and 24 May 2022. This was a large national event for the respondent where managers from across the country meet at a conference. The conference itself was held on 24 May 2022

29. The attendees at the conference could travel on 23 or 24 May. The respondent would pay for hotel accommodation for the night after the event, on 24 May, but not, Mr Smith said, for accommodation for the night of 23 May. The claimant said, however, that there was a budget in his area to pay for people to stay on 23 May. We prefer the claimant's evidence and find that there was a local arrangement for the franchisee in the claimant's area to pay for managers' stay and related expenses on the night before the conference.

30. The claimant travelled to the conference on 23 May with some other managers. The claimant is unclear what time he arrived, but it was in the evening. Mr Smith arrived during the day and worked at another franchise site. He drove there from Grimsby and we find that on the way he contacted his area managers by phone. There was a loose arrangement to meet up. Mr Smith said that he invited all of his area managers to meet him to watch a football match in the evening between Grimsby Town and Notts County.

31. We find that this is not quite accurate. Mobeen Shah, the claimant's AC under Mr Smith, agreed that he had a conversation with Mr Smith around the time Mr Smith would have been driving, but he was not invited to the football match. Mr Shah is Pakistani. Another area manager however, Mr Shahzada Khurram, also gave evidence that he was invited to the football match. Mr Khurram is also Pakistani. Mr Shah suggested that perhaps the reason he was not invited was because he did not like football.

32. We find that Mr Smith did go to the pub in the evening in Liverpool and watched a football match. He was accompanied at that match by a number of people and we find that that included various managers of different ethnicities across his region. The football match started around 7.45.

33. The claimant did not go to the pub to watch the football match and we think that he was not invited, or did not know about it. However, it is clear that Mr Smith only spoke to area managers, not restaurant managers. He said that he effectively let his managers know where he would be. It is not the case, in our judgment, that there was an explicit invitation passed on to restaurant managers to join Mr Smith in the pub. It is clear there was no invitation or request to pass the invitation on to RGMs. We also find that the claimant's manager was not invited, or does not recall being invited, so he would not have passed that message on to the claimant in any event.

34. When the claimant arrived in Liverpool, he did not know where Mr Smith was. The claimant was with a number of other managers who also said they did not know where Mr Smith was. They found a restaurant and had something to eat. The claimant said that the people in the group of managers that he was part of were all Asian.

35. Returning, then, to Mr Smith, at the end of the football match, or at some point, the people who were in the pub with Mr Smith separated. Some went to eat – and some decided to have another drink. Mr Khurram went to have some food and met with the claimant and others.

36. This series of events is the basis of the claimant's claim (as recorded in the list of issues) that Mr Smith segregated white people from non-white people, allowing white people to attend to watch a football match, but not non-white people. In fact, the claimant does not refer to a football match in his claim form. He just says "Darren Smith Segregated the group so he had his own group of white skinned people, and all Dark-skinned people were separate". The reference to a football match comes from the respondent's response.

37. It appears, however, that the cause of the claimant's suspicions comes from two photographs in a WhatsApp group at this time – one is a group with Mr Smith and 5 other people, all of whom are white, and the other is a group of 7 Asian people including the claimant.

38. These photos, we find, were both taken after the football match, after the pub group had separated. The time the photos were sent in the WhatsApp group is 11 pm, long after the football match had finished. It is correct that there is one group of white people and one group of Asian people, but we prefer the evidence of Mr Smith and Mr Khuram that what happened is that the people in the two respective groups just decided to carry on their

respective nights with people they chose to spend time with. There is, in our view, absolutely nothing to suggest that Mr Smith separated the people on the basis of their skin colour and we prefer Mr Smith's evidence that in fact most of the people he was with in the picture were from Grimsby like him. They had a clear connection and reason for being together in that they had a shared interest in Grimsby Town football club.

July 2022 allegation

39. The next allegation is said to relate to July 2022. The claimant expressed an interest to his direct manager, Mr Shah, in progressing from Restaurant General Manager. Mr Shah then discussed this with Mr Smith, who was Mr Shah's manager, and the claimant says that Mr Shah later told him that Mr Smith had said to Mr Shah that the claimant can't progress cause he has cultural issues. The claimant says that this comment was directed towards his race.

40. Mr Smith does not deny using the word cultural. He says "I discussed [the claimant's promotion] with Mobeen Shah and said that I feel there are cultural issues impacting on the decision for him to be promoted at this time". He says the comment was taken out of context – that it referred to a culture of winning a competition (relating to store performance) at all costs and that the claimant was at that time being investigated for manipulating numbers to win a competition.

41. Mr Shah says that Darren Smith "told me that there were issues with the claimant progressing due to an ongoing investigation into the Go Large competition results and a possible win it at any cost mentality, as well as the claimant's failure to attend meetings". Mr Shah goes on to say "I understand that [the claimant] believes that I told him that Darren Smith said no due to race issues. This is certainly not the case. It is not what I heard from Darren Smith nor what I told the claimant".

42. The claimant said none of these issues about his attitude had ever been raised before.

43. The chronology of these events is a little confused. Mr Shah was on holiday in July 2022 and he asked the claimant to act up as AC. Mr Shah gave the claimant this opportunity because the claimant had been discussing wanting to progress. The claimant said that on 31 August 2022 he asked Mr Shah if he had spoken to Mr Smith about progression and at this point the claimant says that Mr Shah said "Binu it is between you and me – Darren has said to me that Binu cannot progress because he has cultural issues".

44. In oral evidence, the claimant was clear that the conversation had occurred on 30 or 31 August at an area meeting.

45. However, Mr Shah describes the meeting on 31 August differently. He says that that was the beginning of the Go Large competition, and the claimant was enthusiastic about winning. The Go Large competition (which encourages KFC customers to purchase larger or additional portions of food or drinks) ended on 15 September 2022. The claimant's store won the competition in one of the weeks. Mr Shah said in evidence that there was a business review in October with the ACs and Mr Smith. Mr Smith asked Mr

Shah to review the claimant's store because the increase in "upgrades" was very high. There was scope for manipulating various things within the stores to attempt to produce a higher increase. The competition was about i*mprovements* in upselling, rather than the *greatest number* of increased orders to account for the different sizes and popularity of different stores.

46. In the week that the claimant's store won, there was a 450% increase in up-sales and Mr Smith thought this was a suspiciously high increase. On investigation, Mr Shah had found that the claimant had turned off the self-service ordering machines so that customers had to go to the counter to speak to a person to order, and that more experienced employees had been allocated to work on the tills.

47. This allowed the employees to engage with customers and seek to persuade them to increase the size of their purchase.

48. Mr Shah's evidence is that he discussed this with the claimant who stopped this practice and it was at this point that there were discussions about a few things that had come up in discussion with Mr Smith at that time.

49. We find that Mr Smith did have genuine concerns about how the claimant had won the competition, and that these concerns were based on an analysis of the claimant's sales figures. It was perfectly reasonable for Mr Smith to ask Mr Shah to investigate and this was borne out by what Mr Shah found.

50. This set of incidents is relevant for two reasons. Firstly, Mr Smith says in his witness statement that when he referred to cultural issues "I used it to summarise the mentality of winning at all costs. At the time it was being investigated whether numbers had been manipulated in order to win a competition. While I did not say this was happening, I said that it was a potential".

51. In the ET3 response, the respondents say

    "Furthermore, it was denied that Darren Smith made the comment to the Claimant that he could not progress due to cultural issues. Allegedly Mobeen Shah, Area Coach for the Respondent confirmed this to the Claimant, When investigated further, Mobeen Shah denied this.

    Mobeen Shah confirmed that he believed the Claimant had misinterpreted a previous or different conversation. The conversation that did occur was when Mobeen Shah spoke to the Claimant and informed him that if he wanted to progress he needed to be more involved in meetings. It was also stated that there were some operational issues in the Claimant's store".

52. The unusual phrasing relates to the fact that this refers to the findings of a grievance outcome (which we will address below). There is no other reference to it in the response. This is a different account to that set out in Mr Smith's witness statement.

53. On balance, we find that the conversation between Mr Shah and Mr Smith to which the claimant refers is the one at the end of August 2022. We also

find that Mr Smith cannot have been referring to a win at all costs mentality as the Go Large competition had not happened at that point and there was no investigation ongoing.

54. We also find that Mr Smith most likely did say something about the claimant's participation in meetings as described by Mr Shah, but also that Mr Smith had no reasonable basis for making those comments. He was unable to explain, in oral evidence, what exactly he meant about the claimant's attendance at meetings.

55. We have found Mr Smith, generally, to be an unhelpful witness. He said that he could not remember a great deal of things and while we accept that he had many people and restaurants to manage, we cannot say whether his forgetfulness was real or selective. He certainly had a very clear recollection of matters relating to the football match in Liverpool.

56. However, we also recognise that an inability by Mr Smith to remember matters that are of significance to the claimant might be because either they did not happen as described by the claimant or they were wholly un-noteworthy from Mr Smith's perspective.

57. Conversely, we have found Mr Shah to be an extremely plausible and helpful witness. He appeared to answer all questions honestly and to the best of his abilities with no obvious investment in a particular outcome one way or the other.

58. For these reasons, we find that Mr Shah did have a conversation with the claimant after 31 August about Mr Smith's views of the claimant's prospects of promotion and that included a reference to matters that could reasonably be described as relating to the culture of the workplace - what the respondent expects from its employees.

59. We do not know if the word culture or cultural was used. It may be that it was and Mr Shah has forgotten, or it may be that the claimant misremembers. However, we do find on the basis predominantly of Mr Shah's evidence that there was no communication from him to the claimant about what Mr Smith said that was in any way connected with the claimant's race or his cultural background.

60. In his witness statement Mr Shah says "I spoke with the claimant about [the claimant progressing] and I understand that he believes that I told him that Darren Smith said no due to race issues. This is certainly not the case. It is not what I heard from Darren and not what I said".

61. While it is correct that Mr Shah also refers in the previous paragraph to the Go Large investigation which must be incorrect, we find that the key part is that whatever words were communicated from Mr Shah to the claimant they related to Mr Smith's views of the claimant's performance and not his race.

62. The second way in which the Go Large competition is relevant is that the claimant asserts that his achievement was not celebrated by Mr Smith in the same way as other restaurant managers. We were shown some WhatsApp group chats praising various restaurants. All of them, except from one from Mr Smith about the claimant – are congratulatory and name individuals, together with a message saying something along the lines of congratulations, or well done. The message from Mr Smith to the claimant around 15 September 2022 simply says "£500 on its way to you and the team KFC GOLARGE winners". It is obvious to us that this message has a less exuberant tone than all the others.

63. However, we find that the reason for this is that Mr Smith was suspicious, for reasons set out above, about how the claimant won the competition. In the interview between Mr Smith and Mr Payne as part of the investigation into the claimant's grievance (below) Mr Smith said "Given my concerns, you know what, I probably didn't celebrate it as extravagantly as I could but due to my suspicions" and we prefer this contemporaneous evidence from Mr Smith.

Audit and suspension

64. The next relevant incident relates to 9 and 10 November 2022. The respondent runs a charity curry night where staff from across its restaurants and their friends and family are invited to one of the restaurants (New Street) after the restaurant has shut, for a curry evening. People make and bring food and it is well attended and popular. People are also entitled to bring alcoholic drinks with them.

65. In 2021, the claimant had prepared the food at his house and brought it in. He found that very difficult because he was catering for a large number of people so that in 2022, he decided to cook the biryani for 200 people at the Harehills restaurant and then take it to New Street. In fact the claimant intended to cook the curry outside in the yard at the Harehills restaurant. The event was to be on 10 November 2022.

66. It is not disputed that the claimant brought cooking equipment including a gas bottle and a hob and some other items into the restaurant on 9 November. He intended to cook the food the following day on 10 November. The claimant says that on 9 November, there were a number of senior managers, including a Lee Broddle, holding a meeting at the Harehills restaurant and they saw him bringing the equipment in and that no one said anything to him about it.

67. The claimant also said that Mr Shah had said that he could ask one of the other members of staff to help him so it was obvious that he would be cooking at the restaurant. We do not agree. Mr Shah who was also preparing food for the curry night also had the assistance of another employee, but they were cooking at Mr Shah's house. We prefer Mr Shah's evidence that he did not know the claimant intended to cook at the Harehills restaurant and nor could he have had any reason to think that the claimant would be cooking anywhere other than at his home.

68. The claimant started cooking at some point on 10 November. This included some chicken that was provided by the respondent. The respondent agreed that they would donate some of the chicken, but there was a dispute as to how much. It is not, however, material. The claimant had also started preparing some vegetables.

69. On 10 September 2022, as the claimant was preparing the curry, there was a visit to the Harehills restaurant from an auditor, Imogen Brown, who worked for an organisation called ROCC. ROCC are an independent company who are engaged by KFC to carry out audits of the franchise restaurants to check that they are complying with KFC brand standards.

70. One of the claimant's colleagues told the claimant that they had seen someone in the shop who they thought was a ROCC auditor. The claimant then took all of the part-cooked chicken upstairs to a staff area and went to meet the auditor. He showed her around and showed her the part-cooked chicken, prepared vegetables and she also saw the gas bottle and the hob.

71. The shop failed the audit for the following reasons: unapproved ingredients on site (the vegetable and spices for the biryani); tomatoes and vegetable stored at room temperature; chicken stored upstairs at room temperature; no use by/expiry date on the ingredients stored upstairs (chicken and vegetables). These four problems were each given a level 3 rating. One level three rating results in an audit failure.

72. Ms Brown also recorded a number of other issues that were of concern but did not amount to level 3 failures, included noting that gas cannisters were in use.

73. Because the audit had failed, KFC were notified and a Ms Lynsey Mitchell, KFC Health and Safety Lead, contacted Mr Smith. She sent him a picture of the food preparation upstairs together with a potential cooking set up – namely the stove, gas cannisters and pans the claimant had brought in.

74. At the time, Mr Smith was with two of his ACs - Mr Shahzada Khurram and Mr Khurram Jengari - at a different site in Leeds. Mr Smith was concerned about the significant audit failure and set off immediately to drive to the Harehills store. We prefer his evidence that on the way he phoned Mr Shahzada Khurram and asked him to go to the Harehills restaurant to investigate. We find that there was nothing sinister about his choice of Mr Khurram. It was appropriate that he did not ask Mr Shah to investigate because he did not know to what extent Mr Shah, as the relevant AC, was involved (if at all) and the reason he did not choose Mr Jengari is because Mr Khurram was more conveniently located.

75. There was a dispute about what Mr Khurram was instructed to do. In his witness statement, Mr Khurram said "I was asked by Darren Smith to investigate the claimant for an incident which had occurred involving the claimant for which he was accused of breaching the company's health and safety and food policies".

76. Mr Smith said he asked Mr Khurram to "take lead on the investigation".

77. Ms Ramamoorthy placed great weight on a question and answer between Mr Payne and Mr Smith in the grievance investigation as showing that Mr Smith had instructed Mr Khurram to suspend the claimant from the outset. The exchange is as follows:

> "KP – when and why was Shazhada (sic) Khurram given the instruction to suspend and investigate Binu?
>
> DS – I was already with Khurram as I was in C27 with him doing a business review when we got the call about the ROCC audit, I knew Mobeen was at home and I knew Shahzada was in Leeds, as Shahzada was nearest I asked him to meet me at Harehills. I also knew Mobeen was cooking at home and as Binu's line manager he may need to be involved later down the line given the serious allegations"

78. Ms Ramamoorthy asserted that because Mr Smith did not correct the suggestion that he had told Mr Khurram to suspend the claimant, it must be correct – that Mr Smith had decided and instructed Mr Khurram to suspend the claimant before he went to Harehills.

79. We do not agree. We prefer the evidence of Mr Khuram and Mr Smith in their witness statements and at the hearing that Mr Smith asked Mr Khurram to investigate. It cannot reasonably be inferred from this note of the interview that Mr Smith had instructed Mr Khuram to suspend the claimant. Much like Mr Shah, we found Mr Khurram to be a helpful and plausible witness.

80. What happened next is not substantially disputed, but there is a difference in perception and interpretation.

81. Mr Khurram arrived at Harehills and he took the claimant upstairs to the meting room and conducted an initial investigation. The claimant agreed that he had half-cooked chicken, 2 gas bottles, a gas stove and some vegetables in the restaurant and that he knew that he was not allowed to have them in the restaurant. He said that there was no risk, however, because he planned to cook outside rather than inside. He said that he had had permission to take some chicken from the store, that he was cooking for the company's charity fundraising night and that in 2021 senior managers were aware that food had been cooked in the store.

82. After taking his statement, Mr Khurram went to see Mr Smith, who was in the restaurant and we find that Mr Khurram asked the claimant to wait upstairs while he did that. We find that Mr Khurram said to Mr Smith that he had decided to suspend the claimant and asked if he could confirm that his decision was approved. Mr Smith then spoke, or had already spoken, to an HR advisor and Mr Smith approved the claimant's suspension.

83. Mr Khuram then returned upstairs to tell the claimant he was suspended. As he returned, he saw that the claimant was reading out the statement he had given to Mr Khurram to some other colleagues. Mr Khurram said that he could not do that as it was a confidential matter, he told the other employees to go downstairs and the claimant to remain upstairs.

84. The claimant was then accompanied downstairs with Mr Khurram to get his personal belongings but asked to leave through the back door.

85. We heard a great deal of evidence about parking arrangements at the front and back of the shop. The claimant said that his car was more easily accessible through the front of the shop as it was parked closer. Mr Khurram said he did not prevent the claimant going out the front to get his car, he just wanted him to bring it round the back so he could load his equipment more easily.

86. We prefer Mr Khurram's evidence. It would have self-evidently not have been appropriate for the claimant to carry his food and cooking equipment through the restaurant and Mr Khurram's instruction to take the car round the back was wholly reasonable.

87. The claimant then remained on suspension until 16 December 2022. Mr Khurram sent a letter to the claimant dated 11 November confirming his suspension pending investigation into alleged breaches of Food Safety and Health and Safety. The letter provided that the claimant should not enter any company premises or contact any company staff without Mr Khurram's permission. It provided a phone number for the claimant to contact Mr Khurram. It did not make any reference to any support available to the claimant through the respondent. However, we also find that as an RGM the claimant was aware of the various sources of support available through the respondent for its employees which included access to welfare support and counselling.

88. There was no explicit offer of support to the claimant, but we find that the claimant did not request support and at that time there was no particular reason for Mr Khurram to consider that the claimant was experiencing any undue distress.

Disciplinary investigation and grievance

89. On 11 November 2022 Mr Khuram interviewed Mr Shah. He confirmed that he had been unaware that the claimant planned to use his gas and stove to cook in the store. He thought he was going to cook at home. He also confirmed that he had used some of the respondent's chicken for the curry night and that he was cooking some food for the curry night in the respondent's fryers. However, he said, there was no risk of cross contamination as the oil was then going to be changed.

90. Mr Khurram also interviewed Mr Smith, but the notes are undated and no one was able to say when that took place.

91. In that interview, Mr Smith agreed that he had approved the curry night and that Mr Shah could take some chicken. He said that Mr Shah had told him that he and the claimant were cooking for the curry night, and they would be cooking at home.

92. Mr Smith also said that he spoke to Lee Broddle, another AC, to see if he could assist with the investigation and that Mr Broddle told him that he had seen the gas cannister in store the day before, that he had taken a photo but had forgotten to follow it up with Mr Smith or Mr Shah.

93. In our view, having heard from Mr Shah and Mr Smith we conclude that these notes are a broadly accurate reflection of what transpired.

94. On 12 November 2022 the claimant submitted a grievance to Anne Cooper, operations director. The basis of the claimant's grievance was that the disciplinary and investigation was part of a conspiracy against him, targeting him. He specifically says that Mr Smith should have challenged the ROCC audit failure because the unapproved items were not in a public area or for public consumption, everything was related to the respondent's charity curry night and that managers were aware of food for the curry night being cooked in the restaurant in 2021.

95. The claimant referred to Mr Khurram's investigation. He said that a sentence had been changed in the notes of the first investigation meeting from "during the ROCC visit there was cooked chicken, big utensils…" to "during the ROCC visit …there was chicken been cooked in big utensils". This, the claimant said, was material because the changed version suggested that chicken was being cooked during the ROCC visit and on the gas stove, rather than had been cooked previously. When the claimant pointed out this error to Mr Khurram, however, the notes were immediately changed back.

96. The claimant also raised that there was a long standing disagreement between him and Mr Smith. He referred to the "cultural issues" allegation that has been discussed above, he referred to the circumstances around Colton Mill as set out above and the claimant also said "Darren sarcastically said to one of our colleagues –"I know how Binu won that competition"" in relation to the Go Large competition.

97. Finally, the claimant said that if Mr Smith's team lead the investigation, it would be biased.

98. In response to the last part of the grievance, a new disciplinary investigator, Caroline Plumpton, an AC from a different region, was appointed. Ms Plumpton reinterviewed the claimant on 17 November 2022. Ms Plumpton said that she was only interviewing in respect of an alleged breach of health and safety. She had seen the previous statements obtained by Mr Khurram and did not need, in her view, to reinterview them.

99. In the interview with Ms Plumpton, the claimant agreed that he had decided of his own volition to bring the equipment into the store and cook there and that he had not asked for permission. The claimant again raised the same issues about managers being aware of food being cooked in previous years and that it was for a charity night.

100. Ms Plumpton said, and we accept, that as the claimant had admitted to bringing in his equipment, cooking in the store and that he had not obtained approval for that there she considered that there was no need to speak again to Mr Smith or Mr Shah.

101. Ms Plumpton passed her investigation notes to Alina Ionescu to pass to the person who was to hear the disciplinary hearing.

Disciplinary and grievance hearings

102. The disciplinary hearing was scheduled for 7 December 2022. In the meantime, on 18 November the claimant attended a grievance meeting with Mr Kevin Payne, an RC who had been appointed to hear the claimant's grievance.

103. In the course of that hearing, the claimant set out his complaints and confirmed that he was alleging that Mr Smith is racist. In support of this allegation, the claimant set out the issues relating to his move to Colton Mill, what he says he experienced there and his transfer back to Harehills. The claimant's explanation as to why he believed Mr Smith is racist was the same as we have set out above about Colton Mill.

104. The claimant's other complaints in the grievance were:

    a. Mr Smith did not appeal the ROCC outcome and he should have done

    b. That Mr Smith told Mr Shah that he knew how the claimant had won the Go Large competition

    c. There was no celebration of the claimant's achievements

    d. That Mr Shah had said the claimant could not progress on Mr Shah's return from Holiday

    e. He said that this year (2022) the managers were separate at the conference in Liverpool The claimant referred to a difference between Mr Smith's favourites and a group of "all dark skinned people".

105. We also find that the claimant was given an opportunity to have a representative with him at that meeting but was happy to continue without one.

106. Mr Payne then conducted a grievance investigation. He spoke to the following people:

    a. Ann Cooper (about the Go Large competition)

    b. Mobeen Shah (about cultural issues and the disciplinary investigation)

    c. Becki Walker (AC) (about the conference in Liverpool and recognition for achievements)

    d. Darren Smith (about all the issues)

    e. Francesca Hedges HR (about the decision to suspend the claimant)

    f. Khurram Jengari (AC) (about the Liverpool conference)

107. We make the following relevant findings about those interviews.

108. Mr Shah confirmed that he had not authorised the claimant to cook in store and nor did he know about it at the time.

109. Mr Shah confirmed that he had not told the claimant that Mr Smith said he had cultural issues. He said "It's probably misinterpreted, I said if he wants to progress he needs to get involved in meetings etc…I said the feedback I have about you from Darren is that you don't attend the meetings and you have issues in store, that's why you missed the meetings".

110. Mr Shah said that he arrived late in Liverpool and did not see Mr Smith.

111. Ms Walker said that there was an open invitation to join Mr Smith on the night before the conference. She said there was a mix of cultures there, although Mr Smith was watching football and some other people went upstairs for a drink (including Ms Walker).

112. Mr Smith was asked about appealing a ROCC audit which had failed in another store due to a jumper being left in a CRESCOR (warming device). Mr Smith said he did not appeal, ROCC reviewed it of their own volition. He agreed that he did not celebrate the claimant's Go Large win as much as he might (as discussed above).

113. Mr Smith explained the separation of attendees in Liverpool as we have previously set out.

114. Mr Smith was not asked about the reference to "cultural issues" at all. Mr Payne did ask about the claimant's performance and we set out the exchange:

    "KP - Prior to ROCC audit and Curry night, were there any operational concerns with regards to BR and if so was he aware and how was this communicated and managed?

    DS – prior to the Curry night – a while ago as an AC I managed Binu I had concerns with ability when he was at Colton Mill, I told him this and it resulted in him moving back to Harehills, I supported this move and we did leave him on the higher salary too. More recently I had concerns over the credibility of Go large, and a kiwi report that they found pest activity upstairs and no action had been taken. Other than that, generally, Binu's operations are good."

115. We find that Mr Smith gave a genuine and honest answer to this question. In respect of the pest issue, mice had been found in the claimant's store. It is unclear whether this was as a result of a default by the claimant – there was conflicting evidence about this. However, we conclude that Mr Smith genuinely believed that the claimant had been slow to notice a problem with pests, even if this was not accurate.

116. In our view, Mr Smith was somewhat separate from the actions of RGMs, the majority of supervision and management being done by ACs so that it is likely that he only had the broadest overview of what the issues were at any given moment unless something was particularly drawn to his attention.

117. Mr Smith was asked when and why he instructed Shahzada Khurram to investigate and suspend the claimant. We have already addressed that above.

118. Ms Hedges confirmed that she gave advice to Mr Smith about suspending the claimant on 10 November. She confirmed that it was properly Mr Khurram's' decision to suspend the claimant (although we find and accept that that required the approval of Mr Smith). She explained that it would not have been appropriate in the circumstances to temporarily redeploy the claimant as RGM in another store because of the concerns that food and health and safety standards had not been met.

119. Mr Payne also said, and it was not challenged, that he spoke to Callum Kinsella who confirmed that he was routinely challenged by Mr Smith about clocking in and out procedures.

Grievance outcome

120. Following this investigation, Mr Payne sent the claimant a grievance outcome on 7 December 2022. Mr Payne set out in detail his findings on each point the claimant raised. None of the claimant's complaints were upheld. It is not necessary to set out in detail the grievance outcome. The claimant's complaint about this is that his performance and achievements were criticised in the outcome.

121. It is possible to read some criticism of the claimant in this outcome letter in the following ways.

    a. There is reference to the ongoing (at the time) disciplinary investigation into the health and safety and food safety concerns and Mr Payne says that the ROCC audit result was the claimant's responsibility as RGM. This was in the section setting out Mr Payne's response to the claimant's complaint that the failure of the ROCC audit was an opportunity for Mr Smith to dismiss the claimant.

    b. That Mr Smith had said that the claimant's failure to attend meetings and the fact that there were operational issues in store would be a detracting factor to further progression. This was in the section setting out Mr Payne's response to the claimant's complaint that Mr Smith had said the claimant could not progress due to cultural issues.

122. We find that the reason Mr Payne included this information in the grievance outcome was because it genuinely reflected his findings from the grievance investigation. In both cases he was setting out his conclusions on the evidence he had heard. We have already explained our findings about Mr Smith's assertions about the claimant attending meetings. The reference to performance issues refers to the pest problem referred to above.

123. The claimant appealed against the grievance outcome on 14 December 2022. There was an appeal meeting on 10 January 20203 and the and this appeal was not upheld. The outcome was communicated to the claimant on 25 January 2023. However, we do not need to make any detailed findings about this as the claimant does not pursue any allegations about the grievance appeal.

Disciplinary hearing and resignation

124. The claimant was invited on 1 December 2022 to attend a disciplinary hearing with Ms Saghir on 7 December 2022 to answer the allegation as follows:

> "It is alleged you have carried out a serious breach of health and safety protocols within the store. Namely on 10 November 2022, further particulars being you brought external equipment into the store which is not permitted as part of Health and Safety"

125. The claimant's complaints about this were that he was given a disciplinary sanction, to which we will come, but also that:

    a. For the first time the issue of him locking the fire door was raised

    b. The notetaker said in the hearing that "Binu getting a suspension with pay is like having a paid holiday and you should be enjoying it"

    c. The claimant received his grievance outcome only 8 minutes before the start of the disciplinary hearing

126. At the disciplinary hearing, the claimant agreed that the gas stove, gas bottle and curry ingredients were in the store. The claimant raised the same issues that we have set out at length about the knowledge of the other managers, the fact that the cooking was for a charity event for the respondent, that he did not believe there was any real risk and that he was being targeted by Mr Smith.

127. Ms Saghir did ask the claimant questions about the fire door being locked and the claimant gave a detailed response to the effect that Mr Shah had locked the door. Ms Saghir said in evidence that the issue relating to the fire door was brought up by the claimant in a break in the hearing so she wanted to ask formally about it. We prefer Ms Saghir's evidence that she was responding to an issue raised by the claimant.

128. In oral evidence, Ms Saghir could not remember if the note taker had made the comments that were alleged. However, it was put to Ms Saghir on behalf of the claimant that in fact she had admonished the note taker for the comments in the course of the hearing and Ms Ramamoorthy was complementary about her doing that. We find on the balance of probabilities that the note taker did say something like this and it would have been upsetting for the claimant, but that Ms Saghir dealt with it properly and immediately and it can have had no effect on the outcome of the disciplinary hearing.

129. In respect of receiving the grievance outcome, the claimant's evidence in his witness statement cannot be correct because at the start of the disciplinary hearing the claimant confirmed that he had not in fact had the grievance outcome at that time. In oral evidence he said he received it in the break.

130. Given that it was part of the claimant's case that he was being targeted by Mr Smith it would have been preferable for the grievance to have been

concluded and the outcome given to Ms Saghir in advance of the disciplinary hearing. However, in our view ultimately it dd not impact on the fairness of the disciplinary process or the outcome.

131. The outcome of the disciplinary hearing was that the claimant was given a final written warning. Ms Saghir said that although she found that the claimant had committed gross misconduct, she took into account his previous clean disciplinary record and the mitigation he had offered and issued a final written warning. In the disciplinary outcome letter of 9 December 2022, Ms Saghir said

    "There has been a clear breach of health and safety by bringing in unapproved equipment into the store. Whist I appreciate you had a good intention for the charity event this does not mean to say you should compromise health and safety measures within the store. As you know this had a knock on effect on the ROCC audit. This does not represent a good brand standard for the store. It is concerning that you do not believe there has been a breach of health and safety I am aware you have mentioned you have alleged a grievance; I have looked into this matter, and this has been resolved for you and an outcome has already been issued".

132. We have no hesitation in accepting that Ms Saghir's outcome was genuine and based on her assessment of the evidence. The claimant had admitted all the key facts – that he had brought in prohibited equipment and food without authorisation. Ms Saghir took into account all the surrounding facts – that it was for the respondent's charity, the claimant's previous good record, the potential knowledge of other managers – and reduced the sanction.

133. We find that Ms Saghir was genuinely of the view that the breach of health and safety amounted to gross misconduct. We also find the she did not take into account any allegations relating to the fire door and she was not influenced by the note taker's comments.

134. Given that the claimant had admitted the breaches that formed the basis of the disciplinary allegations, we find that Ms Saghir could reasonably conclude that any allegations about Mr Smith made in the claimant's grievance – whether upheld or not – would not impact on the decision about the claimant's actions on 9 and 10 November.

135. The claimant did not appeal the decision. The suspension was lifted and he returned to work on 9 December 2022 and there was a back to work meeting. The claimant said in his witness statement that

    "Issue of fire door brought in on [the disciplinary hearing] and issues with performance, operational and credibility was the final nail in the coffin. Binu Raveendran felt humiliated and tortured and was left with no option but to hand in his notice on 16/12/22, finished working on 18/12/22"

136. The claimant's resignation letter sets out, in summary, the matters that form part of his claim and that we have discussed at length.

137. In oral evidence, the claimant said that he decided to leave when he received the disciplinary outcome and the grievance outcome, both of which were received within a couple of days of each other.

138. We accept the claimant's evidence that he felt that the disciplinary and grievance outcomes were the final straw. The claimant has been clear and impassioned about that. However, it is a decision for us as to whether that amounts to a constructive dismissal and we address that in our conclusions, below.

Law

Unfair dismissal

139. In respect of the claimant's claim for unfair dismissal, section 95 ERA sets out the circumstances in which an employee is dismissed. Section 95(1)(c) says that this includes circumstances where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".

140. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.

141. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, [1997] ICR 606 it was held that contracts of employment include the following implied term:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

142. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant. This is an objective test – it is for the Tribunal to decide, on the evidence it has heard, whether the conduct was calculated or likely to destroy the relationship of mutual trust and confident (*Waltham Forest v Omilaju* [2004] EWCA Civ 1493).

143. Even if the respondent's conduct was capable of destroying the trust and confidence between the parties, the claimant cannot then claim that he was constructively dismissed if he subsequently affirms the contract or waives the breach. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the court said that an employee must not wait too long before resigning. If the employee continues to work in accordance with his contract or does some positive acts in accordance with it, he may be found to have waived the breach and re-affirmed the contract thereby losing the right to treat the contract as discharged by the employer. However, provided it is more than an innocuous act, a further act may revive the previous breach which had

been waived, which may intern revive the employee's right to resign in response to the cumulative breaches.

144. If the claimant demonstrates that he has been dismissed, it is open to the respondent to show that the constructive dismissal was for a potentially fair reason and that it was fair in all the circumstances. The respondent has not pleaded a potentially fair reason and, for reasons that will become apparent, it is not necessary for us to address that any further.

Basis of discrimination and victimisation claims

145. The claimant brings claims under s 39 and s 40 Equality Act 2010. Section 39 provides that

> (1) An employer (A) must not discriminate against a person (B)—
>
> (*a*) in the arrangements A makes for deciding to whom to offer employment;
>
> (*b*) as to the terms on which A offers B employment;
>
> (*c*) by not offering B employment.
>
> (2) An employer (A) must not discriminate against an employee of A's (B)—
>
> (*a*) as to B's terms of employment;
>
> (*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
>
> (*c*) by dismissing B;
>
> (*d*) by subjecting B to any other detriment
>
> …
>
> (4) An employer (A) must not victimise an employee of A's (B)—
>
> (a) as to B's terms of employment;
>
> (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
>
> (c) by dismissing B;
>
> (d) by subjecting B to any other detriment.

146. Section 40 says

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

(b) who has applied to A for employment.

147. Section 212 Equality Act 2010 provides that detriment does not include an act that amounts to harassment unless the Equality Act 2010 disapplies the provisions on harassment in the particular case. This means that if an act is both harassment and a detriment for the purposes of direct discrimination or victimisation only the claim for harassment will succeed.

148. In *MOD v Jeremiah* [1979] IRLR 436 the court of appeal held that a detriment exists if a reasonable worker would take the view that the treatment was to his detriment. In many cases it is obvious. In *Shamoon v Chief Constable of the RUC* [2003] IRLR 285, Lord Nicholls said: “while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so”. There is therefore an element of objectivity to this test.

Direct race discrimination

149. Section 13 of the Equality Act 2010 provides:

(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.

150. By virtue of section 9 of the Equality Act 2010, race is a protected characteristic.

151. Section 23 (1) 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.

152. The case of *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 provides, at para 110,

“In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class”.

153. Section 136 of the Equality ACT 2010 provides

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

154. We refer to the case of *Igen Ltd v Wong* [2005] IRLR 258. That case says that the tribunal must consider all the evidence before us to determine whether the claimant has proved facts from which we could conclude that the respondent has committed the discriminatory acts complained of. We are entitled at that stage to take account of all the evidence but must initially disregard the respondent's explanation.

155. If we are satisfied that the claimant has proven such facts, it is then for the respondent to prove that the treatment suffered by the claimant was in no sense whatsoever on the grounds of her race.

156. In *Madarassy v Nomura International* [2007] IRLR 246, however, the court of appeal said that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (in this case, race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

157. This means that there must be something more than just unfavourable treatment and a difference in status, there must be some evidence form which we can infer that the unfavourable treatment was because of race.

Harassment

158. S 26 Equality Act 2010 says, as far as is relevant,

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

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

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

159. Subsection 5 lists the relevant protected characteristics, and they include race.

160. In *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336*,* the EAT analysed this provision. There are a number of elements to this provision

    a. The unwanted conduct. Did the respondent engage in unwanted conduct? This is a subjective test

    b. The purpose or effect of that conduct: Did the conduct in question either:

        i. have the purpose *or*

        ii. have the effect

        either

            - violating the claimant's dignity or

            - creating an adverse environment for her 2 ? (We will refer to (i) and (ii) as 'the proscribed consequences'.)

    c. The grounds for the conduct. Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?

161. If the conduct had the effect of violating the claimant's conduct or creating an adverse environment, the tribunal must consider whether it was, objectively, reasonable for the claimant to have felt that way. It is clear from subsection 4 that all the circumstances must be considered. In *Richmond Pharmacology*, it was said that

    "…if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if [he] did genuinely feel [his] 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 [his] 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. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt".

162. The EAT cautioned against encouraging a culture of hypersensitivity and it is necessary to consider the purpose of the comments or actions to determine the context.

163. In respect of whether the conduct was on the grounds of a protected characteristic, the test in section 26 Equality Act 2010 is now "related to". The causal link required by "related to" is a less strict test than for direct discrimination and whether conduct is related to race is a question for the Tribunal to determine on the facts before it. However, it is not sufficient, for the purposes of the test, for the alleged harassing conduct to merely be done in the context, for example, of a grievance about race discrimination. The alleged harassing act itself must be related to the claimant's race.

Victimisation

164. Section 27 Equality Act says, as far as relevant,

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

165. The respondent agrees that the claimant did a protected act by raising his grievance on 12 November 2022, so we do not need to say anything more about that.

166. The questions are, was the claimant subjected to any detriments and, if so, were any of them because he did that protected act?

167. The question of whether the detriment was *because* of the protected act can be difficult to answer. It is not enough to ask whether the detriment would have happened if the protected act had not been done (the "but for" test).

168. In *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48 Lord Nicholls expressed the test as

> *"why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact".*

169. In the same case, Lord Scott drew a distinction between the existence of the protected act as the reason for the treatment complained of and the making of the protected act as the reason for the treatment.

170. In that case the protected act was the bringing of tribunal proceedings. The detriment complained of was found to have been because the respondent was acting as any person would be likely to as a respondent in litigation. Namely, that the existence of the proceedings caused the employer to behave as they did, rather than the fact that the proceedings had been implemented. It is instructive to consider whether the same detriment would have happened if the proceedings had concluded. If not, then it was the

existence of the proceedings that caused the detriment rather than the fact of *making* the protected act.

171. In *Chief Constable of Greater Manchester Police v Paul Bailey* [2017] EWCA Civ 425 the court of appeal said"

"[section 27 uses] the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport *[1999] UKHL 36, [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome…*

…the claim is subject to the provisions of section 136 of the 2010 Act relating to the burden of proof, which read (so far as material):

[set out above]

The effect of section 136 (or, strictly, the cognate provisions in the predecessor legislation) has been authoritatively expounded in a line of decisions culminating in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931, and Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867. In brief, a tribunal must first decide whether a claimant has established a prima facie case of unlawful discrimination (or victimisation) in the sense elucidated in Madarassy at paras. 56-57; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation".

172. This means that the reason for the detriment, if any, must be the reason why the decision to subject the claimant to any detriments was made. If the claimant can show facts from which we could conclude that *doing* the protected act was the reason for the detriment, it will be for the respondent to show that in fact the detriment was in no way because of the protected act. It is not enough, however, to show a detriment and that a protected act had been done, there must be at least something which connects the two. If, however, the claimant shows that "something", the burden of proof will be reversed and it will be for the respondent to show that the detrimental treatment was in no way because the claimant did a protected act.

Conclusions

173. We address our conclusions by reference to the list of issues.

Direct discrimination and harassment

174. Did the respondent do the following things? If so, was it because of (in the case of direct discrimination) or related to (in the case of harassment) race?

Suspend the Claimant and start a disciplinary investigation around the 10th November 2022

175. We have found that this did happen. However, the reason, and as we have found the only reason, for suspending the claimant and starting a disciplinary investigation was that the respondent in the person of Mr Khuram held a genuine, and in our view reasonable, belief that the claimant had potentially committed acts of misconduct or gross misconduct. We have set out our reasons for those findings above and do not need to repeat them. We have also found that it was Mr Khurram's decision, not Mr Smith's. However, to the extent that Mr Smith had any involvement or influence on Mr Khurram's decision (again as explained above in respect of appointing Mr Khurram and approving his decision) that reason for Mr Smith's actions was because he genuinely and reasonably believed the claimant had an allegation of gross misconduct to answer and that Mr Khurram was an appropriate person to appoint (again for reasons we have already explained).

176. Although being suspended is detrimental and may well cause the 'proscribed consequences' in terms of harassment, this act was not because of, or in any way related to, the claimant's race.

177. For these reasons, this allegation of harassment and direct discrimination is unsuccessful and is dismissed in respect of both respondents.

Place him in a room alone on the 10th November 2022;

178. The claimant was asked to wait in the upstairs room. We have set out above our findings about that. In our judgment, in the context that we have described, this was a reasonable thing for Mr Khurram to do. The claimant described this incident in very dramatic terms in the hearing. He said that he was locked in the training room, although he did clarify that he meant that he was asked to stay there.

179. In our view, this incident was wholly innocuous – it cannot be said, realistically, even to amount to a detriment in the sense discussed above. No reasonable employee would consider being asked to wait in one place while the manager went to do something else a detriment. It certainly does not reach the high threshold required for harassment as set out above.

180. The claimant was just asked to wait in a room for a few minutes in circumstances where he was discussing his disciplinary investigation with colleagues and Mr Khurram was trying to manage the situation. Even if this *could* be said to amount to a detriment – in that a reasonable employee would view it as a detriment – we have heard absolutely no evidence to link this to the claimant's race at all. We have also not heard any evidence to suggest that this was in any way Mr Smith's decision.

181. This allegation of direct discrimination and harassment related to race fails in respect of both respondents because it was

a. not detrimental; and

b. not in any way connected with the claimant's race.

Make him leave the restaurant by the back door on the 10th November 2022;

182. We have found that the claimant was asked to bring his car round the back of the shop. He was not prevented form going out of the front door to get his car. In our judgment this was for wholly sensible practical reasons. The claimant needed to remove large amounts of food and cooking equipment and it would have been wholly unrealistic and impractical to bring them through the front of the shop.

183. The facts as we have found them in relation to this allegation do not, by any reasonable standards amount to a detriment. It certainly does not reach the high threshold required for harassment as set out above. In any event, however, Mr Khurram's' instruction was not in any way connected with the claimant's race and therefore this allegation of harassment and direct race discrimination fails in respect of both respondents.

Made adverse disciplinary findings against the Claimant and impose a final written warning on the 9th December 2022;

184. Again, this clearly did happen. In our judgment, the reason for the adverse disciplinary findings and the final written warning was because the respondent genuinely and reasonably believed that the claimant had committed the acts of which he was accused and that they amounted to gross misconduct.

185. In our judgment, there was an adequate investigation and the claimant was given an opportunity to make representations. The reality is that the claimant did not dispute that he had breached the respondent's rules by bringing the cooking equipment onto the premises and cooking or intending to cook food there.

186. In our judgment, the respondent has clearly taken account of the surrounding circumstances by imposing a final written warning rather than dismissing the claimant. The claimant was responsible for managing the restaurant. To commit such a flagrant breach of health and safety, food safety and brand standards as the manager is very likely to amount to gross misconduct and in many cases would result in a fair and reasonable dismissal.

187. The fact that the respondent gave the claimant only a final written warning indicates to us that they took into account the fact that the claimant was cooking for the respondent's charity, that the rules were not clearly communicated and that the claimant had a good disciplinary record.

188. While the act of receiving a final written warning is detrimental and may well in some circumstances result in the proscribed consequences, in all the circumstances we think that a reasonable employee would think that the claimant had done well to get away with a final written warning so that it

would not in fact amount to a detriment. In respect of harassment, it would not be reasonable for the final written warning to have the proscribed consequences.

189. In any event, the adverse findings and final written warning were wholly because of the respondent's reasonable belief and not in any way connected with the claimant's race.

190. For these reasons, this allegation of direct discrimination and harassment is unsuccessful in respect of both respondents.

Around 30th July 2022, Darren Smith commented that the Claimant could not be promoted because of 'cultural issues'

191. We have found that it is unclear if Mr Smith used the phrase as described by the claimant. However, the claimant only ever said that this had been reported to him by Mr Shah. We have found Mr Shah to be a plausible and reliable witness and his evidence was very clear that any criticism of the claimant was about his *work culture* (to paraphrase) and, in any event, any comments Mr Shah made were not related to the claimant's race and he was not reporting any discriminatory comments by Mr Smith.

192. Again, it is possible that this comment could amount to a detriment or, in some circumstances, could produce the proscribed outcome but the comment was not in any way connected with the claimant's race and for this reason these allegations of direct discrimination and harassment are unsuccessful in respect of both respondents.

Around the 7th December 2022, the Respondent criticised the Claimant's performance and achievements within the grievance process

193. There was some criticism of the claimant's performance in the grievance outcome. However, we have found that the reason for that limited criticism was that Mr Payne was setting out his relevant and genuine findings for the purposes of addressing the claimant's grievance.

194. We have found that the criticism of the claimant by Mr Smith about the claimant's failure to attend meetings as reported in the grievance was not reasonable and was not based on any evidence by Mr Smith.

195. However, in our judgment, this was because Mr Smith was operating at a level one step removed from the claimant. His assessment of the claimant was good overall, he just had limited criticisms. It is also important to remember that Mr Smith was giving those answers in the context of answering an allegation about using the phrase "cultural issues". Whether Mr Smith's perceptions of the claimant's performance were wholly accurate or not, he was addressing an allegation that he had used a discriminatory phrase.

196. In that context, it was reasonable for Mr Smith to explain his views of the claimant which, in our judgment, were genuine even if they were not

robustly evidenced. Similarly, it was reasonable for Mr Payne to set out those views and his findings about them in the grievance outcome.

197. We have considered whether, although there is no allegation that Mr Payne discriminated specifically against the claimant, the criticism in the grievance outcome was somehow tainted by discrimination because they originally came from Mr Smith and he was being discriminatory in saying them.

198. We find, for reasons that are explored in more detail below, that Mr Smith's expressed views were not because of the claimant's race and nor were they in any way related to the claimant's race.

199. For these reason, therefore, these allegations of discrimination and harassment are unsuccessful in respect of both respondents.

Around the 24th May 2022, at a meeting in Liverpool, Darren Smith segregated white people from non-white people, allowing white people to attend to watch a football match, but not non-white people.

200. We have found that this simply did not happen as described by the claimant. In our judgment, the various people at the event chose to spend time with whoever they wanted. The group was not, we have found, divided up by Mr Smith, and people were not excluded from watching football at the pub. Mr Smith cannot possibly, therefore, have segregated the employees.

201. To the extent that Mr Shah was not invited to the pub, we have heard absolutely nothing to suggest that this was related to Mr Shah's or the claimant's race, or race more generally. The selection criteria (in so far as it is reasonable to describe them as such) for attending at the pub for RGMs, seemed to be whether the invitation had been passed on by the relevant AC and whether the individual was interested in watching Grimsby Town play football.

202. However in our judgment, this strays significantly from the claimant's stark allegation that managers were segregated. Our finding is that they simply were not and for this reason these allegations of discrimination and harassment are unsuccessful in respect of both respondents.

Mr Smith's conduct towards the claimant generally

203. In the course of the hearing we gave the claimant an opportunity to explain why he believed that the negative treatment he perceived from Mr Smith was related to race. The claimant then explained the circumstances around his move to Colton Mill and back as set out above.

204. We have found that there was no evidence that Mr Smith had ever acted in a way that could be perceived as discriminatory. The claimant's suspicions seemed to be based on his perception of Mr Smith's favouritism towards Mr Kinsella, who is white.

205. Mr Smith gave evidence about what he said had happened. In his view, there was no preferential treatment of Mr Kinsella and, as we have observed, in fact the claimant was able to retain the higher salary from

Colton Mill when he returned to Harehills. We acknowledge that salary is not the be all and end all – there may be questions of status separate from that. However, we remind ourselves that even if Mr Kinsella was treated more favourably by Mr Smith than the claimant this is not of itself enough for us to conclude that this was for a discriminatory reason. There must be something more and we have not heard any evidence of anything else from which we could conclude that any of Mr Smith's perceived detrimental treatment of the claimant was in any way connected with the claimant's race, or race more generally.

206. For these reasons, the claimant's claims of direct race discrimination and harassment related to race are unsuccessful and are dismissed in respect of both respondents.

Victimisation

207. It is agreed that the claimant did a protected act by instigating a grievance on 12 November 2022.

208. Did the respondent do the following things because the claimant raised that grievance?

Raise unwarranted performance concerns about the Claimant which were brought up within the grievance and disciplinary processes

209. We have addressed the reasons for the performance concerns in our decision about the respective allegation of harassment and discrimination.

210. However, it is right to say that in one sense the respondent did raise those concerns because the claimant brough the grievance and that those concerns were raised directly in response to the allegation relating to "cultural issues". Namely, in the sense that were it not for the fact that the claimant brought the grievance, the comments would not have been made.

211. However, we are required to go beyond that. The question is what was the *real reason* for the respondent raising those concerns. Was it because of the *existence* of the grievance; or because the claimant had *raised* the grievance.

212. In our judgment, the real reason that Mr Smith told Mr Payne about his concerns about the claimant's performance was because he was asked a question related to them and he genuinely had those concerns. We have already acknowledged that those concerns might not all have been justifiable, but that does not detract from our finding that they were genuinely held.

213. The distinction is whether Mr Smith raised those concerns because he considered that he was honestly answering Mr Paynes questions or because the claimant had raised a complaint in which he complained of race discrimination.

214. In our judgment, the answer is that Mr Smith was complying, genuinely and honestly, with Mr Paynes grievance investigation. The reason for the unwarranted performance concerns was that Mr Smith was answering,

honestly, even if not necessarily correctly, the questions that Mr Payne asked him. It was not, in the sense explained in the cases referred to above because the claimant did a protected act but because he was responding to, and complying with, the grievance process.

215. For these reasons, the claimant's claim of victimisation is unsuccessful and is dismissed in respect of both respondents.

Unfair dismissal

216. Did the respondent do the following things:

The Claimant relies on the discrimination, harassment and victimisation contained with the paragraphs above arising out of the factual allegation in paragraphs 169 – 197, above

217. We have already address the allegations of discrimination and victimisation and found that the claimant was not directly discriminated against because of his race, he was not subjected to harassment related to race and he was not victimised.

218. To that extent, the allegations that the respondent did acts amounting to a repudiatory breach of contract must fail.

219. We consider alos, however, the factual assertions behind those allegations and whether, even if they are were not discriminatory, they were individually or cumulatively calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and, if they were, were those acts done without proper cause.

220. In respect of suspending the claimant and starting a disciplinary investigation, we conclude that this may well destroy or seriously damage the relationship of mutual trust and confident. However, in our judgment, and as we have clearly set out, the respondent had reasonable and proper cause for doing this. They reasonably believed that the claimant might have committed gross misconduct and it was proper to instigate a disciplinary investigation and follow it through.

221. In respect of placing the claimant in a room by himself – we do not think that, in the way we found this had happened, this is conduct capable of destroying or damaging the relationship of trust and confidence. However, even if it were the respondent had reasonable and proper cause for doing this – namely to protect the integrity of their investigation.

222. In respect of making the claimant leave the premises by the back door, again we do not think that, in the way we found this had happened, this is conduct capable of destroying or damaging the relationship of trust and confidence. However, even if it were the respondent had reasonable and proper cause for doing this, namely to avoid the claimant carrying all his cooking equipment through the restaurant when it was open.

223. In respect of making adverse disciplinary findings against the claimant and imposing a final written warning, we conclude that this may well destroy or

seriously damage the relationship of mutual trust and confidence. However, in our judgment, and as we have clearly set out, the respondent had reasonable and proper cause for doing this. They reasonably believed that the claimant had committed gross misconduct and they had a reasonable and genuine belief in the findings they made.

224. We go further and say that the sanction of imposing a final written warning was wholly reasonable in all the circumstances. As we have already observed, another employer might have reasonably and lawfully dismissed the claimant in the circumstances we have found. The decision to instead impose a final written warning was an entirely reasonable and proper course of action in this case.

225. In respect of Mr Smith's alleged comments that the claimant had cultural issues, we have found that this was not a discriminatory comment. The question then is whether it was nonetheless conduct capable of destroying or damaging the relationship of trust and confidence and, if it was, whether Mr Smith had reasonable and proper cause for doing that.

226. Mr Smith made the comments to Mr Shah. Mr Shah clearly did not perceive them as unfounded or pejorative, but as feedback to pass on to the claimant, as we have found it happened. It is part of a manager's role to give feedback to their employees and from other comments we have read it is clear that Mr Smith did think that the claimant had good qualities as well as areas for improvement. We find, therefore, that the comments as we have found them to have been made did not amount to conduct capable of destroying or damaging the relationship of trust and confidence. In the alternative, if they did, then Mr Smith had reasonable and proper cause for making them in that he was discussing the possibility of the claimant's progression with Mr Shah and giving feedback on that.

227. In respect of the criticisms of the claimant in the grievance process, we have found that this was not discriminatory and that Mr Smith genuinely believed what he was saying, even if he could not adequately explain why he held those beliefs. Mr Payne cannot be criticised for reporting those comments and relying on them in the grievance outcome. The criticisms were also in the context of positive comments about the claimant.

228. Making unwarranted criticism of the claimant's performance is capable of damaging the relationship or mutual trust and confidence. However, in this case, Mr Smith's *actual* comments were measured, balanced and genuine even if in evidence he was unable to give a satisfactory explanation about his views of the claimant's attendance at meetings. We have already observed that Mr Smith had oversight of many managers and many shops.

229. On the specific facts therefore we find that the criticism of the claimant fell short of being conduct capable of destroying or damaging the relationship of trust and confidence.

230. Finally, in respect of the alleged discriminatory conduct, we have found that Mr Smith did not segregate white people from non-white people so that this

self-evidently cannot be conduct capable of destroying or damaging the relationship of trust and confidence.

Fail to contact the Claimant throughout his period of suspension; Fail to check on the Claimant's mental health and well-being throughout the period of suspension;

231. There are three additional allegations that the claimant has made of conduct leading to his resignation. The first of these is an alleged failure to contact the claimant during his suspension and the second is that the respondent failed to check on the claimant's mental health. We think these are effectively the same thing. The respondent did contact the claimant throughout his suspension to arrange various meetings and to address his grievance and disciplinary. Further, the claimant was given a point of contact in Mr Khurram which he appears not to have made use of.

232. The real issue is that the claimant was not offered support with his mental health. There was no specific support offered. However, as mentioned Mr Khurram did offer his contact details for the claimant to use him as a point of contact and the claimant was an experience RGN who ought to have been aware, if he was not, of the support available to staff. Had the claimant needed support, there was no good reason why he could not have mentioned that to Mr Khurram and asked to be referred for support.

233. We have also found that the claimant did not communicate to Mr Khurram, either directly or by the way he presented, that he was experiencing any particular problems with his mental health.

234. In our view, it is certainly good practice to offer employees support, or remind them of the availability of that support if they are being suspended. This is obviously a difficult and upsetting experience. It would have been better if the claimant had been reminded of this at the time.

235. However, in our judgment, this failure is a failure of good practice, it is not conduct capable of destroying or damaging the relationship of trust and confidence.

Treat the Claimant poorly in grievance hearings.

236. The final allegation is that the claimant was treated poorly in grievance hearings. It is unclear what specifically this refers to or whether the claimant was continuing to rely on it. It seems to relate to the comments of Ms Ionescu that being suspended was like having a paid holiday. This was said in a disciplinary hearing, not the grievance hearing, but in any event it was not acceptable.

237. The claimant was complementary of the way Ms Saghir responded to that. It was clear straight away, therefore, that the respondent did not tolerate that comment and that the claimant realised that straight away. In all the circumstances, therefore, this was not conduct capable of destroying or damaging the relationship of trust and confidence because, as a matter of fact, it had not done so.

238. We have been unable to identify any other way in which the claimant says he was treated poorly in the grievance hearings – aside from matters we have already addressed in respect of the outcome. There may have been an issue about the grievance appeal hearing but this happened after the claimant resigned so can have had no impact on the claimant's decision to resign. For this reason the respondent did not call the appeal officer to give evidence and we have not consider that further.

239. For these reasons, therefore, whether individually or cumulatively, none of the alleged acts of the respondent were conduct capable of destroying or damaging the relationship of trust and confidence and the claimant's claim that he was unfairly dismissed is unsuccessful for the reason that he was not entitled to treat his contract as repudiated so that he was not dismissed within the meaning of section 95 Employment Rights Act 1996.

Time limits

240. We are aware that there was an issue to be determined as to whether any of the claimant's discrimination or victimisation claims were brought after the time limit for bringing them and, if so, whether they formed part of a continuing course of conduct or time should be extended for bringing those claims.

241. As we have not upheld any of the claimant's claims, it is not necessary and would not be proportionate, to give further consideration to that issue.

Failure to provide a written statement of main terms of employment or statement of changes to main terms of employment.

242. Finally, for the sake of completeness, the claimant has claimed that there was a failure by the respondent to provide written terms of his employment or written notification of changes to those terms in accordance with sections 1 and 4 Employment Rights Act 1996 and section 38 Employment Act 2002. As a mater of fact, we have found that the claimant was provided with a written statement of his main terms of employment and changes to them. However, the provisions of section 38 Employment Act 2002 are only relevant where a tribunal finds in favour of a claimant.

243. We have not upheld any of the claimant's claims so that the provisions do not, in any event, apply.

Employment Judge **Miller**

Date 17 November 2023

Appendix – list of issues

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5th October 2022 may not have been brought in time.

1.2 Were some of the discrimination, harassment and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct Race discrimination (Equality Act 2010 section 13)

2.1 The claimant, describes himself as British Indian and compares himself to, variously:
(i) Darren Smith (a white British man);
(ii) Mobeen Shah (a British Pakistani man);
(iii) Callum Kinsella (a white British man);
(iv) A hypothetical comparator.

2.2 Did the respondent do the following things:

2.2.1 Suspend the Claimant and start a disciplinary investigation around the 10th November 2022;
2.2.2 Place him in a room alone on the 10th November 2022;
2.2.3 Make him leave the restaurant by the back door on the 10th November 2022;
2.2.4 Made adverse disciplinary findings against the Claimant and impose a final written warning on the 9th December 2022;
2.2.5 Around 30th July 2022, Darren Smith commented that the Claimant could not be promoted because of ‘cultural issues’;
2.2.6 Around the 7th December 2022, the Respondent criticised the Claimant’s performance and achievements within the grievance process;
2.2.7 Around the 24th May 2022, at a meeting in Liverpool, Darren Smith segregated white people from non-white people, allowing white people to attend to watch a football match, but not non-white people.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says he was treated worse than the comparators noted above, as well as a hypothetical comparator in relation to the allegations at 1.2.6 and 1.2.7 above.

2.4 If so, was it because of race?

2.5 Did the respondent's treatment amount to a detriment?

3. Harassment related to race (Equality Act 2010 section 26)

3.1 Did the respondent do the following things:

3.1.1 The Claimant relies on the same factual issues noted above in paragraph 2.2

3.2 If so, was that unwanted conduct?

3.3 Did it relate to race?

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the claimant do a protected act as follows:

4.1.1 Instigate a grievance on the 12th November 2022

4.2 Did the respondent do the following things:

4.2.1 Raise unwarranted performance concerns about the Claimant which were brought up within the grievance and disciplinary processes

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, was it because the claimant did a protected act?

4.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

5. Remedy for Discrimination

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

6. Unfair dismissal

6.1 Was the claimant dismissed?

6.1.1 Did the respondent do the following things:

6.1.1.1 The Claimant relies on the discrimination, harassment and victimisation contained with the paragraphs above arising out of the factual allegation in paragraph 2.2 above.
6.1.1.2 Fail to contact the Claimant throughout his period of suspension;
6.1.1.3 Fail to check on the Claimant's mental health and well-being throughout the period of suspension;
6.1.1.4 Treat the Claimant poorly in grievance hearings.

6.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:
6.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
6.1.2.2 whether it had reasonable and proper cause for doing so.

6.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

6.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

7. Remedy for unfair dismissal

7.1 Does the claimant wish to be reinstated to their previous employment?

7.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

7.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

7.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

7.5 What should the terms of the re-engagement order be?

7.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.6.1 What financial losses has the dismissal caused the claimant?
7.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
7.6.3 If not, for what period of loss should the claimant be compensated?
7.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
7.6.5 If so, should the claimant's compensation be reduced? By how much?
7.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
7.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
7.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
7.6.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
7.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

7.6.11 Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?

7.7 What basic award is payable to the claimant, if any?

7.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?