



EMPLOYMENT TRIBUNALS

Claimant: Mr M Javid Khan

Respondent: MTR Corporation (Crossrail) Limited trading as MTR Elizabeth Line

Heard at: East London Hearing Centre

On: 3 November 2023, 8 November 2023, 9 November 2023
10 November 2023 (in chambers)

Before: Employment Judge Allen KC

Members: Ms Forecast
Mr Woodhouse

Appearances:

For the Claimant: in person
For the Respondent: Mr C Milsom (counsel)

JUDGMENT

1. The Claimant's claim for sex discrimination is dismissed upon withdrawal.
2. The Claimant's claim for unfair dismissal succeeds:
 - a. The basic award is reduced under s122(2) ERA 1996 by 50% on the basis that it is just and equitable to do so because of the conduct of the complainant before the dismissal.
 - b. The compensatory award (yet to be determined):
 - i. will be reduced under s123(1) ERA 1996 by 75%;
 - ii. will be increased by 10% under s207A TULR(C)A due to the Respondent's failure to comply with the ACAS Code of Practice;
 - iii. will be reduced under s123(6) by 50% on the basis that the dismissal was caused or contributed to by the complainant, and the tribunal considers it just and equitable to make that reduction.
3. The Claimant's claim for wrongful dismissal succeeds.

4. The Claimant's claim for direct discrimination because of race fails and is dismissed.
5. The Claimant's claim for direct discrimination because of religion fails and is dismissed.
6. The Claimant's claim for victimisation fails and is dismissed.

CASE MANAGEMENT ORDERS

1. The case is listed for a Remedy Hearing on **10 January 2024** for 1 day. The Claimant's application for a preparation time order and a wasted costs order dated 23 October 2023 will also be determined at that hearing. If any other application by either party is to be determined at this hearing, it should be made in writing and sent to the tribunal and the other party by **3 January 2024**.
2. The Remedy hearing will involve calculating the Claimant's notice pay; his basic award; and his loss of earnings and any other elements of his compensatory award for unfair dismissal and then applying the percentage reductions to the unfair dismissal basic award (50%) and the compensatory award (reduce by 75%, increase by 10%, reduce by 50%). If any additional documents are required for the Remedy hearing, the parties should agree a supplementary bundle by **3 January 2024** and send it to the tribunal 3 working days before the hearing in PDF form. Two additional printed copies of the trial bundle and 5 copies of any supplementary bundle should be brought to the hearing by the Respondent.

REASONS

1. Following a period of early conciliation between 24 and 26 October 2021, the Claimant presented his claim on 30 October 2021.
2. The issues were identified at a preliminary hearing on 16 May 2022. The parties confirmed at the outset of this hearing that the issues remained as previously identified, save that it was agreed that the person named as 'Rohan Williams' in the record of the hearing on 16 May 2022 was actually 'Rohan Lewis'. During the hearing, the Respondent conceded that the Claimant's participation in an investigation into a sexual harassment grievance in 2020 amounted to a protected act (which disposed of issue 43.14).
3. The issues remaining for us to determine were therefore as follows:
Unfair dismissal
43.1 What was the reason for the Claimant's dismissal? The Respondent contends that the reason was misconduct.

43.2 Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

43.3 Was the decision to dismiss the Claimant a fair sanction that was within the reasonable range of responses for a reasonable employer.

43.4 Did the Respondent follow a fair procedure in dismissing the Claimant?

43.5 If not, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

43.6 Did the Claimant contribute to his dismissal?

43.7 The Claimant alleges:

43.7.1 that his dismissal was primarily discriminatory on race and / or religion grounds and/or an act of victimisation;

43.7.2 the Respondent failed to comply with the ACAS code;

43.7.3 the Respondent failed to undertake a fair investigation;

43.7.4 The Respondent's senior management and HR colluded to dismiss him. The Claimant will rely on a recording of a conversation with management before his disciplinary hearing indicating that he would be dismissed;

43.7.5 the Respondent came to unreasonable conclusions on the information;

43.7.6 the Respondent unreasonably dismissed him.

Direct race discrimination (Section 13 Equality Act 2010)

43.8 The Claimant is British Asian for the purpose of the direct race discrimination claims about the following:

43.8.1 Suspended by Grace Williams on 21 May 2021;

43.8.2 The delay in the investigation into allegations against him;

43.8.3 Dismissal on 29 September 2021;

43.8.4 Not being offered a settlement following dismissal,

43.9 Was that less favourable treatment?

43.9.1 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.

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

43.9.3 The Claimant says he was treated worse than Marco Newell in respect of allegations 43.8.1 - 43.8.3 in that allegations of sex harassment were made against Mr Newell who was not subject to suspension and dismissal.

43.9.4 In respect of allegation 43.8.4 the Claimant says he was treated worse than Rohan Williams who was offered a settlement after being dismissed for the matters related to the Claimant's alleged misconduct.

43.10 If so, was it because of race?

Direct religion and belief discrimination (Section 13 Equality Act 2010)

43.11 The Claimant is Muslim for the purpose of the direct religion and belief discrimination claims about the following:

43.11.1 Suspended by Grace Williams on 21 May 2021;

43.11.2 The delay in the investigation into allegations against him;

43.11.3 Dismissal on 29 September 2021;

43.11.4 Not being offered a settlement following dismissal,

43.12 Was that less favourable treatment?

43.12.1 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.

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

43.12.3 The Claimant says he was treated worse than Marco Newell in respect of allegations 43.11.1 - 43.11.3 in that allegations of sex harassment were made against Mr Newell who was not subject to suspension and dismissal.

43.12.4 In respect of allegation 43.11.4 the Claimant says he was treated worse than Rohan Williams who was offered a settlement after being dismissed for the matters related to the Claimant's alleged misconduct.

43.13 If so, was it because of religion or belief.

Victimisation (Equality Act 2010 section 27)

43.14 Did the Claimant do a protected act in reporting to Grace Williams and Sarah Hibbert on 11 August 2020 that Marco Newell was sexually harassing a work colleague [this was conceded at the Hearing before us];

43.15 Did the respondent do the following things:

43.15.1 Suspended by Grace Williams on 21 May 2021

43.15.2 The delay in the investigation into allegations against him;

43.15.3 Dismissal on 29 September 2021;

43.16 By doing so, did it subject the Claimant to detriment?

43.17 If so, was it because the Claimant did a protected act?

Wrongful dismissal / Notice pay

43.18 What was the Claimant's notice period?

43.19 Was the Claimant paid for that notice period?

43.20 If not did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?

4. The Claimant's claim had initially also included claims for age discrimination, disability discrimination and for a redundancy payment. These were dismissed upon withdrawal on 16 May 2022.
5. At the outset of this hearing, the Claimant confirmed that the claim of sex discrimination should also have been dealt with at the same time as the other withdrawals and agreed that we should dismiss it upon withdrawal.
6. The hearing took 3 days before the conclusion of evidence and submissions. The tribunal sat in chambers on the 4th day.
7. We were referred to pages in a bundle running to page 1159. On Day 1 of the hearing, the claimant gave us transcripts of 4 covert recordings, marked as follows:
 - 7.1 A: dated 7 October 2021; Marco Newell and Ashton Grimes IT
 - 7.2 B: dated 8 October 2021: Marco having sex in his office
 - 7.3 C: dated 21 November 2021: Madalina Transcript
 - 7.4 D: dated 23 November 2021: [D] Transcript
8. The Claimant told the tribunal that he had made recordings C and D and that the other recordings had been made by others.

9. We also received on Day 3 of the hearing, a document which the Claimant said was a short self-report from D which the Claimant had received during his period of employment. The Respondent reported to the tribunal that it could not find this document on its files but it did not object to the document being put before the tribunal.
10. We had a chronology and cast list prepared by the Respondent.
11. We heard oral evidence from the Claimant's trade union representative, Mr Whyte (which was not challenged in cross examination - albeit that the Respondent said that it was not agreed); and from the Claimant. On behalf of the Respondent, we heard from David Pearce (Fleet Delivery Manager, Engineering Team) the investigator; Martin Bendry (Head of Stations at the relevant time) who made the decision to dismiss; and Dave Martin (Risk and Business Resilience Manager) who determined the appeal against dismissal.
12. We heard oral submissions from both parties. The Respondent also provided written submissions.
13. Following discussion with the parties about the relevant background information relating to the personal history of a non-party, the Tribunal reminded itself of the open justice principle and taking into account the importance of that principle, the tribunal determined that the minimum necessary to protect that person's rights would be to refer to that person in the Tribunal Reasons by the initial D. there was no objection from the parties to the suggestion that D's privacy needed to be protected in a proportionate manner.
14. The nature of this tribunal's task is different in relation to different aspects of our decision making:
 - 14.1 In relation to the fairness of the dismissal, we must determine the fairness of the Respondent's actions on the basis of the band of reasonable responses. Our focus in that regard is on the information that was before the decision makers (taking into account any information that should have been before them on a reasonable investigation).
 - 14.2 In relation to wrongful dismissal, we must determine on the evidence before us what happened and whether the Claimant was guilty of gross misconduct – i.e. a repudiatory breach of contract entitling the Respondent to dismiss him.
 - 14.3 In relation to *Polkey* we need to determine what the Respondent would have concluded in the absence of any procedural defects (or at least the percentage chance that this Respondent would have dismissed the Claimant in any event).
15. Therefore we have sought to distinguish below between: the undisputed facts in particular in relation to the period 18 to 21 May 2021; our findings as to the facts before the decision makers; our own findings of fact as to 'what happened'; and

our findings as to what would have happened but for any procedural defects in order to come to our conclusions on: unfair dismissal based on the information which was before the decision makers; wrongful dismissal based on the evidence before us; and our findings on the Respondent's *Polkey* argument.

16. Given the differences between what was said at different times by the witnesses and given the suggestion that the Respondent's decision makers failed to take account of all of the evidence before them, it has been necessary to set out the evidence that was before the Respondent's decision makers in detail below.

Findings of Fact

17. The Respondent is an organisation providing rail services on behalf of TfL (the Elizabeth Line – formerly known as Crossrail) currently employing approximately 1,500 employees.
18. The Claimant's employment dated back to 1 March 2010 when he was employed by Greater Anglia. He was TUPE transferred to the Respondent on 31 May 2015. He was summarily dismissed on 29 September 2021. His role at the date of dismissal was Control Room Team Leader. The Claimant's unchallenged evidence was that he had a good disciplinary record prior to the events that led to his dismissal in 2021.
19. The Claimant asserted his race and religion as British Asian, Muslim. We have noted below the race (as put to the Claimant by the Respondent and not challenged) and religion (where known) of any individual cited as a comparator in relation to the discrimination claims or where otherwise relevant.
20. The unchallenged evidence of Mr Bendry was that the Claimant reported to Marco Newell, Station Manager (Afro-Caribbean, religion not known). Rohan Lewis, Duty Customer Experience Manager (Afro-Caribbean, religion not known) was one of 8 Duty Managers, who are above the Claimant and below Mr Newell in terms of hierarchy and have operational responsibility. Mr Newell reported to the Group Station Manager, Mr Varsani, who reported to the Head of Stations (Mr Bendry); who reported to James Cox, Head of Customer Operations; who reported to Paul Parson, Customer Experience Director; a who reported to Nigel Holness, Managing Director.
21. Below the Claimant in the hierarchy but reporting to Mr Newell were Customer Experience Assistants such as Madalina Gherman; Shaheen Ali; Roda Ali; and Yasir Ghayas (British Asian, Muslim).
22. D was an Apprentice who was recruited by the Respondent through its Steps Into Work Programme, focussed upon those with neurodivergent and/or learning disabilities. He was subject to an Education Health and Care Plan. He may be autistic, dyslexic and dyspraxic. It was agreed by the parties and the tribunal accepted that he was a vulnerable person. The Claimant asserted that D's medical condition and / or medication may have had an impact on his memory. This was not disputed (or agreed) by the Respondent. The Claimant's assertion was taken into account by the tribunal in its decision making. It was common ground that D is Jewish.

23. Grace Williams is a HR Business Partner. Jesse Kailen was a Learning and Development Apprentice.
24. The Claimant had operational supervision of the Customer Experience Assistants and the Customer Experience Apprentices albeit that they were line managed by Mr Newell and not by the Claimant.
25. Grace Williams, HR Advisor, assisted in the grievance relating to Marco Newell in 2020; and was present for the investigation interviews with Mr Lewis, D and Ms Gherman in 2021; and the disciplinary appeal in relation to the Claimant.
26. In 2020 a female Customer Experience Assistant brought a grievance relating to sexual harassment and bullying and harassment against Mr Newell. That grievance was investigated by Sara Hibberd, Retail Systems Manager. She interviewed a number of witnesses including the Claimant, who was interviewed on 11 August 2020 and who made negative comments about Mr Newell which supported the argument that he may have harassed the female Customer Experience Assistant. The Respondent has accepted that aspects of the Claimant's evidence at that interview amount to a protected act.
27. There was no complaint made by the Claimant in the following 9 months that he was being targeted by Mr Newell.
28. The grievance outcome was that the sexual harassment complaint was not upheld. In relation to the bullying and harassment complaint, the grievance investigation recommended that it be upheld and a letter of advice was issued to Mr Newell (stated by the Respondent to have been outside the disciplinary procedure) recommending that he consider his management style and that a repeat of similar misconduct may lead to formal disciplinary action. There was also a recommendation by the grievance investigator that a hearing take place in relation to an allegation of breach of confidentiality pertaining to the grievance process itself. There was no disciplinary process involving Mr Newell. The Respondent's assertion before this hearing is that the grievance investigation report was not given to Mr Newell given that this was a grievance investigation – not a disciplinary investigation.
29. Mr Newell was not suspended at any stage in relation to that grievance investigation. Aside from the submission from counsel that this was a grievance investigation rather than a disciplinary investigation, no reason was given in evidence by the Respondent's witnesses as to why Mr Newell was not suspended.
30. On 18 May 2021 the undisputed facts are:
 - 30.1 Mr Lewis showed a YouTube video on his phone to D;
 - 30.2 The Claimant instigated a hug between Ms Gherman and D;
 - 30.3 Mr Lewis had a conversation with D about Israel / Palestine.

31. On 19 May 2021 at 15:26, Jesse Kailen emailed Grace Williams following a call with D's mother. She reported:

After discussing the EHCP plan she asked me if I knew about [D's] religion, I replied that I did not and was then informed that [D] is Jewish. She said that [D] has been coming home from work upset and that he has been experiencing bullying in work due to his faith.

[D's mother] stated that [D] has been systematically bullied at work and has had colleagues make derogatory comments, about [D's] faith, such as: Comments about [D's] glasses and shoes and about Jewish people don't like spending money. That [D] should research about what the Jews have done/ are doing in Palestine.

[D's mother] also stated that there have been 'Pally'/Palestinian remarks made towards [D].

[D's mother] stated that she is concerned for [D's] safety at work as he is receiving anti semitic bullying whilst at work. She has told [D] to try and not respond to the bullying, as retaliation could make the situation worse.

I asked if [D] had given her names and she said he has given her 3 names, and there are some repeat offenders. I didn't ask for names at this time, but did say to [D's mother] that I would raise the issue with my manager to find out who the right person was to raise this issue with.

32. On 19 May 2021 at 16:24, D emailed Mr Newell and D's mother as follows:

On the 18th of May mohsin said that I should watch a training video, he never told me what it was about he made me watch it on Rohan's phone. It was in fact a music video of a woman in inappropriate positions. It then led to mohsin trying to force me to hug Madalaina, and he wouldn't let me leave the room until I done so. He then made me describe what it felt like even to the point of how madalaina pressed up against me. Mohsin during the day kept asking me what sort of girls I liked and what body parts appeal to me. I hesitated in my reply but he kept asking so I gave a random answer.

On the 18th of May whilst I was having a conversation with mohsin, Rohan interrupted suddenly and said why are you Jews bullying the Palestinians and forcing them out of Palestine. I said that Palestine does not exist, afterwards Rohan made me research the origins of Israel and its original name. Rohan then said that I should educate my parents on this and that we should stop thinking that Israel is the home of the Jewish people."

On the 19th of May mohsin said that I should wear better shoes, glasses and hair. He said that it makes me look dork and a nerd, he said "I know you Jews in the Jewish community don't like to spend money", Also Rhoda was having a conversation with Shah and Mohsin asking if they were going to the Palestine March in central London and Shah said to me that it was stolen land referring to Israel.

I am unable to recall every account of what has happened but there has been subtle remarks and digs about my religion that make me feel incredibly uncomfortable.

The comments are making me feel uncomfortable when I am working. This is especially uncomfortable when I have said several times that I do not want to engage in these conversations, and I don't feel that they are appropriate to have in the work place.

33. Swiftly afterwards, at 16:39 on 19 May 2021, D's mother sent an email to Jesse Kailen forwarding D's email and stating:

Re conversation earlier please find below [D's] statement.

As I explained earlier today [D] has come back from work over the last week with some rather distressing comments made at work to him or in his presence. I have stated to [D] numerous times do not engage in the conversation as we are a peaceful non religious non political family but very proud to be Jewish. [D's] colleagues have been more and more derogatory about his background and have been bullying him into things he does not feel comfortable with and as a vulnerable adult does not always know how to express his upset or distress. Although he has said for them to stop, but they aren't.

[D] doesn't do politics or religion but his colleagues seem very much intent on using [D] as a sounding board for their political views, however uninformed they may be, [D] is not up on the Middle East so chooses not to engage but it seems that his colleagues don't know when to stop.

34. On 20 May 2021, the Claimant took [D] into a room and had a conversation with him which included references by [D] to having been labelled as disabled.
35. On 21 May at 12:00, Mr Newell conducted a Q and A with [D], without a note taker or HR presence. The record states:

[D]: On the 18th May 2021, I was in Stratford control room, with Madalina (CEA Madalina-Rozalia Gherman), Rohan (DCEM Rohan Lewis) and Mohsion (Control Supervisor Mohsion Javid-Khan). Rohan and Mohsion said I should view a training video, so Rohan showed me his mobile, and a video of a woman dancing provocatively in a music video. She only had knickers and bra on.

MN: How did it make you feel?

[D]: I felt uncomfortable. I thought it was strange that it was not a training video. I thought it was company training video. I said to myself, this isn't a training video. Mohsion said I should experience a woman. He said I should cuddle Madalina so I know how it feels like. Madalina and I were hesitant, I said I was going, and Mohsion said 'you're not going until you cuddle her'. Madalina reluctantly came over, and hugged me, after that Mohsion said how does that feel? How does it feel her pressing up against you? I turned around and thought it was just a hug, I didn't say anything. I left the room after this and Madalina left too.

MN: How did that situation make you feel?

[D]: Very uncomfortable. Inappropriate, especially when Mohsion said, how did it make you feel to have a woman press up on you? Whenever I would go into the control room, and Mohsion was there, he would ask about women and what type I like? What body parts of a woman do I like?

MN: How does that make you feel?

[D]: Thought it was inappropriate. I didn't want to challenge, as it felt awkward.

MN: Explain why you were unhappy with Rohan?

[D]: Rohan discussed my Jewish heritage, and the situation in Palestine, in front of Mohsion. I felt Mohsion and others have seemed to be in grossed in my heritage and the situation, which makes me feel uneasy. I never told them to stop, I didn't see any malicious in it at the time.

MN: so what has changed now?

[D]: looking back at what Rohan said was inappropriate. Shah (CEA Shaheen Ali), Mohsion, Roda (CEA Roda Ali), asked if I was Palestine or Jewish? I said to them that I

do not like talking about this type of topic in the work place. I left afterwards, as I didn't want to be there, as I felt uncomfortable. Shah said on my way out its stolen land.

I feel Mohsion was bullying me....and Mohsion can be over bearing. I spoke to Mario (DCEM Mario Jenkins) and he said they do take jokes too far. Referring to some of the Stratford team. Mohsion yesterday (20.05.21) asked me to come over to room 1 on platform 5, and he said I know I can come across a little strange, he also said it makes him feel normal to have banter, jokes when talking to me. I was in the room with him for 20mins. He was going on about my special needs. He doesn't think I have the problem that I have been diagnosed with. Mohsion said he has created two companies he is planning to become a therapist. Right now, he is looking for an office for his company. He told me that he is already helping people. He showed me on his phone two private meeting with his clients which he disclosed with me. Mohsion is helping a woman who was abused by her mum, and she has bruising down her arms. He put a cube on a table, and said this was me at 3 years old, and he thinks I have been missed diagnosed. He said my family and people around me may look at me in a negative way. Mohsion then said, we are trying to get you to become a manager. Mohsion said what are your special needs? I told him what they were. Then he said something that hurt which was, that might be why you look a little odd. He said, when I'm on the platform, I'm a bit slow.

MN: How did you feel about those comments?

[D]: I was not impressed, especially as you said I'm doing well Marco.

MN: That's because you are doing well. You have come a long way from that shy [D], who I first met, to this now more confident and happier [D]. I'm very proud of your achievements. Surely, my feedback as your line manager counts?

[D]: It does, that's why I felt it was odd, when Moshion said what he said. Rohan once said to stm colleague that we are trying to groom [D] to become a manager. I didn't see that as a negative.

MN: Absolutely not, if that's what you would like to become, who's going to stop you from achieving this? I would support you, but we have to take each step at a time. That's a future progression which the management team can support with. Out of all of this, what you like be done, or for me to action?

[D]: Mohsion, Shah, Rohan require boundary education. British value lessons, how to respect each other. I think they should go on a respect and dignity course. Mohsion said to me that he took six months out not to travel the world like he told you, but to study to be a therapist. These customers were abused in these videos, and he was sharing intimate secrets with me.

MN: Anything else to add [D]?

[D]: No.

MN: Ok will go through all my notes, seek council from HR and make my decision of where we go from here with this information. What you need to know is that as your line manager, If I felt there was concerns about your development, I would come to you. I would never set any of my team up to fail. You're one of the team, and are valued. I want you to go home now, relax, don't stress about anything, as you have now offloaded to me. It's my job to take the burden. I will contact over the weekend with any updates and to make sure you're ok. Please note that I have an open door policy, and I am always happy to listen to my team here at Stratford or over the phone text, email whatever you feel more comfortable with. Never keep anything that troubles you to yourself. You must trust your manager, you're not burden. If anyone asks, why were you in my office, tell them to ask me. You do not have to answer to anyone, as it is your business.

[D]: yes

36. Mr Newell at 13:36 on 21 May 2021 had a Q and A with Ms Gherman also without a note taker. Mr Newell's record states:

MN: Hi Madalina, and thanks for coming to see me. I just wanted to ask you a few questions about an incident you may have witnessed or been involved. This comes after I received an email from [D], and wish to explore this with you. Recently, were you asked by anyone, to hug [D]?

MG: Yes, Mohsion asked me to cuddle [D] in the control room.

MN: Did you cuddle [D]?

MG: yes, I pulled one arm around him. MN: Did [D] say anything about it? MG: he laughed.

MN: What happened after that?

MG: [D] left the room for security checks and I went platform. Before this, were talking about greeting each other. How people greet at work.

MN: Who was instigating this conversation?

MG: Mohsion was telling him how staff cuddle and how to be friendly at work, so when we meet at work, sometimes we touch shoulders.

MN: Who was in the room at the time?

MG: Me, Mohsion, Shah, Rohan possibly.

MN: Did you feel uncomfortable about cuddling [D]?

MG: No.

MN: Do you think [D] felt uncomfortable.

MG: No. Mohsion was encouraging [D] and I to cuddle, and said [D] Madalina cuddle. I felt awkward about the situation as I was asked to give him a hug.

MN: Why do you think you were asked to hug him?

MG: Mohsion being Mohsion. I didn't think it would be offensive, but Mohsion asked and just did it. I remember Mohsion asking [D], but [D] could have said no.

MN: If I asked, you to cuddle someone you didn't like in my office, or if I forced you to cuddle someone, and said you can't leave until you do, how would you feel?

MG: I would hate you.

MN: now ask yourself, how might [D] have felt?

MG: Mohsion was insisting. He said it about 10 times. I said no at first, but eventually I did it to shut Mohsion up.

MN: Anything else to add?

MG: No thank you.

37. The tribunal considered that some of Mr Newell's questions were leading questions and some of Ms Gherman's answers were internally contradictory.

38. Mr Newell at 14:00 on 21 May 2021 had a Q and A with Mr Lewis, also without a note taker. Mr Newell's record of that meeting states:

MN: Hi Rohan, thanks for meeting me today. Reason for this meeting is to discuss an email I have received from [D], and I will need clarity, and answers. Do you remember being in the control room recently, and showing [D] a supposed training video?

RL: No.

MN: Did you show [D] any video on your mobile recently?

RL: no what I can recall.

MN: [D] stated that on Tuesday, that you showed him a video, and claimed it was a training video.

RL: yes, I was in the control with Mohsion, Madalina, and Shah. We were having a banter. A video came on from you tube, on my phone. Lady was dancing I showed Madalina. That was it.

MN: Did you show [D] the video?

RL: Everyone was in the room and saw the video.

MN: What was the video?

RL: it was a woman dancing.

MN: Did you or Mohsion say it was a training video?

RL: no

MN: Talk me through the hugging incident. Did you hear anyone say to Madalina to hug [D]?

RL: I can't remember that.

MN: Did Madalina hug [D]?

RL: I believe she did for a joke. It was banter.

MN: Talk me through what was discussed about Jews and Palestinians.

RL: I can't remember how the discussion started but I asked [D] if he was aware of what's going on in Palestine. He then replied, there is no Palestine. And that's when I said to him, historically there is a Palestine. [D] Googled Israel Palestine conflict. We then then read, or I read what it said on google. And that was it.

MN: Did you read it out a loud.

RL: Yes, I read out aloud what was said on google.

MN: Apart from Tuesday 18th May, have you ever spoke to [D] about his heritage, Palestine affairs or anything to do with Jewish culture?

RL – no, I have no interest in the conflict. The only reason why I brought it up on that day was that [D] said he was Jewish or of Jewish decent. I thought lets discuss the current situation and affairs.

MN: Anything else to add

RL: No.

39. As the Claimant accepted in cross examination, given the information received by the Respondent by this point, it was inevitable that there would be an investigation into conduct in the workplace.
40. There was no Q and A with the Claimant. The Claimant and Mr Lewis were suspended on 21 May 2021. The Claimant was suspended by Mr Newell in a telephone call and there was a follow up letter from Mr Newell emailed to him by Grace Williams. The letter referred to allegations of sexual harassment, bullying and harassment and inappropriate conduct towards another employee in the workplace. No specifics were given.
41. The tribunal considered that it was reasonable for both Mr Lewis and the Claimant to have been suspended at this time.
42. Mr Pearce was appointed as a disciplinary investigator in relation to both the Claimant and Mr Lewis. He was new to the organisation and he did not have any previous experience of conducting a disciplinary investigation. The Respondent did not give the tribunal any explanation as to why this investigation was a disciplinary investigation rather than a grievance investigation.
43. Mr Pearce interviewed [D] on 27 May 2021 at 09:00. [D] initially read from the note of his Q and A interview with Mr Newell which he described as 'the statement that Marco sent me'. [D] did not repeat some of the accusations in his letter of 19 May 2021 (e.g. that the Claimant had said that [D] should wear better shoes, glasses and hair and that it makes him look like a 'dork and a nerd' and that he said "I know you Jews in the Jewish community don't like to spend money"); and he did make other accusations about the Claimant (e.g. "Even Mohsin turned around once talking about religion and said [D] is a fake Jew").
44. Mr Pearce interviewed Ms Gherman on 27 May 2021 at 13:00. Her account differed somewhat from the record of her meeting with Mr Newell e.g. she did not repeat that the Claimant had asked her 10 times to hug D. She said the following:

... I was working at Stratford day dispatcher platform 8. Some point went into control room and made a cup of tea. When I got into the control room [D] was there, Shah was there and Mohsion. They were having a conversation but I cannot recall exactly what was said as I was not paying full attention. I recall Mohsion telling [D] that he has to be confident when greeting people at work. We greet colleagues and are friendly to each other. He said at some point to go hug [D] give Madalina a hug. Me and [D] looked at each other and took it as a joke as we were laughing. He kept insisting and said don't be shy give her a hug. [D] looked at me smiling, I looked at him and didn't do anything. Then he asked me give Danny a hug he's shy. He repeated himself lots of times. I said look [D] do you want me to give you a hug, he looked at me and smiled. Wat happened was I put one arm around him and touched shoulder and that was it

...

I feel a bit ashamed. I respect [D], we are colleagues. I do apologise as I do not want him to feel uncomfortable. I took it the wrong way I thought it was a joke and

was asked to do so. Didn't know how [D] felt about it he agreed and he was not forced. I asked him before, I feel a bit ashamed and embarrassed to be honest. I was pressured

GW: Madalina, do you feel like you could say no to Mohsion in that situation?

MG: I said no a couple of times and shook my head. They were laughing and me and [D] looked at each other. From his facial expressions he was waiting to give me a hug. That's what I thought in that moment

...

DP: Have you been aware of other incidents with Mohsion or other guys displaying similar behaviours?

MG: No

DP: Anything previously they have said or made you do that you have uncomfortable?

MG: Because we have known each other so long I assume it is jokes and banter between colleagues, things like that. Can't say I was offended by them before

...

DP: Answered some of these already, but did [D] make it clear he was uncomfortable?

MG: No that's the thing. I probably misunderstood it. All the time we were laughing and smiling. It did not make me feel for a second that he was uncomfortable, he probably was but didn't want to show it

GW: what happened after you hugged him and put your arm around him? Do you remember?

MG: Yes, I think it was for a second or two then we laughed and I had to go outside as I heard a train coming. [D] ran outside to do security checks as well. We have not spoken about it at all after that happened

DP: You've answered the next question, [D] sometimes is not be able to express himself clearly. Do you think at the time he expressed feeling uncomfortable?

MG: Honestly I think maybe he didn't want to show himself in front of his colleagues so people don't think he is less confident, things like that. From my perspective he did not seem upset or uncomfortable in that situation. If he did then of course I wouldn't dared to of joked. I do feel sorry and want to apologise to him. If I knew it would make him feel uncomfortable I would never do it, even if I was asked to do so

MG: From what I witnessed and what I saw I didn't see Mohsion being rude to him. Before it was not in front of me. They talk to each other and laugh with each other. I guess it is a friendly environment

...

45. Mr Pearce interviewed Mr Lewis on 28 May 2021 at 10:00. In relation to the Claimant, the following exchange took place:

DP: Something you haven't mentioned which has been brought to my attention that I need to ask about. I understand there was an incident where Mohsion was asking/insisting on [D] and Madalina hugging. Were you involved in that incident?

RL No, I was on computer and was getting some stuff printed off. I had nothing to do with that whatsoever.

DP: Were you aware that it occurred?

RL: At the last part I actually saw Madalina hugging [D] - he didn't seem distressed. Once again, I should have shut that down and hold my hands up and apologise for that - as the manager on the day.

DP: Thank you, just making a couple of notes.

GW: Rohan, I know you said you were on computer at that time, can you recall what you specifically heard in the background regarding the hug?

RL: No, my mind had drifted off that day Grace, I know as a manager I should have shut the whole incident down, looking back as a manager. I put my hands up to that.

...

GW: Did you hear anybody in that control room making comments directed towards [D] and his faith?

RL: No, none at all. Shaheen Ali was there, Mohsion was there, nothing came up at all, and that's to my knowledge. No way would I ever come out with that. No member of staff at work no matter what ethnic background would say I would make any of those comments. I'm black myself, things are going on in life, but I act professional and leave it outside.

DP: Ok, did you hear Mohsion make any comments towards [D] about women or women's body and sexual preferences?

RL: No didn't hear that at all, I wasn't part of that, if it did happen.

46. Mr Lewis's tone during that interview was apologetic and conciliatory.
47. Mr Pearce interviewed the Claimant on 1 June 2021 at 13:30. The following relevant exchanges took place:

DP: Thank you, it is alleged on 18th May that you behaved inappropriately when in the Stratford Control Room and what can you tell me about that?

MJ: As far as I'm aware, I didn't speak out of context or behave inappropriately. Not sure who started a conversation but when I spoke to [D] on way out to break. I asked if he ever didn't want to speak about religion or politics just say so and we can leave the room then he did that the next day.

DP: Did you tell [D] you were going to show him a training video?

MJ: I called [D] in to check on his calling patterns and policies for the security checks, so when I called him in, I didn't say come in for a video.

DP: Ok

...

DP: It is alleged you showed videos on someone else's phone to [D]? Can you clarify what the videos were and why you used someone else's phone?

MJ: As I called him in, Rohan was watching something on his phone and then [D] just viewed it before I questioning him about calling patterns between Liverpool Street and Shenfield. And what would he do if you found a bag on the platform.

DP: Ok, were you aware that you were making [D] feel uncomfortable at the time by him seeing those videos?

MJ: Never, he never felt uncomfortable because I always treated him really well. Many occasions where I have bought him food, he has come from home without food, he's always been hungry and he has never shown or said to me that he has been uncomfortable.

...

DP: Why did you tell Madalina and [D] they had to hug?

MJ: It didn't come off like that, it wasn't like that. The way it happened was I asked 'Do you want to hug Madalina?' Madalina responded by saying [D] do you want a hug? And [D] initiated it, he opened his arms first and smiled and hugged her. Nothing provocative, just a friendly hug.

...

DP: Ok, next question Mohsion, did [D] or Madalina say no when you asked them to hug?

MJ: Never, at no times. No body language, no signals, they were both smiling.

...

DP: Ok, understood. How did that conversation about Israel and Palestine come about?

MJ: I have no idea, there is general conflict going on in the news, I didn't start it or finish it. When I left the room with [D], I said to him if you ever don't want to speak about religion or politics just say so and leave the room. He followed my advice the next day. There was another discussion can't remember who it was but he just walked out. He even knows that I said that to him.

...

GW: Mohsion why did you ask [D] and Madalina to hug in the first place? How did that come about?

MJ: Was just friendly banter. [D] do you want a hug? He obviously wanted a hug, and he went to Madalina, he hugged her. I didn't drag him, force him, I didn't say anything extreme to him to make him hug her. He wanted to hug her. Shaheen Ali was in the room, you can ask him.

DP: Ok. Can you explain why the both individuals involved have both stated that you explicitly told them they couldn't leave the room until they hugged?

MJ: That's incorrect, it wasn't like that.

DP: Ok. Next question, why did you feel the hug was appropriate work place behaviour?

MJ: Friendly banter that's it. I didn't mean anything by it. GW: Is it something that has happened before?

MJ: No never.

...

DP: Ok, thank you. Did you on 19th May say to [D], 'you should wear better clothes shoes and style his hair? 'It makes him look like a dork and a nerd and I know you Jews in the Jewish community do not like to spend money?'

MJ: No

...

DP: Onto another day, why did you take [D] to room 1 on Platform 5 at Stratford Station on 20th May, can you tell me what happened please?

MJ: I took him in, asked if he was ok. He didn't raise no concern, he didn't say nothing that will alert me that any behaviour or anyone had said something to upset him including me. Just a general chit chat. I will send you the video clip of [D]. 2 video clips. 1 of the testimonial and another one of him playing cricket with me on the day before. He didn't express no concerns or no harm and just the Mother has taken things out of context. Simple as that. I don't believe in religion or politics, everyone knows that. I don't speak in those terms, I do not open my mouth when I do not need to.

MJ: Was a general chit chat of how he was.

DP: What were your intentions of taking him into that room, rather than talking to him down on the platform or taking him to the control room?

MJ: If he wants to discuss, that's it. We openly discussed.

GW: Is that something you've done before Mohsion, with other people and or [D]?

MJ: Yes, everyone does. Not just me, everyone has. Senior managers have. I'm not the only one to go in there.

MJ: Yes

GW: Thank you

DP: Are you aware [D] has autism meaning he may be unable to express himself as well as others?

MJ: Yes he told me in that room, he told me on that day how his Mother and Doctor label him as disabled at the age of 3, I wouldn't know that information unless that information came from [D] direct himself.

DP: Ok, can you confirm why you felt it was appropriate to say you didn't believe his diagnosis was correct?

MJ: I didn't say that. I'm not a doctor and I wouldn't say that. Only thing I said is about being better in life and learning to grow. Trying to inspire him no matter where he is in life, no matter what difficulties he is facing, he can do better.

DP: Ok thank you. Did you state [D] looks a little odd as a result of his learning difficulties?

MJ: Never.

DP: Ok, so this question was going to be how your working relationship with [D] is but we have covered that. Have you ever taken objection to [D's] work ethic before?

MJ: Never, just said to him to work harder and better because there are other people inspiring to be on same level as him, sometimes he says he wants to be a train driver, sometimes a manager. I said to him you need to put the work in, no one will get given a job role just for the sake of it. Everyone is here because they have done work to achieve where they are right now. I was trying to inspire him, make him better and feel good about himself. I would never ever degrade [D]. I treat other people how I want to be treated.

DP: Thanks Mohsion. Last question for now, why do you think anyone would make these claims about you?

MJ: Taken out of context, when you're not there, people say things that are untrue. It's like people trying to write life story but don't know who you are.

DP: Ok. And last one have you shared any confidential videos from therapy sessions with [D]?

MJ: Yes basically told him that the things I have been doing and whatever he wants to become he can do that as well.

GW: What have you been doing Mohsion?

MJ: A testimonial from people that I have been working with and they are turning their lives around.

48. Towards the end of the record of the Claimant's interview included in the investigation pack it states "internet cut out". In the record of the same interview in the investigation pack for Mr Lewis, there is a full record. The italicised words below were left out of the record in the Claimant's investigation pack:

MJ: Wanted to ask because Marco confirmed to me twice on the phone 21st Friday and 24th Monday that he was charged with similar things in the past but he has no previous suspension to his name, so why am I treated differently to others.

GW: That's private and confidential, Mohsion, I can't discuss the details of other cases with you.

MJ: But why would Marco be charged with similar things in the past but not have a suspension to his name yet I have?

HW: She can't say.

49. The Respondent provided no reason to the tribunal for the discrepancy between the two versions of the record of the Claimant's interview or why the Claimant expressly raising the difference in treatment of Mr Newell and himself was therefore not included in the investigation pack which went forward to the disciplinary hearing.
50. The tone set by the Claimant and Mr Whyte during that interview was neither apologetic nor conciliatory.
51. Mr Pearce did not contact Shaheen Ali or Roda Ali at that point in the investigation, despite the Claimant's request that he contact Shaheen Ali; and Mr Lewis referring to Shaheen Ali in his interview with Mr Pearce on 28 May 2021; and D's reference to both Shaheen Ali and Roda Ali in his interview with Mr Pearce on 27 May 2021; and Ms Gherman having stated that they were both present in her interview on 27 May 2021.
52. There was then a delay in proceeding with the investigation into the allegations concerning the Claimant. According to an OH report dated 22 June 2021, the Claimant was signed off sick with depression from 15 June 2021. OH recommended "a breathing space from frequent non-essential communication" and noted the Claimant's "request for a brief hiatus in contact to aid his recovery". Mr Pearce relied upon this and also the fact that he was also assimilating himself into a new role and his need to complete the investigation

into Mr Lewis as well as the Claimant for the fact that the investigation report regarding the Claimant was not finalised until September 2021.

53. The investigation into Mr Lewis proceeded and an investigation report was produced by Mr Pearce in June 2021 and he was invited to a disciplinary meeting chaired by Andrew Parker which took place on 30 June 2021. Mr Parker summarily dismissed Mr Lewis, who then appealed. The 17 page written record of the appeal hearing on 28 July 2021, provided by the Respondent, is garbled. The Respondent was not able to explain to this tribunal hearing why that was the case. It is possible to discern that Mr Lewis and his representative Mr Higgins presented a number of arguments including that people who had been witnesses to the alleged comments and behaviour of Mr Lewis had not been interviewed as part of the investigation. It would appear that as a result of some or all of the arguments raised on appeal, Mr Lewis and the Respondent then entered into a settlement agreement. None of the Respondent's witnesses at this hearing were able to tell the tribunal why the Respondent entered into the settlement agreement with Mr Lewis.
54. As a result of Mr Lewis /or his representative having raised at *his* appeal hearing that there had been a failure to obtain information from additional witnesses, Shaheen Ali and Roda Ali were contacted by email from Ms Williams in late July 2021 and asked the following:

*Do you recall being in the Stratford Control Room on 18 May 2021 with [D], Mohsion Javid-Khan, Rohan Lewis and Madaline Gherman?
If yes, please can you outline what you recall from this incident?*

55. Shaheen Ali said:

. . . there was no antisemitic comments made by anyone including Mr Javid or Mr Lewis. I can also confirm I did not witness any bullying or intimidating behaviour from Mr Javid or Mr Lewis towards [D]. [D] was not isolated and targeted in this conversation.

. . .

Regarding inappropriate behaviour, I can confirm [D] was asked by Ms Gherman if he would like a hug. He accepted this quite happily. No other member of staff encouraged Madalina to forcefully give him a hug. . . . there was no bullying behaviour and throughout the day [D] was happy and worked along side Mr Javid and Mr Lewis with no signs of being distressed,

56. Roda Ali said:

. . . I do not recall any incident that was out of the ordinary.

. . .

I witnesses [D] hugging Madalina Gherman and he was smiling and blushing.

57. Shaheen Ali's comments in particular suggest a greater familiarity with the charges against either or both of Mr Lewis and / or the Claimant than is consistent with confidentiality having been maintained. That indicates how important it is to interview all relevant witnesses as soon as possible.
58. Mr Pearce compiled an investigation report dated September 2021 in which he set out a chronology of which the relevant part stated:

Date Not Specified 'Before Christmas 2020'	Yasir Ghayas allegedly asked questions to [D] about whether Jewish people cover their face and genitals during sexual activity
18 th May 2021	Mohsion, Rohan, [D], Madalina and Shaheen were in the Control Room at Stratford Station. [D] was allegedly asked to view a training video on (Rohan's) phone by Mohsion. The video allegedly showed a woman wearing underwear dancing provocatively. Mohsion Javid-Khan allegedly stated that [D] should 'experience a woman'. When asked, both [D] and Madalina stated they did not want to do so but did anyway.
18 th May 2021	[D] was having a conversation with Mohsion when Rohan allegedly interrupted making comments with regards to Jewish people bullying Palestinians out of Palestine. A subsequent conversation followed discussing [D]'s Jewish heritage. Rohan allegedly made [D] search online for information about Palestine and the conflict.
19 th May 2021	Mohsion allegedly made comments to [D] with respect to his appearance stating that he should 'wear better shoes, glasses and hair' and that it makes him look like a 'dork and a nerd'. Mohsion allegedly proceeded to say "I know you Jews in the Jewish community don't like to spend money".
19 th May 2021	Jesse Kailen, Learning & Development Apprentice, received a phone call from [D's mother] on behalf of [D]. [D] and [D's mother] followed up with an email statement to Jesse Kailen.
20 th May 2021	Mohsion allegedly took [D] into Room 1 on Platform 5 at Stratford station for approximately 20 minutes. He allegedly explained to [D] that sometimes he can come across 'a little strange' but that it is intended as banter. Mohsion allegedly discussed [D's] disabilities which included Mohsion claiming he believed [D] had been misdiagnosed. Mohsion allegedly stated that he believed that might be why [D] 'looked a little odd'. Mohsion proceeded to talk about how he had taken six months unpaid leave in 2020 to train as a therapist, not to travel as he had claimed to MTREI. Mohsion allegedly showed [D] private images and videos of patients whom he claimed he was helping. Mohsion allegedly placed a cube in front of [D] and claimed and stated that it represented him at 3 years old.

59. There were things set out in that chronology that the Claimant was not asked about by Mr Pearce – such as his alleged comment to D on 18 May 2021 about whether D had 'experienced a woman'; and his alleged comment to D on 20 May 2021 that he can come across 'a little strange' (The Claimant was asked if he

has said 'odd' – which the Claimant denied). It was not suggested by Mr Pearce to the Claimant that he had said anything specifically unacceptable to D about Palestine.

60. The disciplinary allegations were set out as follows in section 5 of the investigation report:

5. DISCIPLINARY ALLEGATIONS

The allegations are specifically defined [by] Mohsion Javid Khan as;

5.1 Sexual Harassment against a colleague whilst in the workplace on 18th May 2021

5.2 Bullying and Harassment of a colleague through derogatory and anti-Semitic comments on, but not exclusive to 18th and 20th May 2021

5.3 Inappropriate conduct in the workplace towards a colleague including but limited to 18th and 20th May 2021

61. Mr Pearce summarised the evidence for and against in relation to each allegation – taking into account the evidence obtained from interview and from the emails including the comments made by Shaheen Ali.

62. Mr Pearce's conclusions were set out as follows:

8.1 SEXUAL HARRASSMENT AGAINST A COLLEAGUE WHILST IN THE WORKPLACE ON 18TH MAY 2021

In consideration of the above incidents, the Investigating Manager has found that there is evidence that an incident did take place on 18th May involving [D] and Mohsion Javid-Khan in relation to hugging a colleague in the workplace. Whilst Mohsion denies forcing anyone, he did acknowledge that a 'hug' did take place between the two individuals. It is clear from the witness statements that an incident did occur on 18th May 2021, one of which supports the version of events presented by [D].

Furthermore, the evidence presented indicates that Mohsion was complicit in sharing inappropriate content to [D] on a mobile device in the workplace.

Therefore the Investigating Manager believes that the allegation should be upheld.

8.2 BULLYING & HARASSMENT TOWARDS A COLLEAGUE INCLUDING BUT NOT LIMITED TO 18TH AND 20TH MAY 2021

In consideration of the above incidents, the Investigating Manager has found that there is evidence of bullying and harassing behaviour. It appears that this has previously been shrugged off as banter and 'just Mohsion being Mohsion', however the Investigating Manager believes that this is inappropriate behaviour for a workplace.

Mohsion claims to have a video of [D] specifically praising Mohsion by name, however this has not been provided and has not been considered as part of this investigation.

Considering the evidence provided, there is exceptionally strong support for these allegations with little evidence to support any argument against.

Therefore the Investigating Manager believes that the allegation should be upheld.

8.3 INAPPROPRIATE CONDUCT IN THE WORKPLACE TOWARDS A COLLEAGUE INCLUDING BUT NOT LIMITED TO 18TH AND 20TH MAY 2021

In consideration of the above incidents, the Investigating Manager has found that there is evidence of inappropriate conduct in the workplace. In both Mohsion's and [D's] interviews it was stated that videos of therapy sessions were viewed and provided by Mohsion.

Apart from the confidentiality issue this raises, there does not appear to be any reason why these videos were shown or necessary. The evidence suggests that whilst Mohsion may believe he is trying to help [D], [D] states this is having the opposite effect.

Therefore the Investigating Manager believes that the allegation should be upheld."

63. In relation to Allegations 2 the conclusion lacked any findings as to what the Claimant was said to have said or done (aside from the matters already covered

in Allegation 1); and in relation to Allegation 3, the conclusion lacked detailed findings on what the Claimant was said to have said or done and when and in relation to both Allegations 2 and 3, the term 'including but not limited to' in relation to the dates is unhelpful.

64. The instigation of the hug (Allegation 1) was on 18 May 2021. In oral evidence, Mr Pearce said that the matters referred to in Allegations 2 and 3 were only in relation to 20th May 2021.
65. The conclusions do not make any specific reference to anything that the Claimant is said to have done or said on 19 May 2021.
66. The use of the term 'upheld' was inappropriate for an investigation report. On appeal, the Respondent accepted that this had been an inappropriate term to use. Mr Pearce's function was to determine whether there was a case to answer – not whether the allegations should be upheld.
67. The report did go on to recommend that a disciplinary hearing take place. It also made a number of recommendations including that given the culture that had been allowed to develop at Stratford, the Team be given equality and diversity training; and that a separate investigation take place against Yasir Ghayas.
68. On 21 September 2021, the Claimant was invited to a disciplinary hearing. The date of the disciplinary was then rearranged and it took place on 29 September 2021. The invitation letter set out the allegations as follows:
 - Allegation 1: Sexual Harassment against a colleague whilst in the workplace on 18th May 2021
 - Allegation 2: Bullying & Harassment towards a colleague including but not limited to 18th and 20th May 2021
 - Allegation 3: Inappropriate conduct in the workplace towards a colleague including but not limited to 18th and 20th May 2021
69. The investigation report was attached with its appendices including all of the witness interview and email records, however the tribunal regarded that list of allegations as unhelpfully lacking in specificity as to dates and action or words used, in particular in relation to Allegations 2 and 3. The allegation of antisemitism was not expressly stated in that invitation letter.
70. The letter did also tell the Claimant that he had the right to be accompanied and it informed him that the result of the disciplinary hearing could be his summary dismissal and it notified him of the contact details for the employee assistance programme.
71. For the purposes of an assessment of fairness, the 'investigation' is everything that takes place prior to the decision to dismiss. The disciplinary hearing took place on 29 September 2021, conducted by Mr Bendry. The Claimant was accompanied by Mr Whyte. The Claimant and Mr Whyte adopted a combative stance. The approach taken by Mr Bendry was to require the Claimant to disprove the case against him. In relation to Allegations 2 and 3, even this was

not done by putting specific instances of alleged behaviour or comments to the Claimant. Mr Bendry did not 'go through the evidence' at that hearing. Some of the exchanges were as follows:

The first allegation. Sexual Harassment against a colleague whilst in the workplace on 18th May 2021. Is there anything additional or further that isn't contained within this pack or documentation that you want to put forward today?

...

MJ: The chain of care was so poor. There are certain issues you seriously need to look at in HR. Breach of confidentiality, he has caused me to go off with stress, which has had a knock on effect on my professional life, I work hard. I don't want this to affect my future and I want justice. I do the right thing for people for the right reasons and I've been targeted. Marco targeted me because I put a statement against him.

HW: This is in regards of sexual harassment claim from Andreea. Marco suspended him for a different incident. He should not have been doing this investigation.

MJ: He admitted on the phone at 16:05 on 21/05/2021. And said 'I was charged with a similar thing last year buddy, you will be okay.'

HW: That was him making reference to the sexual harassment case with Andreea.

MJ: I was so shocked he admitted that to me. He also called me on 24/05/2021 at 13:00 and he said exactly the same thing. I changed my chain of care because of that. I didn't want to do it because I wanted to give him the benefit of the doubt. He admitted to me he was charged with the same things. I did raise the issue in the first investigation meeting. Grace had biases, every time I discussed issues with Marco, she shut me down and then ended the meeting straight away. She promised me, on paper- protection. And I believe she leaked the statement to Marco because I have evidence of certain things that took place.

...

MB: So moving onto allegation two, Bullying & Harassment towards a colleague including but not limited to 18th and 20th May 2021, as previously said, is there anything further you want to bring up today?

...

MB: Okay, moving onto allegation three, Inappropriate conduct in the workplace towards a colleague including but not limited to 18th and 20th May 2021. The same question to you Mohsion, anything further you want to add that is not in the pack that you want to discuss?

MJ: What's the third charge?

MB: Inappropriate conduct in the workplace towards a colleague including but not limited to 18th and 20th May 2021.

MJ: No, my intention is always to make sure I have a good impact on them, I have a 100% record prior to this, never been ill prior to this. I have letters and recommendations from former employers, Greater Anglia, it shows my character. What is concerning is how this has happened, I can't even tell my family what I am going through, it has impacted me so much. How can you explain to your family, you spent 12 years at a place and they've done this to you?

MB: Okay you typed over from GA?

MJ: Yes that's correct.

SB: Appreciate the statement you made, anything else you want to add, evidence or anything you want to discuss in relation to allegation three?

MJ: Nothing.

HW: He is innocent basically, of all charges.

SB: Okay

MB: So a couple of bits I want to finish up on before we take an adjournment. Thank you for your responses to the allegations and the additional bits you have provided. In terms of reading the interviews that have happened and what's been put forward with regards to allegation one. There is reference to the hugging in the Stratford office, can I ask what the relevance is to anybody's role or job, on top of that, why and how did that come about?

MJ: The restrictions had been lifted. I made as a comment. That's it. May the 17th 2021, lifted restrictions on people hugging in public places, on the Gov website you can check it, I made a comment. I didn't physically push them together. The statement from Shah is saying I didn't force them, they wanted to. Another thing is how come I am suspended for it, when she physically hugged him?

...

MB: Okay so allegation two and around [D's] medical conditions, references made throughout the pack about comments regarding [D's] religious beliefs and a question asked by you to [D]. Mohsion you probably know more about [D] because you have worked in the environment. Are those questions relevant or required in the workplace?

...

MB: I'm asking Mohsion what was the purpose was behind those questions?

MJ: What questions?

MB: Regarding [D's] religious beliefs and what's going on in the world with Palestinians?

MJ: I didn't make those comments. I am very anti-war, that's why I don't contribute any conversations about war. I don't talk about it because like me people end up in situations like this. I didn't initiate a conversation, even though they are saying I did. I don't want to reveal things on behalf of [D] that he told me because of our friendship as I don't want to reveal certain things later on in court, I have close knowledge of what he has told me. I don't want to reveal things that I don't need to because I shouldn't be here.

...

72. Over and over again in the disciplinary hearing, in particular in relation to Allegations 2 and 3, Mr Bendry required the Claimant to disprove allegations that were not specified adequately or at all.
73. At the conclusion of the hearing, Mr Bendry informed the Claimant that all of the allegations had been upheld and that he was summarily dismissing him. In the outcome letter 1 October 2021 Mr Bendry repeated his reasons as follows:

Allegation 1: Sexual Harassment against a colleague whilst in the workplace on 18th May 2021

The evidence is clear that a hug did happen between two colleagues ([D] and Madelina).

The two colleagues have stated in their statements that on multiple occasions said no and you continued to make this happen. More specifically, Madelina states that she told you at least ten times no that she didn't want to hug [D].

I don't deem that as appropriate and consider it as sexual harassment. Therefore I do find there is sufficient grounds to uphold this allegation.

Allegation 2: Bullying & Harassment towards a colleague including but not limited to 18th and 20th May 2021

Your response to the allegation was providing an email from November 2020 and no further evidence in relation against Bullying & Harassment. I referenced that Bullying & Harassment takes place in varying forms. Having reviewed the evidence, there is nothing additional that you presented that indicates [D] was not bullied.

There were references in relation to [D]'s diagnosis which you've confirmed you were aware of.

You refuted discussions in relation to his religion, however from what you've said to [D] has then resulted in his mother feeling like she had to contact the company.

Therefore I do find there is sufficient grounds to uphold this allegation

Allegation 3: Inappropriate conduct in the workplace towards a colleague including but not limited to 18th and 20th May 2021

Having considered all the evidence in the pack, I believe there has been inappropriate conduct in the workplace towards your colleagues.

Therefore I do find there is sufficient grounds to uphold this allegation.

74. Mr Bendry failed to make findings about specific actions or words of the Claimant in relation to Allegation 2 and 3. In reading those findings it is not possible to know what Mr Bendry considered that the Claimant had actually done or said or why he had rejected the Claimant's account or the accounts of other witnesses. The conclusions were so general as to leave it impossible for the Claimant to challenge them on appeal in any particularised manner. To make a finding that something must have happened because someone's mother had written in to complain about it is not a reasonable path to follow.
75. Contrary to a statement in Mr Bendry's witness statement, the Claimant and his representative did make Mr Bendry aware that the Claimant considered that Marco Newell had targeted him because the Claimant had made a statement against him. Mr Bendry failed to investigate this.
76. In relation to Allegation 1, it had been pointed out to Mr Bendry at the disciplinary hearing that not all of the witnesses to the 'hug' had suggested that it was inappropriate or non-consensual on D's part or that the Claimant had insisted that they couldn't leave the office before they hugged. Mr Bendry did not specifically deal with that point in his conclusions. Mr Bendry did make a finding that "Madelina states that she told you at least ten times no that she didn't want to hug [D]". This was part of very brief reasoning in relation to Allegation 1 and even that is not an accurate record of what she actually said. She had not said

that at the interview with Mr Pearce the investigator. At the formal disciplinary investigation she said “I said no a couple of times”. She had been reported as saying to Mr Newell that the Claimant had said to her about 10 times that she should hug [D] – not that she has told the Claimant 10 times that she did not want to do so.

77. The outcome letter failed to address a point that had been made in the disciplinary about the Claimant’s previously clean record; it also failed to address alternative sanctions. In his witness statement, Mr Bendry said that he had considered alternative sanctions. However, the tribunal found that difficult to believe given that they were not mentioned in a letter that had clearly been drafted with HR support nor mentioned in the verbal outcome given at the conclusion of the meeting. The tribunal found that Mr Bendry had not taken into account the Claimant’s record and that he had not considered alternative sanctions.

78. The Claimant appealed on 2 October 2021. His appeal letter states:

I would like to appeal the decision made against Mohsion Javid Khan on 29/09/21 on the following grounds below.

- 1) Failures Of Procedures.
- 2) Failures Of Policy’s.
- 3) Severity Of Sanctions.

79. The appeal hearing took place on 21 October 2021, conducted by Mr Martin, attended by Ms Williams. The Claimant was represented by Mr Whyte, as he had been throughout.

80. A number of points were raised by the Claimant, many of which were dealt with by Mr Martin in his appeal outcome letter dated 19 November 2021. Aside from those specifically referred to below, the tribunal considered that Mr Martin had dealt with the other points within the band of reasonable responses.

81. At the outset of the appeal hearing, it was raised on behalf of the Claimant that Mr Bendry had not gone through the evidence. Mr Martin’s ultimate response in the appeal outcome letter was:

You raised the point that Martin Bendrey, Head of Stations, failed to discuss all of the evidence from the investigation report compiled by David Pearce, 345 Delivery Manager. Within the MTR’s Disciplinary Policy, it states that the Disciplinary Manager will read the allegations against the employee and the evidence that has been gathered.

Having reviewed the minutes from your disciplinary hearing I note various references evidence within the pack and attempts by the Disciplinary Manager to discuss the evidence presented in the pack. You were also asked for comments regarding the contents of the pack.

In addition, the investigation containing all the evidence gathered was provided to you in advance of the meeting. It is my view that there was sufficient opportunity to discuss and raise challenges to any of the evidence during the disciplinary hearing. I do not believe that the MTREI disciplinary policy requires the hearing Manager to read the entirety of the investigation report during the hearing.

82. The tribunal did not agree in relation to Allegations 2 and 3 that Mr Bendry had conducted a reasonable process or that he had given the Claimant sufficient opportunity to address specific points or indeed that the investigation pack itself contained sufficient specificity to enable Mr Bendry to have fallen back on that. The tribunal considered that this was self-evident on the face of the documents before Mr Martin and that this response was not within the band of reasonable responses.
83. The point was made at the appeal that Mr Pearce used the language of 'upheld' rather than 'case to answer'. Mr Martin did agree that this use of language was inappropriate but concluded that it had no influence on Mr Bendry. The tribunal considered that this did have an impact on the way that Mr Bendry approached the disciplinary hearing in that he was basing himself on a series of conclusions that allegations had been upheld and asking the Claimant to disprove them – rather than regarding himself as the decision maker and weighing the accounts that were before him. Again, the tribunal considered that this was self-evident on the face of the documents before Mr Martin and that this response was not within the band of reasonable responses.
84. Another point raised on behalf of the Claimant was that he had been suspended and that Mr Newell had not. This was not properly understood by Mr Martin (he thought that it was being suggested that Mr Newell had previously suspended the Claimant) and it was not addressed in his outcome letter.
85. The Claimant provided a recording of Mr Newell stating that the Claimant was not coming back anyway (which we have as transcript A). Mr Martin did deal with this in his appeal outcome letter. The tribunal did consider that Mr Newell was clearly indicating that he did not expect that the Claimant would be returning post appeal but the tribunal did not consider that this was indicative of a control by Mr Newell of the disciplinary process or a pre-determined outcome of the appeal in any event and the tribunal considered that it was likely to be merely a statement of managerial bravado.
86. In relation to Mr Newell, it was suggested on behalf of the Claimant that Ms Williams had leaked his 2020 witness statement to Mr Newell in which the Claimant described Mr Newell in unflattering terms and that Ms Williams was a drinking buddy of Mr Newell's.
87. This caused the appeal hearing to be adjourned. Mr Martin's preliminary view was that this was unfounded and inappropriate and having spoken to Ms Williams, he then concluded that it was unfounded. The tribunal considered that Mr Martin closed his mind to any suggestion that she could be guilty of wrongdoing. The tribunal did not consider that this issue relating to Ms Williams was at the core of the disciplinary matter being considered, however it should not have been dismissed in the manner in which it was.
88. The appeal meeting was never reconvened. The Claimant sent directly to Ms Williams an email with a picture with the word 'Karma' with arrows above and below the word around suggesting that 'what goes around comes around'. The tribunal considered that this was a threatening and inappropriate thing for the

Claimant to have done but the tribunal did not consider that this matter concerning Ms Williams was sufficient reason for not reconvening the appeal hearing at all (with a different HR advisor present) or for not investigating the matter raised by the Claimant relating to Ms Williams and Mr Newell.

89. The failure to reconvene meant that the appeal did not fully discuss the sanction and whether it was proportionate. Mr Martin told the tribunal that at a reconvened hearing he would have given the Claimant the opportunity to have added anything that he wanted to say and that he would have delivered the outcome verbally.

The Legal Framework

90. The relevant parts of sections 94 and 98 Employment Rights Act 1996 (ERA) state:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

...

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

...

(b) relates to the conduct of the employee

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

91. The tribunal reminded itself that the hearing before the tribunal is not a re-hearing of the disciplinary and that in determining the unfair dismissal claim, it was not for the tribunal to step into the shoes of the employer and substitute its own views. Different employers may investigate in different manners or even reach different conclusions and may both be acting reasonably.
92. Guidance as to what constitutes reasonableness in the context of a dismissal for conduct was given in the case of *BHS Ltd v Burchell* [1980] ICR 393. The guidance suggests that the tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.
93. The tribunal must also consider whether the sanction of dismissal fell within the band of reasonable responses open to a reasonable employer.

94. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: *Sainsburys Supermarkets Ltd v Hitt* [2003] IRLR 23. The question for the tribunal is whether the Respondent acted within the band of reasonable responses rather than whether the tribunal subjectively consider that there was a 'fair dismissal'.
95. As part of its decision making, a tribunal must consider whether there were any procedural flaws which caused unfairness by looking at the fairness of the whole of the disciplinary process. A single procedural flaw need not render a dismissal unfair. The tribunal must determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

The Basic Award – reductions

96. Section 122(2) ERA states:

122 Basic award: reductions

...

- (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

The Compensatory Award – reductions

97. The relevant parts of Section 123 ERA state

123 Compensatory award

- (1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

- (2) The loss referred to in subsection (1) shall be taken to include—

- (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

...

- (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding

98. A compensatory award can be reduced under s123(1) if it is just and equitable to do so including if there was pre-termination misconduct not known to the employer at the time of the dismissal. However, contrary to the submission of the Respondent in this case, post-termination conduct cannot be directly taken into account as a basis for a reduction under s123(1) or s123(6) (*Soros and another v Davison and another* [1994] ICR 590, EAT). However, a tribunal can take post-termination conduct into account in determining whether there should

be a reduction to the compensatory award claim on a just and equitable basis to reflect the possibility that post-termination conduct would have led to dismissal on the basis of that conduct (*Cumbria County Council and another v Bates* EAT 0398/11).

ACAS Code

99. Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 states:

207A Effect of failure to comply with Code: adjustment of awards

- (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
- (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
- (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
 - (b) the employer has failed to comply with that Code in relation to that matter, and
 - (c) that failure was unreasonable,
- the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

100. The unfair dismissal claim concerns a matter to which the ACAS Code of Practice on Disciplinary and Grievance Procedures relates. In relation to the order of adjustments to the compensatory award, the tribunal followed the guidance in the IDS Handbook on Unfair Dismissal at 17.214 which reflects the Court of Appeal's comments in *Digital Equipment v Clements* [1997] ICR 237.

Direct Discrimination

101. Both race and religion are protected characteristics under the Equality Act 2010.
102. The relevant parts of sections 13, 23, 27, 123 and 136 of the Equality Act state:

13 Direct discrimination

- (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.
- ...

23 Comparison by reference to circumstances

- (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.
- ...

27 Victimisation

- (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.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

123 Time limits

(1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

136 Burden of proof

(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.

103. A bare difference in status and a difference in treatment does not make out a prima facie case of discrimination. Unreasonable behaviour in and of itself is insufficient to advance a prima facie case of discrimination but it can go to credibility and can open the door to an inference of discrimination.

104. In order to establish a prima facie case in a victimisation claim, it is for the Claimant to establish knowledge of the protected act. The protected act need only have a significant influence on the impugned conduct. It need not be the sole or main reason.

Wrongful Dismissal

105. The tribunal is required to reach findings on the balance of probabilities as to what happened and then to determine whether the Claimant's conduct amounted to a repudiatory breach of contract thereby entitling the Respondent to dismiss him without notice. A repudiatory breach can be conduct which breaches the implied term of trust and confidence. The burden is on the Respondent to show that the Claimant's conduct amounted to a repudiatory breach.

106. In determining whether a breach took place, a tribunal is entitled to look beyond the live evidence before it. Some weight can be given to the documentary

evidence and to the records of interviews conducted during an internal investigation. Hearsay or documentary evidence, or other types of evidence of whatever nature, are not, as such, inadmissible in employment tribunal proceedings, and if such evidence is sufficiently relevant to what the tribunal has to decide, then it should be considered. But the assessment of the evidence, and what weight to attach to it, is a matter for the tribunal (*Hovis v Louton* EA-202-000973-LA).

Conclusions

Unfair dismissal

43.1 What was the reason for the Claimant's dismissal? The Respondent contends that the reason was misconduct.

107. This is not a high hurdle for a Respondent to reach. The Claimant was put through a disciplinary process in relation to alleged misconduct and findings were made that he was guilty of misconduct. The tribunal has rejected the assertions made by the Claimant as part of this case that the reason for his dismissal was race or religion discrimination; or victimisation; or the assertion made during the internal process that the real reason was to get rid of a TUPE transferred employee (not a specific claim before the tribunal). The tribunal is satisfied that the reason for dismissal was misconduct.

43.2 Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

108. As per the *Burchell* test, there are three parts to this question: Did the Respondent hold a belief in the Claimant's guilt; if so were there reasonable grounds for that belief; and had the Respondent carried out a reasonable investigation at the time when the belief was formed?
109. In relation to Allegation 1, the tribunal was satisfied that the Respondent believed that the Claimant was guilty of instigating the hug. The tribunal was also satisfied in relation to Allegation 1, that there were reasonable grounds for a finding of misconduct – albeit that the tribunal did not consider that the Respondent sufficiently articulated its findings in the disciplinary outcome letter (or that those findings were an accurate reflection of all of the evidence). At a basic level, the Claimant accepted during the internal process that he had instigated a hug between two subordinate co-workers, which was also evidenced by both of those involved.
110. Given the tribunal's finding as to the inadequacy of the investigation process in relation to Allegations 2 and 3 (including at the disciplinary hearing) and the lack of specificity as to what the Claimant was found to have done or said, the tribunal concluded that the Respondent did believe that the Claimant was guilty of misconduct in a general sense but the tribunal concluded that the Respondent had not reached a conclusion as to what that misconduct actually was (given that there was no adequate finding as to exactly what he was guilty of in relation to those allegations). Given the lack of specific findings by the Respondent, the tribunal concluded there were not reasonable grounds to support a finding of misconduct in relation to Allegations 2 or 3.

111. We have addressed the investigation process next – whether at the point at which a decision was made, the Respondent had conducted a reasonable investigation.
112. In relation to Allegation 1, the tribunal considered that the Respondent had (just) adequately investigated the matter. It was clear to the Claimant what was alleged to have happened. He was given an adequate opportunity to respond and he did so. That the Claimant did instigate the hug was admitted. In relation to Allegations 2 and 3, the Respondent had not adequately investigated the matters. The Claimant was unable to respond to generalised allegations at the disciplinary hearing – even with reference to the conclusions at the investigation stage and the content of the investigation report. At the disciplinary hearing, the decision maker did not articulate the specific claims in relation to allegations 2 and 3, even when asked to do so; and in the disciplinary outcome letter there was insufficient specificity on those allegations to allow the Claimant to mount an appeal. This aspect of the process was not rectified at the appeal stage.

43.4 Did the Respondent follow a fair procedure in dismissing the Claimant?

113. We have addressed this question prior to issue 43.3. Some basic procedural safeguards were in place. There was an investigation. There was an invitation to a disciplinary hearing. There was a hearing. The Claimant received an outcome letter and he was able to exercise the right to appeal. The appeal decision maker considered many of the points made on appeal. However, a fair procedure within the band of reasonable responses was not followed for the reasons outlined above: there was insufficient investigation into Allegations 2 and 3; there were no adequately reasoned conclusions in relation to Allegations 2 and 3; the disciplinary hearing should not have merely required the Claimant to disprove allegations made against him. It is an intrinsic part of a fair investigation (as happened at the investigation report stage but which then failed to happen at the disciplinary hearing – which is part of the investigation in the broader sense) that a decision maker looks for the evidence to prove or disprove allegations. The outcome letter was insufficiently specific in relation to Allegations 2 and 3 to enable the Claimant to mount a meaningful appeal against the determinations made. There was no investigation into some matters raised by the Claimant at the disciplinary and appeal stages. The appeal hearing was not reconvened.

43.3 Was the decision to dismiss the Claimant a fair sanction that was within the reasonable range of responses for a reasonable employer.

114. Given the findings above, the tribunal have considered this in relation only to Allegation 1. Mr Bendry in his witness statement highlighted Allegation 1 as being the primary factor in his decision making and in his oral evidence he suggested that he would have dismissed for that allegation alone. It is however clear to the tribunal that his conclusions on the other allegations were part of his decision making process and that they also contributed to his decision to dismiss.
115. The finding on Allegation 1 in the outcome letter was briefly stated

Having fully considered the evidence and your response to my questions concerning the case I am satisfied that the facts of the case are as follows:

Allegation 1: Sexual Harassment against a colleague whilst in the workplace on 18th May 2021

The evidence is clear that a hug did happen between two colleagues ([D] and Madelina). The two colleagues have stated in their statements that on multiple occasions said no and you continued to make this happen. More specifically, Madelina states that she told you at least ten times no that she didn't want to hug [D]. I don't deem that as appropriate and consider it as sexual harassment. Therefore I do find there is sufficient grounds to uphold this allegation.

116. That was not an accurate reflection of all of the evidence. It did not explain why evidence to the contrary was rejected. It did not consider the context. The decision maker did not take into account the Claimant's record or consider any alternative sanctions.
117. The tribunal was unimpressed by the manner in which the culture at the Respondent's workplace had been allowed to develop. The tribunal found that it was reasonable for Mr Bendry to have found the Claimant was at fault in instigating the hug – even in the context highlighted by the Claimant at the disciplinary hearing of the end of Covid restrictions. The tribunal noted that D was requesting that the individuals concerned in his complaints needed boundary education.
118. Given that the tribunal was satisfied that the Respondent had (just) arrived at a finding of misconduct, with reasonable grounds and following a (just) reasonable investigation in relation to Allegation 1 in isolation but with an unreasonable process overall, the tribunal struggled with this question of whether that allegation alone could have led to a fair dismissal. The tribunal concluded that the sanction was outside the range of reasonable sanctions for the matter that we have determined was a reasonable finding of misconduct when the other matters were stripped away.

43.5 If [there was an unfair process], would the Claimant have been fairly dismissed in any event and/or to what extent and when?

119. Given the tribunal's findings above, a fair process may have led to a conclusion that Allegation 1 was upheld and may have placed it in a more serious context (e.g. the allegations that the Claimant made comments to D about experiencing a woman and about types of body parts). A reasonable investigation of Allegations 2 and 3 might have led to a determination of misconduct in those regards. The tribunal considered that if the Respondent had conducted a fair process, there was a possibility that the Claimant would have been fairly dismissed in any event by this Respondent. A fair investigation may well have enabled the Respondent to come to conclusions on other aspects of the allegations against the Claimant - in particular the more detailed allegations about the Claimant's comments to D about how he had felt about the hug with MG; and the showing of the videos of therapy clients to D. It did not appear to the tribunal that a fair process would have led to a conclusion that the Claimant had made antisemitic remarks to D.

120. The tribunal considered that a reduction of 50% was just and equitable in relation to this part of the arguments advanced by the respondent under section 123(1) ERA about what a fair process might have concluded. A fair process would not have taken any longer.
121. The Respondent had urged the tribunal to additionally consider whether the Claimant's other conduct in making or making use of covert recordings and in sending the 'karma' email to Ms Williams should result in his compensatory award being reduced under s123(1). The tribunal, mindful of the guidance in *Soros* did not make a further reduction to the Claimant's compensatory award on the basis of post employment conduct but taking into account the guidance in *Bates* the tribunal did make a further reduction of 25% to the compensatory award under section 123(1) on the basis that the Claimant's conduct in relation to obtaining and deploying covert recordings and in sending the 'karma' email to Ms Williams may additionally have led to his fair dismissal. The tribunal took into account that the Claimant's behaviour after his dismissal took place after a process that the tribunal have found to have been unfair and that the Claimant was left (with some justification) feeling that he has not had the reason for his dismissal explained properly to him. However, the Claimant's threatening email to Ms Williams was serious blameworthy conduct as was the making of covert recording of former colleagues – in particular D, a person known to the Claimant as being vulnerable. If the Claimant had been still employed, he would have been disciplined for such actions.
122. The aggregate figure of a 75% reduction under s123(1) takes account of the combined effect of the factors identified above.

43.7.2 failure to comply with the ACAS Code

123. The tribunal deals with the ACAS Code at this point, given the order in which reduction and increases in the compensatory award should take place.
124. Parts of paragraph 4 of the ACAS Code state:
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
 - . . .
 - Employers should allow an employee to appeal against any formal decision made.

125. Paragraphs 9 and 12 state:

9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

. . .

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present

evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

126. The tribunal considered that whilst some procedural safeguards were in place, the Claimant did not have the opportunity to put his case at the disciplinary hearing – he should have been asked about specifics and not generalities; Mr Bendry did not ‘gone through the evidence’ and this was not rectified on appeal. In addition, a full opportunity to appeal was not given to the Claimant given that the disciplinary outcome did not make clear what the specific findings were on Allegations 2 and 3; and that the appeal hearing should have been reconvened and was not. The tribunal considered that a 10% increase in the compensatory award was just and equitable in this regard.

43.6 Did the Claimant contribute to his dismissal?

127. The Claimant clearly did contribute to his dismissal and his conduct was such that it would be just and equitable to further reduce his compensation. He instigated the hug and he was in a position of some operational authority. D was an apprentice and a vulnerable individual. Taking into account the reduction already made under s123(1), the tribunal considered that a further 50% reduction is just and equitable. The basic award is also reduced by 50% on the basis that it would be just and equitable to do so on the basis of the Claimant’s conduct.
128. The other elements of ‘issue 43.7’ are dealt with elsewhere in these conclusions. For the avoidance of doubt, the tribunal do not find that the Respondent’s senior management and HR colluded to dismiss the Claimant. The transcript of the recording of Mr Newell’s comment that the Claimant would not be returning after his appeal hearing was not convincing on that point and the tribunal saw no other evidence that pointed strongly enough towards that conclusion.

Direct race / religion discrimination (Section 13 Equality Act 2010)

129. The tribunal has taken these two types of direct discrimination together and dealt with each of the questions set out at sections 43.9, 43.10, 43.12 and 43.13 in relation to the four alleged detriments.

43.8.1 / 43.11.1 Suspended by Grace Williams on 21 May 2021;

130. The tribunal find that the Claimant was not suspended by Ms Williams. He was suspended by Mr Newell. He was clearly treated less favourably than Mr Newell had been treated when Mr Newell was accused of sexual harassment and bullying and harassment in 2020 in that Mr Newell was not suspended and the Claimant was suspended. Suspension was an appropriate action for the Respondent to take in the Claimant’s case given the accusations made by a co-worker. The tribunal was surprised that an employee such as Mr Newell was not suspended (or at least temporarily moved) when an accusation of sexual harassment of a subordinate had been made. The Respondent was unable to present any evidence as to why Mr Newell was not suspended. However, the

material circumstances are not the same given that there was no disciplinary process in relation to Mr Newell and in any event, despite the failure to provide evidence as to why Mr Newell was not suspended, there was nothing before the tribunal to suggest that race or religion may have played any part in the decision either not to suspend Mr Newell or the decision to suspend the Claimant. Clearly a different decision maker must have been involved as Mr Newell would not have taken the decision as to whether or not he himself should or shouldn't be suspended in 2020. Mr Lewis was also suspended by Mr Newell in 2021 at the same time as the Claimant and Mr Lewis is of a different race to the Claimant.

131. The tribunal concluded that Mr Newell was not an appropriate comparator because of the material differences. The tribunal concluded that a hypothetical comparator would not have been treated more favourably. The tribunal concluded that the treatment of the Claimant was not because of race or religion.

43.8.2 / 43.11.2 The delay in the investigation into allegations against him;

132. The delay was in part due to the Claimant's ill health and his request for a hiatus and in part due to the need for Mr Pearce to also deal with the investigation into Mr Lewis's behaviour and for Mr Pearce to concentrate on his own new job. The comparison with Mr Newell is not appropriate. That was a grievance investigation. No such medical factors were involved; there was no parallel investigation into anyone else in Mr Newell's case and the investigator was not newly in post as far as the tribunal is aware. There was nothing to suggest that race or religion played a part in the delay.

133. The tribunal concluded that Mr Newell was not an appropriate comparator because of the material differences. The tribunal concluded that a hypothetical comparator would not have been treated more favourably. The tribunal concluded that the treatment of the Claimant was not because of race or religion.

43.8.3 / 43.11.3 Dismissal on 29 September 2021;

134. The Claimant was dismissed. Mr Newell was not dismissed. In that sense, the Claimant was treated less favourably. However, the material circumstances were very different. Mr Newell was not found to have sexually harassed a co-worker. The allegations against the Claimant were upheld (albeit unfairly at least in part) Mr Newell was not put through a disciplinary process. Mr Lewis, who was of a different race, was also dismissed in 2021. In any event, there was nothing to suggest race or religion played any part in the decision to dismiss.

135. The tribunal concluded that Mr Newell was not an appropriate comparator because of the material differences. The tribunal concluded that a hypothetical comparator would not have been treated more favourably. The tribunal concluded that the treatment of the Claimant was not because of race or religion.

43.8.4 / 43.11.4 Not being offered a settlement following dismissal,

136. Mr Lewis was offered a settlement agreement at the appeal stage. The Respondent's witnesses were unable to tell the tribunal why this had happened. The tribunal noted that it had happened after Mr Lewis pointing out at the appeal

that the investigation had failed to interview some relevant witnesses. Mr Lewis had adopted a more contrite and apologetic stance throughout the process compared to the Claimant. There was an informal conversation at the Claimant's appeal stage but this did not lead to a negotiation of any type. The Claimant was treated less favourably but Mr Lewis was not a good comparator for him in that there were material differences in their circumstances. There was nothing to suggest race or religion played any part in the decision to offer settlement to Mr Lewis.

137. The tribunal concluded that Mr Lewis was not an appropriate comparator because of the material differences. The tribunal concluded that a hypothetical comparator would not have been treated more favourably. The tribunal concluded that the treatment of the Claimant was not because of race or religion.

Victimisation (Equality Act 2010 section 27)

138. The Respondent accepted during the course of this hearing that the Claimant had done a protected act on 11 August 2020 in making accusations about Mr Newell in his interview as part of the grievance investigation.
139. The tribunal have addressed each of the questions set out at issues 43.15 to 43.17 in relation to the three detriments.

43.15.1 Suspended by Grace Williams on 21 May 2021

140. The tribunal find that the Claimant was not suspended by Ms Williams. He was suspended by Mr Newell. Suspension was an appropriate action for the Respondent to take in the Claimant's case given the accusations made by a co-worker. The Claimant had not complained about Mr Newell in the 9 months after the statement he made in August 2020. It did not seem to the tribunal that Mr Newell knew that the Claimant had given evidence against him. Mr Newell had not been given the grievance report in 2020. Mr Newell did not appear to have been behind D's complaint. Mr Lewis was also suspended and he had not done a protected act. The tribunal find that the suspension did not happen because of the protected act.

43.15.2 The delay in the investigation into allegations against him

141. The delay was in part due to the Claimant's ill health and his request for a hiatus and in part due to the need for Mr Pearce to also deal with the investigation into Mr Lewis and for Mr Pearce to concentrate on his own new job. Mr Pearce did not know about the protected act. The tribunal find that the delay did not happen because of the protected act.

43.15.3 Dismissal on 29 September 2021

142. The dismissal, albeit unfair at least in part, occurred because the allegations against the Claimant were upheld by Mr Bendry. Mr Bendry did not know about the protected act before being told about it by the Claimant and he appeared incurious about it. Mr Lewis was also dismissed by a different manager and he

had not done a protected act. The tribunal find that the dismissal did not happen because of the protected act.

Wrongful dismissal / Notice pay

143. The tribunal makes the following findings based on the evidence before the tribunal. The tribunal notes that the only 'live' evidence relating to the hug which was given to the tribunal is from the Claimant. The tribunal has also given what weight it can to the documentary evidence. The Tribunal considered the documentary evidence and the accounts given by D, Ms Gherman, Mr Lewis, Shaheen Ali and Roda Ali.
144. The tribunal finds that at a time when Covid restrictions had just been lifted in relation to hugging, the Claimant instigated a hug between D and Ms Gherman on 18 May 2021. The Claimant had been insistent about it. The 'hug' involved Ms Gherman putting her arm around D and touching his shoulders. It was not at the time seen as 'a big deal' by any of D's co-workers. It did not at the time visibly upset D. D made a complaint by email the next day about a number of things including that the Claimant had tried to force him to hug Ms Gherman.
145. On the evidence before it, the tribunal does not find that any comments were made by the Claimant on 18 May 2021 about D's 'experience of women' or 'body parts'. The tribunal does not find that any antisemitic comments were made by the Claimant on any of the alleged dates. The tribunal does not find that participation in a conversation about Palestine amounts to antisemitism (albeit that initiating such a conversation with someone merely because that person is Jewish, as Mr Lewis appears to have done, may be antisemitic, depending on the circumstances). It is in any event unclear to what degree the Claimant participated in such conversations. The Claimant accepted that he showed videos of therapy clients (which he described as 'testimonials') to D. Whatever the Claimant's intentions, the tribunal did not consider that this was an appropriate action for the Claimant to have taken, particularly considering D's circumstances. On balance, the tribunal does not find on the evidence before it that any other behaviour of the Claimant on 19 or 20 May 2021 towards D was inappropriate.
146. It was the Claimant's evidence that he was aware that D had said that he liked Ms Gherman. It was the Claimant's evidence that he was aware that D was a vulnerable person. It was the Claimant's evidence that he was motivated by the lifting of covid restrictions. The tribunal considers that whatever his motivation, in instigating the hug, the Claimant's behaviour amounted to inappropriate behaviour in the workplace.
147. Not all inappropriate behaviour in the workplace amounts to a repudiatory breach of contract permitting the employer to summarily dismiss. The Respondent carries the burden of showing a repudiatory breach.
148. The Respondent argues that the Claimant's conduct amounted to harassment related to sex / sexual harassment. The tribunal considered the authority of *Shaw v CCL Ltd* [2008] IRLR 284 relied on by the Respondent and the tribunal

accepted that an act of harassment (as defined in the Equality Act) could amount to a repudiatory breach of contract (in the *Shaw* case by the employer against the employee) but that it did not follow that it *must* amount to a repudiatory breach. The tribunal found that insisting that one employee put her arm around another employee in these circumstances did not amount to a repudiatory breach in this case.

149. The tribunal concluded that the Respondent had not discharged its burden. The Claimant's conduct although inappropriate did not amount to a breach of contract. The wrongful dismissal claim was successful.

**Employment Judge W A Allen KC
Dated: 8 December 2023**