EMPLOYMENT TRIBUNALS

Claimant: **Mr J Alom**

Respondent: **Financial Conduct Authority**

Heard at: **East London Hearing Centre (Hybrid Hearing)**

On: **16,17,18,19, 23 May 2023**
24 May 2023 (in Chambers)

Before: **Employment Judge S Shore**
Members: **Ms J Houzer**
Ms H Edwards

Appearances

For the claimant: In person
For the respondent: Mr O Holloway, Counsel

RESERVED JUDGMENT AND REASONS ON LIABILITY

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claims of direct discrimination because of the protected characteristic of sex (contrary to section 13 of the Equality Act 2010) are determined as follows:

   1.1. The claims that, in investigating the claimant's complaint of 6 April 2020, Simone Ferreira:

      1.1.1. failed to interview Amna Shaukat in respect of the claimant's allegation that she touched him inappropriately without his consent;

1.1.2. failed to interview Amna Shaukat in respect of the claimant's allegation that she invited him to follow her into the female toilets on office premises;

1.1.3. failed to interview two witnesses put forward by the claimant;

1.1.4. made an assumption that the email of 23 January 2020 had been sent by the claimant, without asking him about it; and

1.1.5. failed to investigate an element of the claimant's Stage 1 Equality Complaint in particular that Amna Shaukat's Stage 1 Equality Complaint against the claimant was false, malicious, and vexatious.

are **all** dismissed upon withdrawal.

1.2. The claim that Simone Ferreira's decision on 18 December 2020 not to uphold the claimant's complaint is dismissed upon withdrawal.

1.3. The claim that Graham Reynold's decision on 17 Match 2021 not to uphold the claimant's appeal against Simone Ferreira's conclusion is dismissed upon withdrawal.

1.4. The claim that Graham Reynolds failed to give proper weight to the evidence provided by the claimant, namely a transcript of communications between himself and Amna Shaukat in February 2019 and the claimant's draft personal note of 21 February 2019 is dismissed upon withdrawal.

1.5. The claim that Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's compliant against the claimant is dismissed upon withdrawal.

1.6. The claim that Natasha Oakley was selective in her use of evidence by focusing on emails sent by the claimant to Amna Shaukat rather than emails from Amna Shaukat to the claimant is dismissed upon withdrawal.

1.7. The claim that Natasha Oakley misquoted statements made by the Claimant to her is dismissed upon withdrawal.

1.8. The claim that Graeme McLean's decision on 1 April 2021 to dismiss the claimant was an act of direct discrimination related to sex is dismissed upon withdrawal.

1.9. The claim that Emad Aladhal's decision on 30 June 2021 to reject the claimant's appeal against the decision to dismiss him was an act of direct discrimination because of sex is dismissed upon withdrawal.

1.10. The claim that Emad Aladhal's failure to open the emails sent to him by the claimant in May 2021 or to tell the claimant that he could not open them was an act of direct discrimination because of sex is dismissed upon withdrawal.

2. The claimant's claims of direct discrimination because of the protected characteristic of race (contrary to section 13 of the Equality Act 2010) are determined as follows:

   2.1. The claims that, in investigating the claimant's complaint of 6 April 2020, Simone Ferreira:

   2.1.1. failed to interview Amna Shaukat in respect of the claimant's allegation that she touched him inappropriately without his consent;

   2.1.2. failed to interview Amna Shaukat in respect of the claimant's allegation that she invited him to follow her into the female toilets on office premises;

   2.1.3. failed to interview two witnesses put forward by the claimant;

   2.1.4. made an assumption that the email of 23 January 2020 had been sent by the claimant, without asking him about it; and

   2.1.5. failed to investigate an element of the claimant's Stage 1 Equality Complaint in particular that Amna Shaukat's Stage 1 Equality Complaint against the claimant was false, malicious, and vexatious.

   are **all** dismissed upon withdrawal.

   2.2. The claim that Simone Ferreira's decision on 18 December 2020 not to uphold the claimant's complaint is dismissed upon withdrawal.

   2.3. The claim that Graham Reynold's decision on 17 Match 2021 not to uphold the claimant's appeal against Simone Ferreira's conclusion is dismissed upon withdrawal.

   2.4. The claim that Graham Reynolds failed to give proper weight to the evidence provided by the claimant, namely a transcript of communications between himself and Amna Shaukat in February 2019 and the claimant's draft personal note of 21 February 2019 is dismissed upon withdrawal.

   2.5. The claim that Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's compliant against the claimant is dismissed upon withdrawal.

   2.6. The claim that Natasha Oakley was selective in her use of evidence by focusing on emails sent by the claimant to Amna Shaukat rather than emails from Amna Shaukat to the claimant is dismissed upon withdrawal.

   2.7. The claim that Natasha Oakley misquoted statements made by the Claimant to her is dismissed upon withdrawal.

   2.8. The claim that Graeme McLean's decision on 1 April 2021 to dismiss the claimant was an act of direct discrimination because of race fails.

2.9. The claim that Emad Aladhal's decision on 30 June 2021 to reject the claimant's appeal against the decision to dismiss him was an act of direct discrimination because of race fails.

2.10. The claim that Emad Aladhal's failure to open the emails sent to him by the claimant in May 2021 or to tell the claimant that he could not open them was an act of direct discrimination because of sex is dismissed upon withdrawal.

3. The claimant's claims of harassment related to the protected characteristic of sex (contrary to section 26 of the Equality Act 2010) are all dismissed upon withdrawal.

4. The claimant's claims of harassment related to the protected characteristic of race (contrary to section 26 of the Equality Act 2010) are determined as follows:

4.1. The claims that, in investigating the claimant's complaint of 6 April 2020, Simone Ferreira:

4.1.1. failed to interview Amna Shaukat in respect of the claimant's allegation that she touched him inappropriately without his consent;

4.1.2. failed to interview Amna Shaukat in respect of the claimant's allegation that she invited him to follow her into the female toilets on office premises;

4.1.3. failed to interview two witnesses put forward by the claimant;

4.1.4. made an assumption that the email of 23 January 2020 had been sent by the claimant, without asking him about it; and

4.1.5. failed to investigate an element of the claimant's Stage 1 Equality Complaint in particular that Amna Shaukat's Stage 1 Equality Complaint against the claimant was false, malicious, and vexatious.

are **all** dismissed upon withdrawal.

4.2. The claim that Simone Ferreira's decision on 18 December 2020 not to uphold the claimant's complaint is dismissed upon withdrawal.

4.3. The claim that Graham Reynold's decision on 17 Match 2021 not to uphold the claimant's appeal against Simone Ferreira's conclusion is dismissed upon withdrawal.

4.4. The claim that Graham Reynolds failed to give proper weight to the evidence provided by the claimant, namely a transcript of communications between himself and Amna Shaukat in February 2019 and the claimant's draft personal note of 21 February 2019 is dismissed upon withdrawal.

4.5. The claim that Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's compliant against the claimant is dismissed upon withdrawal.

4.6. The claim that Natasha Oakley was selective in her use of evidence by focusing on emails sent by the claimant to Amna Shaukat rather than emails from Amna Shaukat to the claimant is dismissed upon withdrawal.

4.7. The claim that Natasha Oakley misquoted statements made by the Claimant to her is dismissed upon withdrawal.

4.8. The claim that Graeme McLean's decision on 1 April 2021 to dismiss the claimant was an act of harassment related to race fails.

4.9. The claim that Emad Aladhal's decision on 30 June 2021 to reject the claimant's appeal against the decision to dismiss him was an act of harassment related to race fails.

4.10. The claim that Emad Aladhal's failure to open the emails sent to him by the claimant in May 2021 or to tell the claimant that he could not open them was an act of harassment related to race is dismissed upon withdrawal.

5. The claimant's claims of victimisation (contrary to section 27 of the Equality Act 2010) are determined as follows:

5.1. The claimant did the following protected acts:

5.1.1. In or around April 2016 and April 2017 submitting two internal discrimination-related Stage 1 Equality Complaints and in or around September 2016 and February 2018 subsequent Stage 2 Equality Complaint Appeals, in connection with pay and award; and

5.1.2. Submitted an ET1 Employment Tribunal claim in September 2018 alleging direct Race Discrimination, direct Disability Discrimination and Unlawful Deduction from Wages.

5.2. The other four protected acts originally contended for were dismissed upon withdrawal.

5.3. The following claims of detriment because the claimant made protected disclosures are determined as follows:

5.3.1. The claims that, in investigating the claimant's complaint of 6 April 2020, Simone Ferreira:

5.3.1.1. failed to interview Amna Shaukat in respect of the claimant's allegation that she touched him inappropriately without his consent;

5.3.1.2. failed to interview Amna Shaukat in respect of the claimant's allegation that she invited him to follow her into the female toilets on office premises;

5.3.1.3. failed to interview two witnesses put forward by the claimant;

5.3.1.4. made an assumption that the email of 23 January 2020 had been sent by the claimant, without asking him about it; and

5.3.1.5. failed to investigate an element of the claimant's Stage 1 Equality Complaint in particular that Amna Shaukat's Stage 1 Equality Complaint against the claimant was false, malicious, and vexatious.

were **all** dismissed upon withdrawal.

5.3.2. The claim that Simone Ferreira's decision on 18 December 2020 not to uphold the claimant's complaint is dismissed upon withdrawal.

5.3.3. The claim that Graham Reynold's decision on 17 Match 2021 not to uphold the claimant's appeal against Simone Ferreira's conclusion is dismissed upon withdrawal.

5.3.4. The claim that Graham Reynolds failed to give proper weight to the evidence provided by the claimant, namely a transcript of communications between himself and Amna Shaukat in February 2019 and the claimant's draft personal note of 21 February 2019 is dismissed upon withdrawal.

5.3.5. The claim that Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's compliant against the claimant fails.

5.3.6. The claim that Natasha Oakley was selective in her use of evidence by focusing on emails sent by the claimant to Amna Shaukat rather than emails from Amna Shaukat to the claimant is dismissed upon withdrawal.

5.3.7. The claim that Natasha Oakley misquoted statements made by the Claimant to her is dismissed upon withdrawal.

5.3.8. The claim that Graeme McLean's decision on 1 April 2021 to dismiss the claimant was an act of victimisation fails.

5.3.9. The claim that Emad Aladhal's decision on 30 June 2021 to reject the claimant's appeal against the decision to dismiss him was an act of victimisation fails.

5.3.10. The claim that Emad Aladhal's failure to open the emails sent to him by the claimant in May 2021 or to tell the claimant that he could not open them was dismissed upon withdrawal.

5.4. The claim that Jamie Bell's decision on 23 April 2021 not to uphold the claimant's Stage 1 grievance against Saima Barlas was dismissed upon withdrawal.

6. The claimant's claim of unfair dismissal fails.

7. Because none of the claimant's claims have succeeded, there is no requirement for a remedy hearing.

REASONS

Introduction and History of Proceedings

1. The claimant was employed as by the respondent, which is the financial regulatory authority for the United Kingdom, latterly as an Associate in the Asset Management Department, from 15 February 2015 to 1 April 2021. He has self-identified as non-white Asian.

2. The claims arise from complaints made about the claimant's conduct that ultimately led to his dismissal.

3. The claimant started early conciliation with ACAS for the first time on 1 March 2021 and obtained a conciliation certificate on 1 March 2021 [24]. The claimant presented his first ET1 (3200936/2021) on 26 March 2021 [25-50]. In his first claim, the claimant brought claims of direct sex discrimination and victimisation under sections 13 and 27 of the Equality Act 2010.

4. The sex discrimination claim arose out of the way that the claimant alleged he was treated during an investigation into a harassment-related equality complaint that he had made against a female colleague, Amna Shaukat. The claimant compared himself to the way that the same female colleague had been treated when she had made an earlier harassment-related equality complaint against him.

5. The first ET1's victimisation complaint arose out of two alleged protected acts:

    7.1. an ET1 that the claimant had submitted in September 2018; and

    7.2. an indication that he had given in February 2021 that he would be submitting another ET1 in relation to discrimination and victimisation.

8. The claimant stated early conciliation with ACAS again on 1 April 2021 and obtained an early conciliation certificate on 6 April 2021. The claimant presented his second ET1 (3200936/2021) on 26 April 2021.

9. The second ET1 named Amna Shaukat and the Financial Conduct Authority ("FCA") as respondents. The claimant alleged that he had he had been subjected to unwanted conduct of a sexual nature on multiple occasions on and off work premises by Ms Shaukat throughout 2018, 2020 and 2021. He brought claims of sex discrimination and sexual harassment.

10. The claimant has been a litigant in person throughout these proceedings. We do not underestimate how difficult it must have been for the claimant to navigate these proceedings. The law is dense and complicated.

11. The two claims were consolidated by the Tribunal by Regional Employment Judge Taylor on 10 June 2021. The claims have expanded in scope from the cases put in the ET1s because of successful applications to amend made by the claimant. The number of complaints has been reduced by strike outs, the consequences of non-paid deposits, and withdrawal by the claimant.

12. The claimant indicated that he wished to amend his claims following the submission of his second ET1.

13. By an order sent to the parties on 12 July 2021, Employment Judge Russell ordered the Claimant to send a properly particularised draft of the proposed amendments to the respondent and Tribunal by 9 August 2021. The claimant provided a particularised draft proposal to amend his claim and add respondents on 8 August 2021. The respondent objected to the Claimant's application to amend in a letter dated 20 August 2021.

14. The application to amend was heard by Employment Judge Lewis on 18 November 2021. EJ Lewis was unable to determine the application but increased the time estimate for the final hearing to six days and listed a further preliminary hearing in an Order dated 29 December 2021 [64-68]. EJ Lewis relisted the application to amend for 20 May 2022.

15. Employment Judge Frazer dealt with the application to amend on 20 May 2022 and produced an Order on the same date [71-76]. The application to amend was allowed but the claimant's application to add respondents was refused.

16. The respondent applied for a strike out/deposit that was listed for a further public preliminary hearing. The respondent produced an amended Particulars of Response dated 7 July 2022 [80-89]. The respondent was ordered to produce an agreed List of Issues by 17 June 2022.

17. A public preliminary hearing took place before Employment Judge Martin on 18 October 2022 who made the following Judgment [90-95]:

    17.1. The claimant's complaint of harassment related to sex set out at paragraph 6.9 of the draft list of issues and the corresponding claims of direct sex discrimination at paragraph 7.1 were both dismissed as having no reasonable prospect of success.

    17.2. The claimant was ordered to pay a deposit in respect of each of the fourteen remaining allegations of harassment related to sex and direct

sex discrimination and in respect of the allegations of harassment related to race. The total deposit was £5,800.00.

17.3. The claimant's cross-application to strike out the response was refused.

18. The case returned for a further preliminary hearing before Employment Judge Elgot on 20 February 2023. The preliminary hearing produced a Corrected Judgment dated 24 March 2023 [106-108] that:

18.1. Struck out the claims that EJ Martin had made the subject of a deposit order: fourteen allegations of harassment related to sex and direct discrimination because of sex, and the allegation of harassment because of race. The practical effect of that decision was to remove Ms Shaukat as a respondent, as all claims against her were dismissed.

18.2. Refused the claimant's renewed application to strike out the respondent's response.

18.3. Granted an application to amend the claim made on 13 January 2023 to include an allegation of victimisation relating to a complaint made by him against Saima Barlas which was determined by Jamie Bell.

18.4. Refused an application to amend dated 1 August 2022 supplemented by further submissions on 11 December 2022 to amend his claim by the addition of new 'post-employment' complaints relating to acts of direct race discrimination, alternatively harassment based on race, and victimisation.

19. EJ Elgot also made case management orders dated 21 March 2023 [97-100] that required the respondent to prepare and send to the claimant an up to date and clear List of Issues that reflected the case after EJ Elgot's preliminary hearing and Judgment.

20. That List of Issues was produced at pages 101 to 105 of the bundle and was the List that we worked from at this hearing.

21. The Financial Conduct Authority is the only respondent.

22. This hearing was recorded at the request of Mr Alom. The parties were reminded that they may not make their own recordings of the proceedings.

Issues

23. It may assist those reading these Reasons for us to set out the final agreed List of Issues presented to us in the bundle. Our Judgment above reflects the resolution of all the claims in this original List of Issues:

Direct discrimination on the grounds of Sex by the Respondent

1.1 Did the Respondent subject the Clamant to the following treatment, as alleged or at all?

1.1.1 In investigating the Claimant's complaint of 6 April 2020, Simone Ferreira:

a) failed to interview Amna Shaukat in respect of the Claimant's allegation that she touched him inappropriately without his consent;

b) failed to interview Amna Shaukat in respect of the Claimant's allegation that she invited him to follow her into the female toilets on office premises;

c) failed to interview two witnesses put forward by the Claimant;

d) made an assumption that the email of 23 January 2020 had been sent by the Claimant, without asking him about it; and

e) failed to investigate an element of the Claimant's Stage 1 Equality Complaint that Amna Shaukat's Stage 1 Equality Complaint against the Claimant was false, malicious, and vexatious.

1.1.2 Simone Ferreira's decision on 18 December 2020 not to uphold the Claimant's complaint.

1.1.3 Graeme Reynolds' decision on 17 March 2021 not to uphold the Claimant's appeal against Simone Ferreira's conclusion.

1.1.4 Graeme Reynolds failed to give proper weight to the evidence provided by the Claimant namely a transcript of communications between him and Amna Shaukat in February 2019 and the Claimant's draft personal note of 21 February 2019.

1.1.5 Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's complaint against the Claimant.

1.1.6 Natasha Oakley was selective in her use of evidence by focusing on emails sent by the Claimant to Amna Shaukat rather than emails from Amna Shaukat to the Claimant.

1.1.7 Natasha Oakley misquoted statements made by the Claimant to her.

1.1.8 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

1.1.9 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

1.1.10 Emad Aladhal's failure to open the emails sent to him by the Claimant in May 2021 or to tell the Claimant that he could not open them.

1.2 Was this treatment less favourable?

1.3 If so, was it because of sex?

1.4 The Claimant relies upon Amna Shaukat as actual comparator; and/or alternatively, a hypothetical female comparator.

2 Direct Discrimination on the grounds of Race by the Respondent

2.1 Did the Respondent subject the Clamant to the following treatment, as alleged or at all?

2.1.1 The Claimant relies on the treatment set out at paragraph 1.1 above.

2.2 Was this treatment less favourable?

2.3 If so, was it because of the Claimant's Race?

2.4 The Claimant relies upon a hypothetical non-BAME White employee.

3 Harassment related to Sex by the Respondent

3.1 Did the Respondent act as follows:

3.1.1 The Claimant relies on the treatment set out at paragraph 1.1 above.

3.2 If so, were these actions 'unwanted conduct related to sex'?

3.3 Did they have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account:

3.3.1 The perception of the Claimant;

3.3.2 The other circumstances of the case; and

3.3.3 Whether it is reasonable for the conduct to have that effect.

4 Harassment related to Race by the Respondent

4.1 Did the Respondent act as follows:

4.1.1 The Claimant relies on the treatment set out at paragraph 1.1 above.

4.2 If so, were these actions 'unwanted conduct related to Race'?

4.3 Did they have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account:

4.3.1 The perception of the Claimant;

4.3.2 The other circumstances of the case; and

4.3.3 Whether it is reasonable for the conduct to have that effect.

5 ***Victimisation by the Respondent***

5.1 Did the Claimant carry out a protected act? The Claimant alleges that the following were protected acts:

5.1.1 In or around April 2016 and April 2017 submitting two internal discrimination-related Stage 1 Equality Complaints and in or around September 2016 and February 2018 subsequent Stage 2 Equality Complaint Appeals, in connection with pay and award.

5.1.2 Submitting an ET1 Employment Tribunal claim in September 2018 alleging direct Race Discrimination, direct Disability Discrimination and Unlawful Deduction from Wages.

5.1.3 On 6 April 2020 submitting and pursuing his discrimination-related Stage 1 Equality Complaint against Amna Shaukat.

5.1.4 On 18 December 2020 submitting and pursuing his Stage 2 Equality Complaint Appeal against Amna Shaukat.

5.1.5 On 17 May 2021, making representations in respect of the disciplinary appeal process to which he was subject in May 2021 and June 2021 in which the Claimant alleged he was being subject to discriminatory treatment and victimisation.

5.1.6 On 2 and 15 February 2021, and 10 March 2021 the Claimant had provided indications that he would be carrying out another protected act in the form of submitting an ET1 in relation to discrimination and victimisation.

5.2 Were these protected acts? In particular, were they false allegations made in bad faith?

5.3 Did the Respondent subject the Claimant to the following treatment, as alleged or at all?

5.3.1 The Claimant relies upon the treatment set out at paragraph 1.1 above; and

5.3.2 Jamie Bell's decision on 23 April 2021 not to uphold the Claimant's Stage 1 grievance against Saima Barlas.

5.4 Did the treatment alleged amount to a detriment?

5.5 Was the detrimental treatment because the Claimant had done the protected act or acts?

6 Unfair Dismissal

6.1 What was the reason for the dismissal? The Respondent asserts that it was misconduct.

6.2 If yes:

6.2.1 Did the Respondent genuinely believe in the Claimant's guilt?

6.2.2 Was that belief based upon reasonable grounds?

6.2.3 Was it following a reasonable investigation?

6.3 Did the decision to dismiss (and the procedure adopted) fall within a range of reasonable responses open to the Respondent?

6.4 If the dismissal was unfair, what, if any, Polkey reduction should be made?

6.5 If the dismissal was unfair, what, if any, reduction should be made to reflect the Claimant's contribution to his dismissal.

7 Time

7.1 Has the Claimant shown that his claims under EA 2010 are in time (to include consideration of whether there was conduct on the part of the Respondent extending over a period (s.123 (3)(a) EA 2010)?

7.2 If not, for any allegations that are found to be out of time, has the Claimant shown that it is just and equitable pursuant to s.123 (1)(b) EA 2010 for the Employment Tribunal to consider those allegations?

8 Remedies

8.1 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

8.2 Should any uplift or reduction be applied due to either party's failure to comply with the ACAS Code of Practice?

8.3 Is the Claimant entitled to an award for personal injury?

8.4 Is the Claimant entitled to an award for aggravated damages?

24. Mr Alom withdrew a large number of allegations on the first day of the hearing (16 May). He withdrew more allegations on the third day of the hearing (18 May). He withdrew all allegations of direct discrimination because of sex and harassment related to sex. The withdrawals left the List of Issues as follows:

1 Direct Discrimination because of Race by the Respondent

1.1 Did the Respondent subject the Clamant to the following treatment, as alleged or at all?

1.1.1 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

1.1.2 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

1.2 Was this treatment less favourable?

1.3 If so, was it because of the Claimant's Race?

1.4 The Claimant relies upon a hypothetical non-BAME White employee.

2 Harassment related to Race by the Respondent

2.1 Did the Respondent act as follows:

2.1.1 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

2.1.2 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

2.2 If so, were these actions 'unwanted conduct related to Race'?

2.3 Did they have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account:

2.3.1 The perception of the Claimant;

2.3.2 The other circumstances of the case; and

2.3.3 Whether it is reasonable for the conduct to have that effect.

3 ***Victimisation by the Respondent***

3.1 Did the Claimant carry out a protected act? The Claimant alleges that the following were protected acts:

3.1.1 In or around April 2016 and April 2017 submitting two internal discrimination-related Stage 1 Equality Complaints and in or around September 2016 and February 2018 subsequent Stage 2 Equality Complaint Appeals, in connection with pay and award.

3.1.2 Submitting an ET1 Employment Tribunal claim in September 2018 alleging direct Race Discrimination, direct Disability Discrimination and Unlawful Deduction from Wages.

3.2 Were these protected acts? In particular, were they false allegations made in bad faith?

3.3 Did the Respondent subject the Claimant to the following treatment, as alleged or at all?

3.3.1 Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's complaint against the Claimant.

3.3.2 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

3.3.3 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

3.4 Did the treatment alleged amount to a detriment?

3.5 Was the detrimental treatment because the Claimant had done the protected act or acts?

4 Unfair Dismissal

4.1 What was the reason for the dismissal? The Respondent asserts that it was misconduct.

4.2 If yes:

4.2.1 Did the Respondent genuinely believe in the Claimant's guilt?

4.2.2 Was that belief based upon reasonable grounds?

4.2.3 Was it following a reasonable investigation?

4.3 Did the decision to dismiss (and the procedure adopted) fall within a range of reasonable responses open to the Respondent?

4.4 If the dismissal was unfair, what, if any, Polkey reduction should be made?

4.5 If the dismissal was unfair, what, if any, reduction should be made to reflect the Claimant's contribution to his dismissal.

5 Time

5.1 Has the Claimant shown that his claims under EA 2010 are in time (to include consideration of whether there was conduct on the part of the Respondent extending over a period (s.123 (3)(a) EA 2010)?

5.2 If not, for any allegations that are found to be out of time, has the Claimant shown that it is just and equitable pursuant to s.123 (1)(b) EA 2010 for the Employment Tribunal to consider those allegations?

6 Remedies

6.1 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

6.2 Should any uplift or reduction be applied due to either party's failure to comply with the ACAS Code of Practice?

6.3 Is the Claimant entitled to an award for personal injury?

6.4 Is the Claimant entitled to an award for aggravated damages?

25. As we did not find in favour of the claimant on any of his claims, we do not have consider any issues concerning remedy.

<u>Law</u>

26. The statutory law relating to the claimant's claims of sex and race discrimination and victimisation is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13 (direct discrimination); 26 (harassment); 27 (victimisation) 123 (time limits) and 136 (burden of proof). The relevant provisions are set out here:

13. Direct discrimination

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.

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

(a) age;

(b) disability;

(c) gender reassignment;

(d) race

(e) religion or belief;

(f) sex;

(g) sexual orientation.

26. Prohibited conduct (Harassment)

A person (A) harasses another (B) if

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

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

(i) violating B's dignity, or

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

In deciding whether conduct has the effect referred to, each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

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

27. Victimisation

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.
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;

(c) making an allegation (whether or not express) that A or another person has contravened this Act.

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.

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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal…

27. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

*"**Section 98 Employment Rights Act 1996***

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

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

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

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

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical, or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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."

28. We were referred to the following precedent cases by the parties, which we considered when making our decision:

Claimant

28.1. **Bărbulescu v Romania** ECtHR Grand Chamber 61496/08 [2017] IRLR 1032;

28.2. **British Home Stores Limited v Burchell** [1978] ICR 303;

28.3. **Deer v University of Oxford** UKEAT/0532/12/KN;

28.4. **Tykocki v The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust** UKEAT/0081/16/JOJ;

28.5. **Hyland v Cheshire & Greater Manchester Community Rehabilitation Company Ltd** 2424492/2017;

28.6. **Ogbonna v Partnership of East London Cooperatives (PELC)** 3201789/2017;

28.7. **Carmelli Bakeries Ltd v Benali** UKEAT/0616/12/RN;

28.8. **Nartowska v Fluid Options UK Ltd** 2414596/2019; and

28.9. **Archer and another v Solvent Resource Management Ltd** 1102496/2009 and 1102520/2009.

Respondent

28.10. **Hill v Governing Body of Great Tey Primary School** UKEAT/0237/12/SM; and

28.11. **Turner v East Midlands Trains Ltd** [2012] EWCA Civ 1470.

Housekeeping

29. We started the first day of the hearing at 10:10am. We apologised to the parties for the late start, which had been due to the need to set up the hybrid video link.

30. The claimant is unrepresented. We reminded him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

    "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

    (a) ensuring that the parties are on an equal footing;

    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

    (c) avoiding unnecessary formality and seeking flexibility in the proceedings;

    (d) avoiding delay, so far as compatible with proper consideration of the issues; and

    (e) saving expense.

    A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

31. We strived to ensure that Mr Alom was given every opportunity to put his case and ask any questions he had about procedure and the law. There were times when we had to intervene to advise Mr Alom that some of his questions to the respondent's witnesses were not assisting us to answer the questions raised in the list of issues, which is entirely normal in complex cases where parties are representing themselves.

32. Mr Alom said that he had a number of medical issues that affected his ability to conduct the hearing. We were not provided with any contemporaneous medical evidence of the medical issues or their effect on him but took Mr Alom at his word. We were mindful of the Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings, dated 22 April 2020 and the relevant provisions of the Equal Treatment Bench Book. We gave Mr Alom as much time as he needed when he asked for breaks and tailored our start and finish times around his needs.

33. The hearing was conducted in a hybrid format. The Tribunal, Mr Alom, Mr Holloway, and some of the respondent's witnesses attended in person. Some of the witnesses attended by video link. Some of the respondent's witnesses attended from outside the United Kingdom. Those witnesses had been through the protocols and satisfied the Tribunal administration that they were permitted to give evidence from the jurisdiction in which they were situated.

34. The parties produced a paginated joint bundle of 1452 pages with an index. Any references to documents in the main bundle will be accompanied by the page numbers from the bundle in square brackets (e.g., [34-36]). If we refer to a particular paragraph in a document, we will use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraph, we will use two silcrows (§§).

35. Mr Alom produced his own bundle of 425 pages. Any references to documents in Mr Alom's bundle will be accompanied by the prefix "CB" and the page numbers from the claimant's bundle in square brackets (e.g., [CB 28-29]). If we refer to a particular paragraph in a document, we will use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraph, we will use two silcrows (§§).

36. The parties produced a bundle of witness statements that contained the evidence in chief of:

    36.1. The claimant, who produced a witness statement of 111 pages and 354 paragraphs dated 5 May 2023;

    36.2. Natasha Oakley, who was an HR Business Partner at the time of the events with which the claims were concerned, but at the date of the hearing was the respondent's Head of Strategy and Analysis. Ms Oakley heard Ms Shaukat's equality complaint against the claimant. Her witness statement was dated 9 May 2023 and consisted of 11 pages and 69 paragraphs;

    36.3. Simone Ferreira, who was Head of Department, European Wholesale Banks at the time of the events with which the claims were concerned, but at the date of the hearing was the respondent's Head of Risk Advisory in the Risk Division of the respondent. Ms Ferreira heard the claimant's equality complaint against Ms Shaukat. Her witness statement was dated 3 May 2023 and consisted of 9 pages and 53 paragraphs;

    36.4. Graeme Reynolds, who was Deputy Chief Economist and Head of Department for Economic and Financial Analysis at the time of the events with which the claims were concerned, but at the date of the hearing was the respondent's Director of Competition. Mr Reynolds chaired the claimant's appeal against the outcome of his grievance against Ms Shaukat. His witness statement was dated 4 May 2023 and consisted of 8 pages and 46 paragraphs;

    36.5. Jamie Bell, who was Senior Manager, Market Oversight Data and Systems for the respondent at the time of the events with which the claims were concerned, but at the date of the hearing was the respondent's Head of Secondary Market Oversight. Mr Bell investigated the claimant's grievance against Saima Barlas, who had been an anonymous witness in in Ms Shaukat's complaint against the claimant. His witness statement was dated 9 May 2023 and consisted of 8 pages and 55 paragraphs;

36.6. Graeme McLean, who was Head of Transformation for the respondent at the time of the events with which the claims were concerned, but at the date of the hearing was the respondent's Head of the CEO's Office. Mr McLean was the dismissing officer. His witness statement was dated 9 May 2023 and consisted of 9 pages and 68 paragraphs; and

36.7. Emad Aladhal, who is Director of the Specialist Directorate for the respondent. Mr Aladhal heard the claimant's appeal against dismissal. His witness statement was dated 2 May 2023 and consisted of 8 pages and 50 paragraphs.

37. We asked the parties to confirm that the List of Issues contained in the main bundle [101-105] was correct and agreed. Mr Alom's response was that he believed that in his original proceedings, he had made a claim of aiding and abetting harassment etc, which would be a claim under section 112 of the Equality Act 2010. Mr Alom was unsure as to why that claim had not been included in the draft List of Issues. We asked Mr Alom if he had raised the omission with the Tribunal before today. He said he had mentioned it to EJ Elgot, who conducted the preliminary hearing on 20 February 2023 [97-100].

38. Mr Holloway, who appeared for the respondent at that preliminary hearing, said that the List of Issues produced to the Tribunal [101-105] had been the subject of discussions over a long period. A version had been sent to the claimant following the preliminary hearing before EJ Elgot, as had been ordered at paragraph 2 of the case management order [97]. It was submitted that this was the first time that the claimant had objected to the list sent to him.

39. Mr Holloway added that the list before the Tribunal today was, essentially, the same list as had been agreed in July 2022. The Tribunal had written to the parties on 7 July 2022, noting that the issues were "as outlined". The case then came before EJ Martin on 18 October 2022 [90-96], who struck out some claims and ordered deposits in respect of others. The List of Issues was updated in the light of the strike outs and subsequent strike outs when the claimant failed to pay any of the deposits ordered.

40. The list was amended again following EJ Elgot's Corrected Judgment dated 23 March 2023 [106-108]. Mr Holloway offered to investigate the specifics but submitted that it was too late to add a new claim at this stage. He recalled that the matter was raised before EJ Elgot and was part of the refusal to amend. We noted that there was no specific reference to the point in issue in the Judgment [107(§5.1)].

41. We asked Mr Alom why he had only raised the matter this morning. He said he thought this was the time and place to raise it. He could not say why he had taken this course of action. We decided to determine the point as a preliminary matter on the second day.

42. We discussed the timetabling of the case. It was agreed that:

42.1. The rest of the first day would be a reading day;

42.2. The claimant's evidence would take us though day 2 and into day 3;

42.3. The respondent's evidence would start on day 3 and continue into day 4;

42.4. Closing submissions would be on day 5; and

42.5. The Tribunal would make and deliver a decision (initially on liability) on day 6.

43. We then considered the question of documents in the case. There was a discussion about an additional document that had been given page numbers 1453 to 1459. We had a copy, so it was added.

44. We then discussed the order in which witnesses would be called. Some witnesses were only available on certain days. We agreed to work around the availability of witnesses. We than adjourned the hearing at 10:46am to 10:00am on day 2 to complete our reading. We completed our reading, which included reading the Tribunal file, which included interlocutory documents that had not been included in the bundle.

45. At the start of the second day, we returned to the matter of the allegation of aiding and abetting. Mr Alom took us to the document titled "ET1 Claim Description" [37-50], which had been appended to his ET1. We could find no reference to anything that could be interpreted as a claim under sections 111 or 112 of the Equality Act 2010.

46. Mr Holloway accepted that the claimant had applied to amend his claim and had mentioned sections 111 and 112 in that application. We had not seen that document.

47. It was submitted that, in respect of section 111 and 112 claims, the application was not particularised and contained a generic allegation. Mr Holloway then took us through the long and complicated history of the claimant's applications to amend his claim and the numerous List of Issues that were produced as the claims grew and shrank. It is not proportionate or a good use of the Tribunal's time to set out every date that an application was made, a decision was delivered or a List of Issues sent to the claimant because we are only dealing with the final list in this hearing.

48. The claimant said that he had been required to particularise his claim, which he had done. The claims were looked at by EJ Lewis and EJ Frazer. He said he was happy not to apply to amend the claim further by the addition of claims under sections 111 and 112.

49. We find it sufficient to summarise the situation by noting that the respondent objected to the addition of section 111 and 112 claims. We find that EJ Elgot told the hearing on 20 February 2023 that she did not consider that an application to amend to include claims under sections 111 and 112 had been made because that was the note of counsel and Mr Alom did not dispute it. Paragraph 2 of EJ Elgot's Order dated 21 March 2023 required the respondent to prepare and send to the claimant and the Tribunal "an up to date and clear List of Issues which reflects the decisions made by me today and by Employment Judge Martin on 18 October 2022."

50. We find that the List required by EJ Elgot was sent to the claimant on 7 March 2023 and that he made no objection to its contents (and specifically, no mention of the absence of claims under sections 111 and 112) until the first day of the hearing. In the light of the claimant's decision not to apply to amend his claim to include sections111 and 112, we found that matter to be closed and proceeded to hear the evidence.

Evidence

51. The claimant gave evidence in person on affirmation and adopted his witness statement. The claimant began his evidence at 10:30am on the second day.

52. We took regular breaks, either at the request of a party, a witness or on our own initiative. We took at break at 11:40 for ten minutes. At 12:10pm, Mr Alom requested a break to consider withdrawing further claims. We gave him what turned out to be thirty-five minutes to consider his position and, on the resumption, Mr Holloway advised us that he and Mr Alom had discussed matters. Mr Alom wished to withdraw all claims of direct discrimination because of sex and all claims of harassment related to sex. As the factual allegations were generic across several different heads of claim, we had to be clear what claims were left. We therefore worked through the List of Issues and Mr Alom confirmed that the following position was correct and that he withdrew the following claims:

    52.1. All claims of direct discrimination because of sex;

    52.2. All claim of harassment related to sex;

    52.3. The factual allegations in paragraph 1.1. of the List of Issues were to be dealt with as follows:

        52.3.1. Paragraph 1.1.1. was withdrawn in its entirety in respect of all indicated claims;

        52.3.2. Paragraph 1.1.2. was withdrawn in its entirety in respect of all indicated claims;

        52.3.3. Paragraph 1.1.3. remained only as an allegation of detriment in the victimisation claim;

        52.3.4. Paragraph 1.1.4. was withdrawn in its entirety in respect of all indicated claims;

        52.3.5. Paragraph 1.1.5. remained only as an allegation of detriment in the victimisation claim;

        52.3.6. Paragraph 1.1.6. was withdrawn in its entirety in respect of all indicated claims;

        52.3.7. Paragraph 1.1.7. was withdrawn in its entirety in respect of all indicated claims;

52.3.8. Paragraph 1.1.8. remained only as allegations of direct discrimination because of race, harassment related to race and as a detriment in the victimisation claim;

52.3.9. Paragraph 1.1.9. remained only as allegations of direct discrimination because of race, harassment related to race and as a detriment in the victimisation claim;

52.3.10. Paragraph 1.1.10. was withdrawn in its entirety in respect of all indicated claims;

52.3.11. The protected acts contended for in paragraphs 5.1.1. and 5.1.2. remained;

52.3.12. The protected acts contended for in paragraphs 5.1.3., 5.1.4, 5.1.5, and 5.1.6. were withdrawn.

53. Mr Alom emphasised that he was a litigant in person and not in the best of mental states when the claims had been presented. He was finding the hearing difficult and complicated. He had taken to decision to withdraw parts of his claim to streamline the case, but still believed that the allegations he had withdrawn were factually correct. We listened to what Mr Alom said but were satisfied that he had made the decision to withdraw on his own initiative and had not been pressurised into making the decision by any third party.

54. Mr Holloway commented that the withdrawal of the claims meant that one of the respondent's witnesses, Simone Ferreira, may not need to give evidence. She was flying back to the United Kingdom to give evidence but could be stood down if the claimant did not need to ask her any questions. We left that question with Mr Alom over lunch. We explained that if a witness was produced by the respondent, but Mr Alom had no questions for them, then the witness's evidence would most likely be accepted by the Tribunal as being credible. We took lunch at 12:20pm and returned at 13:50pm.

55. After lunch, Mr Alom confirmed that he did not require Ms Ferreira to give evidence but did wish to continue with the claim of victimisation related to her grievance decision (her decision on 18 December 2020 not to uphold the claimant's complaint) at paragraph 1.1.2. of the original List of Issues as a claim of victimisation. Mr Holloway suggested that the claimant's answer to the question would be dependent on whether the claimant wished to call Ms Ferreira. We again explained to the claimant that if the attendance of a witness who was willing to attend the hearing was not required by him, a Tribunal would have to accept the witness's evidence in chief (their witness statement) as being credible. Mr Alom was given time to consider his decision and confirmed that he wished to withdraw the remaining victimisation claim in respect of Ms Ferreira's decision. He had already withdrawn the direct discrimination and harassment claims.

56. We excused Ms Ferreira from attendance.

57. Mr Holloway confirmed that the respondent disputed that the first of the two remaining protected acts contended for was a protected act but accepted that the

second act (the issue of ET proceedings in September 2018) was a protected act.

58. We then returned to the cross-examination of the claimant at 13:57pm before taking a break of ten minutes at 15:10pm. Mr Holloway finished his cross-examination at 16:11pm. The Tribunal had no questions for Mr Alom. We explained the concept of re-examination and offered Mr Alom the opportunity to clarify or amplify any of the answers he had given to Mr Holloway's cross-examination questions. He said there was nothing he could think of. The Tribunal had no questions for the claimant.

59. We discussed the position regarding the respondent's witnesses in the light of the withdrawals made by Mr Alom. Mr Holloway had been thinking about the witnesses that the respondent wished to call in the light of the developments in the day. He gave a list of the remaining witnesses and wondered if Mr Bell or Mr Reynolds would still be required. We closed the hearing at 16:40pm.

60. At the start of the third day, at 10:00am, Mr Alom said that he would not have any questions for Graeme Reynolds or Jamie Bell of the respondent and he wished to withdraw the factual allegation against Graeme Reynolds (that on 17 March 2021, Mr Reynolds had not upheld the claimant's appeal against Simone Ferreira's conclusion) which had been paragraphs 1.1.3. and 5.3.2. of the original List of Issues and had only remained as an allegation of detriment in the victimisation claim.

61. Mr Alom also said he wished to withdraw the allegation against Jamie Bell in respect of his decision on 23 April 2021 not to uphold the claimant's Stage 1 grievance against Saima Barlas, which had been at paragraph 5.3.2. of the original List of Issues and had only ever been an allegation of detriment in the victimisation claim.

62. The Tribunal pointed out to the claimant that this took Messrs Reynolds and Bell out of the case completely. With the agreement of the claimant, we released them as witnesses and dismissed the claims at paragraphs 1.1.3 and 5.3.2 of the original List of Issues. We then took a break at 10:10am.

63. On the resumption at 10:15am, we discussed the running order of the respondent's witnesses in the light of their availabilities. The Tribunal decided to hear Natasha Oakley first and then hear Graeme McLean and Emad Aladhal, who were only available from the fourth day.

64. Natasha Oakley gave evidence on affirmation and produced a witness statement dated 9 May 2023 that ran to eleven pages and 69 paragraphs. Ms Oakley began her evidence at 10:20am on the third day. At the relevant time, Ms Oakley was Head of Strategy and Analysis for the respondent and had been with the organisation since 2006.

65. Ms Oakley's role in this case was to investigate a complaint made by Ms Shaukat against the claimant under Stage 1 of the FCA's Equality Complaints procedure. She was appointed to the task in February 2020.

66. We took a break for ten minutes at 11:20am and took lunch between 12:55pm and 13:30pm. Ms Oakley was cross-examined in detail by Mr Alom. The cross-examination ended at 14:06pm. Ms Edwards and Ms Houzer asked Ms Oakley a few questions. There was no re-examination of the witness and we broke for the day at 14:11pm as the next witnesses were not available until the following day.

67. The fourth day of the hearing started at 11:00am. There were no preliminary matters.

68. Graham McLean gave evidence on affirmation and produced a witness statement dated 9 May 2023 that ran to nine pages and 68 paragraphs. Mr McLean began his evidence at 11:00am on the fourth day. At the relevant time, Mr McLean's role was Head of Transformation for the respondent. He had been with the respondent since 1995. His role in this case was as dismissing officer.

69. Mr McLean gave evidence until 13:15pm, when we broke for lunch. He returned at 14:00pm and was cross-examined until 14:37pm. There were no questions from the Tribunal and no re-examination questions. At the end of Mr McLean's evidence, we spoke to Mr Alom about the procedure for closing submissions. We closed the hearing for the day at 14:37pm, as the final live witness, Emad Aladhal, was not available until the fifth day.

70. We started the fifth day at 10:00am. Mr Alom raised a point concerning the cross-examination of Natasha Oakley on the third day. The third day had been a Thursday. The fifth day was Tuesday of the following week. Mr Alom took us to page 611 of the bundle, which was the start of a set of minutes from a Grievance Investigation follow up meeting on 6 May 2020 [611-643]. The attendees were recorded as Esther Grey – HR Panel Member, Natasha Oakley, Ms Shaukat and Sue Gartell, Employee Companion for Ms Shaukat.

71. Mr Alom said that Susannah Midson was mentioned in the minutes. On page 617, Susannah Midson is recorded as saying "Yes". He wanted to know what part she took in the meeting.

72. Ms Midson was also mentioned in the bundle as the recipient of the outcome report into Ms Shaukat's case on 28 January 2021 [1286] and in an email from Emma Wilkes of the respondent to Howard Bolton of the respondent dated 25 May 2021 [1353]. In response to a question about how an email of 23 April 2020 came to HR's attention, Ms Wilkes told Mr Bolton that:

> "*The email of 23 April 2020 was sent to the ER team by Susie Midson HR Adviser. She was contacted by the person covering Louise Vergara, they saw the email from Jasthi* [the claimant] *in Louise's inbox and contacted the HR adviser team to see if they needed to do anything with it. I don't believe that the April email was then seen by Natasha, as she had already concluded her investigation based of Amna's complaint."*

73. I asked Mr Alom why this was important or proportionate. Mr Alom said it was relevant because Ms Oakley had said that no one else attended other than the listed attendees. He wanted to know what the relevance of Ms Midson's attendance was. We asked Mr Holloway to make enquiries. His response after

making enquiries was that Ms Midson was an HR Advisor for the respondent and that his instructions were that she was definitely not at the meeting. It was a mistake in the transcript. Mr Alom raised no further questions. We regarded the matter as closed.

74. Emad Aladhal attended via video link, gave sworn evidence on the Koran, and produced a witness statement dated 2 May 2023 that ran to eight pages and 50 paragraphs. Mr Aladhal began his evidence at 10:08am on the fifth day. At the relevant time, Mr Aladhal's role was Director of the Special Directorate for the respondent. He had been with the respondent since 2017. His role in this case was to hear the claimant's appeal against dismissal.

75. Mr Aladhal was asked a few supplementary questions by Mr Holloway before he was cross-examined by Mr Alom in detail. At 11:54, Mr Alom asked Mr Aladhal a question that implied that it was unreasonable for Mr Aladhal to have taken a view on the evidence. We intervened at that point to advise the claimant that it was not a reasonable point for him to allege that a person investigating or hearing a disciplinary allegation at first instance or on appeal cannot take a view of the evidence. It is necessary that someone evaluates the evidence to determine whether a matter proceeds to a disciplinary hearing and what potential penalty should be imposed if dismissal is contemplated.

76. Mr Alom continued his cross-examination until 12:41pm. The Tribunal asked Mr Aladhal some questions and Mr Holloway asked some re-examination questions. Mr Aladhal ended his evidence at 12:56pm. We had a brief discussion with the parties and it was agreed that we would take lunch and hear closing submissions at 15:00pm.

77. In addition to the oral evidence, we considered the written statements of:

    77.1. Simone Ferreira, whose witness statement dated 3 May 2023 consisted of nine pages and 53 paragraphs. Since June 2020, Ms Ferreira has been Head of Risk Advisory in the respondent's Risk Division. Ms Ferreira's role in the case was as the person appointed to investigate the claimant's Equality Complaint against Ms Shaukat on 23 April 2021 [652-657].

    77.2. Graeme Reynolds, whose witness statement dated 4 May 2023 consisted of eight pages and 46 paragraphs. At the relevant time, Mr Reynolds was Deputy Chief Economist and Head of Department for Economic and Financial Analysis for the respondent. He has been with the respondent since September 2014. Mr Reynolds' role in the case was as the person appointed to hear Mr Alom's appeal against the outcome of the claimant's Equality Complaint against Ms Shaukat.

    77.3. Jamie Bell, whose witness statement dated 9 May 2023 consisted of eight pages and 55 paragraphs. At the relevant time, Mr Bell was Senior Manager, Market Oversight Data and Systems for the respondent. He was appointed to his current role as Head of Secondary Market Oversight on 1 April 2021. Mr Bell's role in the case

was as the person appointed investigate Mr Alom's Equality Complaint against Saima Barlas.

78. As the claimant did not wish to ask any of the witnesses any questions, their evidence was accepted as being credible.

79. We received a message from our clerk that Mr Alom was not ready to proceed at 15:00pm, so we agreed to put the start time back to 15:30pm.

80. Mr Holloway made closing submissions first. He had produced a skeleton argument that consisted of 11 pages and 23 paragraphs. Mr Alom had been sent a copy. Part C of the skeleton dealt with remedy. We confirmed that we did not need to hear about remedy that that stage. We were only concerned with liability, which would include a consideration of whether there should be any reduction in compensation following the principle in **Polkey v A E Dayton Services Limited** or contributory fault. We made this decision to save time and expense: there was no point in hearing submissions about remedy until we had decided that the claimant had been successful in one or more of his claims. The **Polkey** and contributory fault positions were findings of fact and would be useful if the claimant won his unfair dismissal claim because the parties would know our thinking on those points and therefore could negotiate a financial settlement with more certainty.

81. Mr Holloway spoke for 40 minutes. Mr Alom produced written closing submissions that consisted of 24 pages and 66 paragraphs. He summarised his case and spoke for 15 minutes, ending at 16:25pm.

82. We advised the parties that we would meet in Chambers the following day and would make this reserved decision. We met in Chambers on 24 May 2023 and made our decision as set out in this Judgment and Reasons.

83. As we have not found for the claimant on any part of his claim, a remedy hearing will not be listed.

84. **Note from Employment Judge Shore – It is entirely my responsibility that it has taken far too long to produce this Judgment and Reasons, for which I offer my sincere and profuse apologies to the parties, the representatives, and my colleagues. Following the hearing, I had to deal with several serious personal matters that reduced the time I had available to complete what was a complicated decision in a complex case, whilst also fulfilling my obligations to ongoing hearings and family duties. I underestimated the time it would take to finally prepare the written judgment and the seriousness of my personal circumstances regrettably affected my focus and capacity to conclude it in good time.**

Findings of Fact

Preliminary Comments

85. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's evidence over the other. If there was no dispute over a matter, we will either record that

with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing to complete disclosure or obtain more documents or call additional evidence, so we have dealt with the case on the basis of the documents produced to us, the witness evidence produced, and the claim as set out in the List of Issues, as it evolved through the hearing.

86. The claimant was reminded that if he did not challenge the evidence of the respondent's witnesses, we were likely to find that unchallenged evidence was credible.

87. The claimant made several serious allegations of misconduct at work against Amna Shaukat in the various grievance and disciplinary matters that were progressed during his employment. Ms Shaukat was neither a party to or a witness in this hearing and was not given any opportunity at the hearing to rebut any of the allegations made against her. We have made no findings of fact on any of the allegations made against Ms Shaukat and no one reading this Judgment and Reasons should take anything that is written herein to indicate that we have.

Undisputed Facts

88. We should record as a preliminary finding that many relevant facts were not disputed, not challenged, or were agreed by the parties. We therefore make the following undisputed findings of fact:

    88.1. At the time of his dismissal, the claimant was employed as an Associate in the Asset Management Department of the respondent, which is the financial regulatory authority for the United Kingdom. He was employed from 15 February 2015 to 1 April 2021.

    88.2. The claimant identifies as non-white. He identifies as being of British-Bangladeshi national origin and of Bengali ethnic background in his witness statement.

    88.3. The claimant was dismissed for the stated reason of gross misconduct following a disciplinary hearing on 25 March 2021. The effective date of termination was 1 April 2021, which is the date that the dismissing officer, Graeme McLean, met the claimant and advised him of the outcome of the disciplinary process.

    88.4. Mr McLean wrote to the claimant on 1 April 2021 [1213-1217] to confirm the outcome of the disciplinary hearing. Mr McLean found that the claimant had committed two acts of misconduct:

        88.4.1. A breach of the FCA's Equal Opportunities and Respect at Work Policy; and

        88.4.2. Breach of confidentiality.

88.5. The first disciplinary matter was an allegation that the claimant had sent a work colleague, Amna Shaukat, an anonymous email on 23 January 2020 [340]. The claimant denied that he had sent it. However, he accepted that if he had sent it, the respondent would have been justified in finding it to have been an act of gross misconduct. We concur with the parties' opinion.

88.6. The second disciplinary matter arose out of an Equality Complaint that the claimant had made against Ms Shaukat. The allegation was that the claimant had breached confidentiality by emailing Ms Shaukat's manager on 27 January 2021 with a copy of one of the recommendations from the Equality Complaint outcome, two screenshots and an allegation that the claimant had written a 300-word document that had been part of Ms Shaukat's application for a Consumer Credit Supervision role with the respondent [918].

88.7. The claimant issued Employment Tribunal proceedings against the respondent on 19 September 2018 alleging race and disability discrimination [1409-1433]. The issue of these proceedings is accepted by the respondent as being a protected act under section 27 of the Equality Act 2010.

88.8. The ET proceedings were withdrawn on 3 October 2019 following a settlement between the parties [337].

88.9. On 7 March 2020, the claimant started a one-year sabbatical from the respondent.

Ms Shaukat's Equality Complaint

88.10. The respondent's policy on harassment [118] states:

> *"Harassment: this includes sexual harassment and other unwanted physical, verbal or non-verbal conduct related to a protected characteristic, which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It also includes treating someone less favourably because they have submitted or refused to submit to such behaviour in the past."*

88.11. It was agreed by the parties that the claimant and Ms Shaukat had a friendship that had started in late 2017 or early 2018 (§50 of the claimant's witness statement, §30 of Ms Oakley's statement and the minutes of the Grievance Investigation Follow up meeting on 6 May 2020 [611-643]).

88.12. It was agreed that the friendship intensified, which was evidenced by many emails between the claimant and Ms Shaukat [145-334]. It was agreed evidence that the claimant gave Ms Shaukat a number of gifts.

88.13. On 23 January 2020, there was an altercation between the claimant and Ms Shaukat in the respondent's canteen at lunchtime (§61 of the

claimant's witness statement). The claimant had sent Ms Shaukat and email congratulating her on securing a place on a course that would lead to an MSc in Financial Regulation [339]. He received no response. He tried to message Ms Shaukat by Skype IM, but found he was blocked. He says that being blocked by Ms Shaukat "…triggered me."

88.14. Later that day, the claimant went to the canteen for lunch. He says he saw Ms Shaukat sitting alone and approached her. The claimant's evidence was that he was in a rotten mood and decided to "…approach and essentially 'pick a fight'." He describes the exchange as being a "…heated and disordered argument." (§61 of the claimant's witness statement).

88.15. During the argument, the claimant says that Ms Shaukat accused him of stalking her. The claimant says he had no further contact with Ms Shaukat after the incident until he emailed her on 29 January 2020. That is a disputed fact that we shall return to below.

88.16. On 23 January 2020, Ms Shaukat received an email timed at 20:27pm [340] that appeared to be from someone with the same name as her. It said:

> *"Do you think that you could threaten people not to ever cross you but then you go ahead and cross other people with no*
>
> *consequences at all? Get HR involved. If you want to bring me down I will certainly make sure I bring you down with me.*
>
> *Employee Handbook - passing off someone else's work as your own is an example of gross misconduct. That 300 word you submitted wasn't your work that was someone else's work. The meta data in the document itself proves it. You was in that interview room, yet you had someone else bring you down your notebook? You was communicating via an app with internet access with someone whilst you was undertaking the case study. Both of these points can and will be evidenced. You will be fired for gross misconduct and booted off the MSc you will be humiliated amongst everyone you know. You've got a previous history of submitting malicious stalking and harassment allegations against people. Being escorted to the car park from the office by canary wharf security? But what happened a few months after wasting their time and resources? They'll have that on record. Evidenced. You're so casually throwing allegations of HARASSMENT and STALKING against me?? It wasn't because of me that you was being escorted to your car by security. Chal tikhe. You're unjustly making ME out to be the villain?? I was never the villain in your story. Chal tikhe. If need be I'll play the part of the villain to absolute perfection. And this other thing? As I've said before if this is a curse for me then it's a curse for you also. You will be haunted by synchronicites, signs, and dreams for the rest of your*

existence! Enjoy. If I'm going down, you're going down and if I'm going down I'm doing so kicking and screaming and making a scene just like how we use to when we were kids. Get HR involved. Get police involved. My minds hanging on by a thread and I really honestly do not give a fuck any more. I've had enough of being patient, I've had enough of crying every single day to and from work, at work, at home, I've had enough of praying. I wish I never met you. I wish I never knew your name or saw your face or even knew of your existence. I wish you never came to ME out of everyone in the building when you was going through your bullshit! Why ME?? Why did you have to come to me?? You could've gone to anyone else why did you come to me?? I never invited you to disturb whatever miserable amount of peace I had in my life! Why ME??

Whenever you're ready to grow a pair and face me to communicate and resolve this bullshit conflict and make peace let me know. In the meantime I will try my utmost to manage myself and my issues for as long as I spiritually mentally and emotionally able to like how I've been trying for the past 18 months! But I'm not giving any promises and any chaos that's to come is all due to the karma that you yourself have created based on your actions and words that you've put in."

88.17. On 29 January 2020, the claimant emailed Ms Shaukat [341-343] (§62 of the claimant's witness statement) accusing her of leaving him feeling upset and belittled after their altercation on 23 January 2020. He accused Ms Shaukat of "…spreading false, malicious rumours about myself to the FCA security team." The email offered to resolve their differences informally through mediation by their direct line managers. The claimant included a draft email to their managers.

88.18. On 30 January 2020, Ms Shaukat spoke to Bernadette Chan of the respondent's HR Division about matters that were of concern. On 31 January 2020, Ms Chan emailed Ms Shaukat [345] and asked her to provide a written account of her experiences.

88.19. Ms Chan emailed Ms Shaukat on 13 February 2020 [345] to follow up the previous email.

88.20. Ms Shaukat emailed Ms Chan on 13 February 2020 [344] and said that:

88.20.1. She understood the purpose of the meeting had been to discuss the situation in detail and for Ms Chan to go away and discuss matters with a colleague to understand potential next steps;

88.20.2. She had heard nothing since the email of 31 January 2020 but did not want to start a formal

investigation/grievance against the other party as she was concerned about her own wellbeing and the other party's mental health;

88.20.3. It had "gone quiet for now" and had not heard anything further from the other party but suggested that "IT block him from emailing me at work."

88.21. On 19 February 2020 at 10:39am Ms Shaukat alleges that she received an email from the claimant that was sexually graphic [347]. The email sender had the same name as Ms Shaukat's boyfriend. The claimant denies that he sent the email.

88.22. On 20 February 2020, Ms Shaukat emailed Ms Chan [348-350] setting out a chronology of events between her and the claimant that included allegations that:

88.22.1. The claimant had bought her gifts that were unwanted. Some of the gifts were expensive.

88.22.2. The claimant had created numerous Snapchat identities and had tried to add Ms Shaukat to them.

88.22.3. The claimant had stated to arrive at work at the same time as Ms Shaukat and she saw him "constantly" in the kitchen area of the 7th floor.

88.22.4. The claimant had behaved inappropriately towards her on 23 January 2020 in the canteen.

88.22.5. She had received the email dated 23 January 2020 [340] that she described as "threatening".

88.22.6. Ms Shaukat had confided in a friend and her manager. The manager had put her in contact with HR and advised MS Shaukat to contact the security desk with a view to being escorted to her car.

88.22.7. As Ms Shaukat was speaking to the security guard, the claimant walked past. Ms Shaukat was escorted to her car by the building team manager.

88.22.8. The claimant sent her another email (which we find is the one dated 29 January 2020 [341-343] because of the matters that Ms Shaukat says were in the email are the same as those in the 29 January email) that accused her of spreading rumours about him to security.

88.22.9. The following day, Ms Shaukat asked the security guard how the claimant had become aware of her reaching out to the security desk. She says the reply was that the claimant had contacted them asking what she had said.

88.22.10. Ms Shaukat did not see the claimant as often, so thought the situation had calmed down.

88.22.11. She had then received the email dated 19 February 2020 [347].

88.23. Ms Shaukat's email contained several documents relating to the allegations [351-369].

88.24. Ms Shaukat sent Ms Chan further information in an email dated 21 February 2020 [370].

88.25. Ms Chan responded by email on 20 February 2020 [371] and advised that she had referred the case to the respondent's specialist Employee Relations (ER) team and that Natalie Gregory of that team would be in touch. Ms Chan had also asked the respondent's Cyber Security Team to investigate the question of the origin of the offensive emails [373].

88.26. Ms Shaukat emailed Ms Chan on 26 February 2020 [374] with more evidence of alleged harassment by the claimant [374-386].

88.27. Ms Shaukat reported the claimant's alleged behaviour to the police on 26 February 2020 [387]. A police office emailed the claimant on 28 February 2020 [420] to strongly advise him not to contact Ms Shaukat in any way directly or indirectly. Documents in the claimant's bundle [CB 26-44] indicate that the complaint was dropped by Ms Shaukat later.

88.28. Saima Barlas sent a log of events she had witnessed between the claimant and Ms Shaukat to the respondent on 3 March 2020 [425-427].

88.29. The claimant started his 12-month sabbatical on 7 March 2020.

88.30. Ms Oakley interviewed Ms Shaukat on 9 March 2020 [429-491].

88.31. On 12 March 2023, the respondent's Cyber Security Team reported to the respondent about the mails:

> *"From this investigation I found no evidence that JA* [the claimant] *was responsible for the emails or anything that would indicate an attempt to test FCAs email protections. There is evidence that JA and AS had a relationship beyond work colleges, in the form of email correspondence between them, but nothing to suggest it was anything more than a close friendship. There is also evidence that this relationship ended badly, in a form of an unsent draft email supposedly to his line managers where he goes into detail around what happened between from his perspective. A third unsent email, with no recipient details or written content in the message, also has a number of files attached that consist of 3 CVs and 2 cover letters written for AS, the metadata suggests that JA created the documents. The remaining*

documents are either presentations or interview question sheets, it is not clear who these documents were for."

88.32. On 23 March 2020, Ms Gregory of the respondent's ER team emailed the claimant [496] to advise him of a complaint that had been made against him. Further details were given in an email dated 26 March 2020 [495]. The claimant replied on 26 March 2023 [493-494] indicating that he would be making a complaint against Ms Shaukat about her spreading malicious rumours about him.

88.33. On 2 April 2020, Ms Gregory sent the claimant an email [500-501] that set out details of the allegations by Ms Shaukat of harassment from May/June 2018 to date in the form of:

88.33.1. Unwanted attention;

88.33.2. Unwanted gifts;

88.33.3. Trying to engage interaction with Amna via anonymous snapchat ID's;

88.33.4. Creating a fake snapchat account using Amna's details;

88.33.5. Anonymous emails sent to Amna's FCA email address;

88.33.6. Anonymous call to Amna's FCA direct line;

88.33.7. Making fake enquiries regarding pest extermination to Amna's FCA email account;

88.33.8. Asking colleagues and staff members about Amna; and

88.33.9. Appearing near/around Amna in the FCA building.

88.34. The email also invited the claimant to a meeting on 6 April 2020 by Skype. Copies of the two anonymous emails were attached to the mail.

88.35. Ms Gregory met the claimant on 6 April 2020 when the claimant said he was going to make a complaint about Ms Shaukat. The meeting was recorded. Ms Gregory emailed the claimant the same day [502]. A transcript of the meeting was produced [511-560].

Claimant's Equality Complaint

88.36. The claimant submitted an equality complaint against Ms Shaukat on 23 April 2020 [653-657] in which he alleged Ms Shaukat had:

88.36.1. Engaged in unwanted sexual conversations with him;

88.36.2. Spread malicious rumours about him;

88.36.3. Submitted a false allegation to the police about him;

88.36.4. Submitted a false and malicious complaint about him to the FCA; and

88.36.5. Made inappropriate race-based comments to him.

88.37. Ms Shaukat was informed of the claimant's complaint against her on 15 April 2020 [562]. Simone Ferreira was appointed to investigate the complaint on 23 April 2020. Ms Ferreira interviewed the claimant on 18 June 2020 [664-740] and advised the claimant that she had concluded her investigation on 30 October 2020 [828].

88.38. Ms Ferreira sent the claimant her investigation report dated 7 December 2020 [849-864] by email [831] on 7 December 2020. All the claimant's complaints were rejected. The claimant appealed Ms Ferreira's decision on 18 December 2020 [843].

88.39. The appeal was heard by Graeme Reynolds, who conducted an investigation that included interviewing witnesses that the claimant said should have been interviewed by Ms Ferreira and considering additional documents produced by the claimant. The appeal meeting took place on 2 February 2022 and a verbatim note was produced [931-956]. Mr Reynolds wrote to the claimant on 17 March 2021 [1087-1093] with the outcome of the appeal, which was rejected.

88.40. We do not find it necessary or proportionate to go into the detail of the outcome and appeal as the claimant has withdrawn all his allegations relating to it.

Ms Shaukat's Equality Complaint (continued)

88.41. Following the meeting with the claimant on 6 April 2020, the respondent continued its investigations and interviews with witnesses. Ms Oakley produced a report dated January 2021 [888—910] that was sent to the claimant on 27 January 2021 [914].

88.42. Ms Oakley's report addressed Ms Shaukat's five complaints against the claimant:

88.42.1. Unwanted gifts – some given in person and others anonymously;

88.42.2. Anonymous emails and calls;

88.42.3. Changing snapchat IDs and passwords without permission;

88.42.4. Seeing him numerous times a day either inside or outside the FCA; and

88.42.5. Making inappropriate sexual comments towards her.

88.43. In respect of the gifts, Ms Oakley concluded [896]:

"My conclusion is that the gifts are not harassment. ***Recommendation 1*** *- However, now that Amna has clearly set out that she does not want to receive gifts from Jasthi, I recommend that neither Amna or Jasthi should buy each other any further gifts, either in a professional or a personal capacity.* ***Recommendation 2*** *- I recommend that Jasthi should take caution in buying gifts for other colleagues, as this will not always be appropriate and can lead to discomfort for the recipient."*

88.44. In respect of the anonymous calls and emails, Ms Oakley concluded [899-901] that she could not find on the evidence that the claimant made the anonymous call on 14 February 2020 or sent any of the emails other than the email sent on 23 January 2020, she found that the 23 January email was harassing in nature and its tone and language were aggressive and threatening and create an intimidating and hostile environment that was unwanted.

88.45. Ms Oakley also found that the 23 January email was, on balance, sent by the claimant [900]. Her reasoning was that the content matter of the email was specific in its references to events and conversations that relate directly to events and conversations between the claimant and Ms Shaukat. The examples Ms Oakley gave were:

88.45.1. References to the respondent's Employee Handbook;

88.45.2. References to the help that the claimant had given Ms Shaukat in preparing her 300-word application;

88.45.3. Knowledge that Ms Shaukat had been accepted on to the MSc course;

88.45.4. Knowledge that Ms Shaukat was escorted to her car by security;

88.45.5. Knowledge that Ms Shaukat was "throwing around" accusations of stalking and harassment; and

88.45.6. Knowledge that Ms Shaukat had confided with someone "in this building".

88.46. Ms Oakley also made the following recommendations:

Recommendation 4 - *Going forward, it is clear that Amna does not welcome any further contact from Jasthi. I therefore recommend that Jasthi respects this and should* ***not*** *contact Amna, this includes via email, phone, skype, IM etc. unless it is absolutely necessary in an FCA work context, although I would expect this situation to be very rare. If Jasthi does need to contact Amna in a work context then he should discuss this with his line manager in the first instance and use his line manager to direct communications. I would also add to this recommendation that I do not see that it would be practical or reasonable for Amna or Jasthi to work closely together*

in a professional capacity and that this should be avoided, if this cannot be avoided then discussion should take place with local management and HR. ***Recommendation 5 -*** *BTS should seek to block all the anonymous email addresses to ensure that Amna does not receive further email correspondence from these addresses."*

88.47. In respect of the allegation of changing Snapchat IDs and passwords without permission, Ms Oakley found that:

"This is the point in the chronology, in 2018, where we see the friendship between Amna and Jasthi change, following Amna's blocking Jasthi on Snapchat. Following this there is then very little communicate between them for most of 2019, before matters escalate in early 2020. I have no conclusive evidence to determine who changed Amna's Snapchat ID's and who made the phone calls. It seems unusual that Jasthi should be able to change Amna's Snapchat unless he was aware of her passwords, which appears not to be the case."

88.48. In respect of seeing the claimant numerous times a day either inside or outside the office, Ms Oakley found that:

"In conclusion, I cannot determine conclusively if Jasthi was 'following' Amna. However, there are 2 key incidents in which I believe Jasthi did not act professionally or appropriately. These were in seeking to confront Amna on the 15th floor and in speaking to the security guard to understand the contents of a private and confidential discussion. This serves to underline my recommendation 4. ***Recommendation 6*** *- That Jasthi undertake training in relation to resilience and how to manage conflict in a positive way. I also recommend -* ***Recommendation 7*** *That the security team are reminded of the importance of confidentiality in relation to private and confidential discussions and staff matters, and if necessary that some training is sought in this regard."*

88.49. In respect of the allegation of making inappropriate sexual comments, Ms Oakley made the following findings:

"Both Jasthi and Amna's accounts, are similar in some regards, in that both recall that the term naked shawarma was said, but the context in which it was used is disputed. I am aware of the term 'naked' in reference to food without bread and so it is possible that Jasthi was factually replying to a question, and on the face of it this seems like a relatively inert comment. There are no witnesses to these events and I have no substantive evidence other than Amna and Jasthi's conflicting accounts of what was intended by the comment. I do however believe that Amna felt uncomfortable about this encounter, whether that was Jasthi's intention or not."

88.50. Ms Oakley regarded the sending of the 23 January 2020 email as harassing in nature and therefore a potential breach of the respondent's Equal Opportunities and Respect at Work Policy (§12.5 of the report [908]). Ms Oakley determined that the alleged act of harassment would be picked up separately with the claimant by HR and his line manager, to be dealt with using the appropriate next steps (§13.3 of the report [910]).

88.51. The claimant emailed Ms Shaukat's manager, Louise Vergara, and his own line manager, Christopher Davis on 27 January 2021. In his email he stated:

> *"As part of a recommendation made in the outcome report against Amna Shaukat (paragraph 9.2.3) that an allegation Amna Shaukat gained her Reg B Supervisor role I 2018 was done so by fraud and deceptions, is formally reviewed by yourself.*
>
> *To help with your formal review please find attached 2 screenshots:*
>
> *1) The first screenshot is dated 17 July 2018 timestamped 11:37. This picture shows Amna Shaukat carrying out her Consumer Credit Supervision case study and seeking input from myself via Snapchat.*
>
> *2) The second screenshot is dated 3 July 2018 timestamped 12:04. This picture shows Amna Shaukat carrying out another case study for a Retail Investments Supervisor Role and was seeking input from myself via Snapchat. In this picture Amna Shaukat's name is written in the top right hand corner.*
>
> *3) I confirm that the 300 words submitted by Amna Shaukat was written in whole by myself and she had submitted this as part of her Consumer Credit Supervision job role which she was ultimately awarded.*
>
> *If this formal review is not conducted properly and the correct conclusion is not reached and Amna Shaukat is not appropriately penalised, I will be informing other colleagues throughout the organisation as well as external stakeholders that Amna Shaukat had fraudulently and deceptively obtained an FCA Supervisor role and when it was brought to the FCA's attention, they did nothing about it.*
>
> *I expect to be kept updated on this matter since it concerns myself.*
>
> *Kind regards,*
>
> *JA"*

88.52. The attached a copy of one of the recommendations from the Equality Complaint outcome, two screenshots and an allegation that the

claimant had written a 300-word document that had been part of Ms Shaukat's application for a Consumer Credit Supervision role with the respondent [918].

88.53. On 28 January 2021, the claimant messaged his manager as follows [915]:

"Btw she's still stalking and harassing me did you know? Even yesterday as soon as shop opened at 5pm I'm getting private number calls. She obviously knew I got the outcome report yday so shes taking the piss.

I'm seeking an SPO against her. Stalking Protection Order. If I come back to the FCA she's gonna have to stay x amount of distance away from me, also gonna try get her barred from the 9th floor regardless of whether I'm in the building or not etc

So are you going to act on the recommendations?"

88.54. On 29 January 2021, the claimant emailed Ms Gregory, copying Ms Oakley asking questions about the grievance outcome [963-965]. Ms Gregory responded on 8 February 2021 by adding comments to the claimant's questions [963-965]. There was no appeal against the outcome of the report.

Grievance against Saima Barlas

88.55. On 29 January 2021, the claimant submitted a grievance against Saima Barlas [927-928] by email [967]. The subject of the grievance was an allegation that Ms Barlas had given deliberately false information to Ms Oakley's investigation.

88.56. Jamie Bell was appointed to hear the grievance and carried out an investigation with the support of HR. The claimant was interviewed on 8 March 2021 [1012-1034]. Mr Bell interviewed Ms Oakley [1121-1131] and Ms Barlas [1220-1243]. Mr Bell prepared a report dated 23 April 2021 [1262-1273], which was sent to the claimant on the same date [1259].

88.57. The claimant did not appeal the outcome. We do not find it necessary or proportionate to go into the detail of the outcome as the claimant has withdrawn all his allegations relating to it.

Disciplinary Procedure

88.58. The respondent's disciplinary policy was produced at pages 125-129.

88.59. On 4 February 2021, Esther Grey of the respondent's ER Team emailed the claimant [962] to advise him that following the outcome of Ms Oakley's report into Ms Shaukat's complaint, she would be in contact with the claimant to arrange a disciplinary hearing to be chaired by Graeme McLean. The claimant responded on the same

date [962] pointing out that he had a Stage 1 grievance complaint in progress (against Ms Barlas) and a Stage 2 equality complaint in progress (against Ms Shaukat). He asked that the disciplinary be paused until the conclusion of the grievances.

88.60. Ms Grey responded on the same date to advise that the disciplinary was narrow in scope and was in relation to the 23 January 2020 email. This was not related to his grievance against Ms Barlas and was not an issue in his appeal against the outcome of the grievance against Ms Shaukat. The claimant did not accept that there was no connection between the grievances and the 23 January email [961].

88.61. The disciplinary was held up by the addition of a second disciplinary matter: an alleged breach of confidentiality. The alleged breach was contained in the claimant's email to his and Ms Shaukat's respective line managers dated 27 January 2021 [918]. The claimant was notified of the new allegation by Ms Grey by email on 10 March 2021 [1077]. The email stated:

> *"Further to my previous emails regarding the disciplinary matter in relation to Natasha Oakley's finding of harassment on your part, I am getting in touch to explain the reason for the delay in initiating the process.*
>
> *We are delaying the disciplinary meeting as we would like to address a second allegation of misconduct on your part. This is in relation to an email that you sent to Louise Vergara, copying in Christopher Davis on 27 January 2021. In your email you refer to a recommendation made in the outcome report against Amna Shaukat. This is a breach of confidentiality. Recommendations arising from investigations of this nature must be taken forward by HR only.*
>
> *As the above matter is linked to your equality complaint and appeal we are delaying inviting you to a disciplinary hearing meeting to address the above allegation in addition to Natasha's finding of harassment until your stage 2 equality complaint has concluded."*

88.62. On 18 March 2021 (the same day that Mr Reynolds sent the claimant his decision on the claimant's appeal against Ms Shaukat), the claimant was sent an invitation to a disciplinary meeting [1133-1134] to be held on 25 March 2021. The hearing was to consider two matters:

> *"i. Allegations of harassment arose from a complaint made by Amna Shaukat in February 2020. These allegations were investigated by Natasha Oakley, Head of Strategy and Analysis. A copy of Natasha's investigation report is attached, which sets out further detail on the allegations and findings. The investigation found that an anonymous email dated 23 January 2020 was sent by you and is harassing in nature and therefore*

a potential breach of the FCA's Equal Opportunities and Respect at Work Policy.

ii. You sent an email to Louise Vergara dated 27 January 2021. In your email you refer to a recommendation made in Simone Ferreira's investigation outcome report into a complaint you made against Amna Shaukat. In disclosing this information, this is a potential breach of confidentiality. Simone's recommendation is confidential and is a matter to be taken forward by HR only."

88.63. The invitation included:

88.63.1. Natasha Oakley's investigation report which sets out the allegations and her findings;

88.63.2. The email dated 23 January 2020;

88.63.3. Email correspondence between yourself and Nathalie Gregory dated 8-9 June 2020

88.63.4. Your email dated 27 January 2021 sent to Louise Vergara;

88.63.5. FCA's Equality Complaints procedure (page 56);

88.63.6. FCA's Equal opportunities and respect at work policy (page 53);

88.63.7. Contractual Terms - Confidentiality of Information (Page 117 para 1.6);

88.63.8. FCA's Disciplinary Procedure (page 61); and

88.63.9. FCA Organisation Chart.

88.64. The claimant supplied eleven items of evidence (§16 of Mr McLean's witness statement).

88.65. At the disciplinary hearing on 25 March 2021, the claimant was represented by his trade union representative. Mr McLean was supported by Ms Grey. The meeting was recorded and a transcript of the meeting was produced [1143 to 1186]. The claimant read out a prepared statement and answered questions from Mr McLean, After the hearing, the claimant sent Mr McLean a copy of his statement [1108-1116].

88.66. After the hearing, Mr McLean considered the evidence and decided that the claimant had sent the email of 23 January 2023 [340] and that this constituted gross misconduct.

88.67. The claimant admitted sending the email of 27 January 2021 to Louise Vergara. Mr McLean found that the FCA's Equality Complaints

Procedure [113-116] specifically provided that an investigation must be kept confidential by all employees involved. He regarded the claimant's conduct as misconduct.

88.68. At an outcome meeting on 1 April 2021 [1204-1211], Mr McLean advised the claimant of his decision and advised the claimant that he was summarily dismissed. The claimant's effective date of termination was 1 April 2021. His decision was confirmed in an outcome letter dated 1 April 2021 [1213-1217].

88.69. The claimant appealed his dismissal on 11 April 2021 [1279-1280] and cited eleven points in relation to the first matter (the email of 23 January) but provided no other details than those listed below:

88.69.1. Assessing evidence and credibility;

88.69.2. Failure to consider evidence;

88.69.3. Misunderstanding of evidence provided;

88.69.4. Standard of proof;

88.69.5. Focus and scope of the investigation;

88.69.6. Objectivity, impartiality,& fairness during the original investigation;

88.69.7. Investigator behaviour during the investigation: Honesty;

88.69.8. Promptness of the original investigation;

88.69.9. Other matters for consideration: HR personnel involved in the original investigation; and

88.69.10. Extenuating circumstances and FCA employment record.

88.70. In respect of the second matter (the email of 27 January 2021), the claimant cited four points but provided no other details than those listed below:

88.70.1. Failure to carry out a separate investigation into the allegation of misconduct;

88.70.2. Failure to consider evidence;

88.70.3. Objectivity, impartiality & fairness; and

88.70.4. Extenuating circumstances and FCA employment record.

88.71. The claimant said he would provide further details prior to or at the disciplinary appeal "alongside new information and evidence which hadn't been considered during the original investigation and/or during the disciplinary hearing meeting of 25 March 2021."

88.72. On 28 April 2021, the claimant was invited to submit to submit the further details of his appeal [1282-1283]. The claimant refused, implying that "prior to or at the hearing" meant precisely that. The claimant was sent an invitation to the appeal on 29 April 2021 [1285]. The appeal was to take place on 11 May 2021 and was to be conducted by Emad Aladhal.

88.73. The claimant attended the appeal meeting, which had been put back to 17 May 2021 at his request, with his trade union representative. The meeting was recoded and a transcript was produced [1307-1330]. On the afternoon of the meeting, the claimant submitted the details of his grounds of appeal [1289-1306] and a selection of documents. Mr Aladhal went through the points raised by the claimant in the order they appeared in the appeal email of 12 April 2023. He interviewed Mr McLean on 21 May 2021 [1331-1338] and Ms Oakley on 24 May 2021 [1339-1344].

88.74. Mr Aladhal invited the claimant back for an outcome meeting on 17 June 2021. The claimant did not attend, so the meeting was rescheduled for 30 June 2021. The claimant produced an affidavit on 25 June 2021 [1385] that simply said that he did not send the email dated 23 January 2020.

88.75. Mr Aladhal sent the claimant the appeal outcome on 30 June 2021 [1388-1398] and rejected his appeal on both matters.

88.76. The respondent agreed that the second of the two protected acts contended for by the claimant (his submission of an ET1 on 19 September 2018 that alleged race and disability discrimination [1409-1433]) was a protected act. The first protected act was disputed.

Points of Dispute

General Points

89. It is rare that a Tribunal will find a witness to be entirely credible or, in the alternative, entirely not credible. In this case, we will address the issue of credibility on an issue-by-issue basis. We found no witness to be either entirely credible or entirely not credible.

90. We have only dealt with the matters in the List of Issues that remained in dispute following the withdrawal of allegations by the claimant during the hearing.

91. In making our decisions on the claims of discrimination and victimisation, we were mindful of the burden of proof in such cases set out in section 136 of the Equality Act 2010.

Jurisdiction - Time

92. We find that the claimant's claims of discrimination and detriment because he made protected disclosures were made in time because they were part of a

continuing series of events. We note that there were time gaps between the allegations, but the underlying situation that the claimant complains about was the same throughout.

Victimisation - Protected Acts

93. We find that the claimant's emails of 19 April 2016 [146-147] and 1 August 2016 [151-152] do not do anything for the purposes of or in connection with the Equality Act 2010 and do not make allegations, express or implied, that the respondent or any other person had contravened the Equality Act 2010. We make that finding because the claimant refers to his mental health in the emails but does not link the failure to award a bonus to his mental health. He alleges that his mental health is made worse by the actions of the respondent.

94. We find that the claimant's grievance dated 10 (or 17 – the parties differ on the date, but it is not a material fact) August 2017 [168-169] is a protected act because he makes the link between his mental health and alleged less favourable/unfavourable treatment because of or related to his mental health by stating *"I believe they have…penalised me for displaying symptoms of negative mental health."* We find that to be an allegation that the respondent had contravened the Equality Act 2010.

95. By a process of logic, we find that an appeal against the grievance outcome [201] dated 21 February 2018 must be a protected act if the grievance itself was a protected act.

96. The respondent has conceded that the second of the two protected acts contended for by the claimant (his submission of an ET1 on 19 September 2018 that alleged race and disability discrimination [1409-1433]) was a protected act.)

Victimisation claims

Ms Oakley's decision to partially uphold Ms Shaukat's grievance against the claimant (List of Issues §§1.1.5. and 5.3.1.)

97. We find that Ms Oakley's Equality Complaint Investigation Report [888-910] that was sent to the claimant on 27 January 2021 [914] upheld only the following part of Ms Shaukat's grievance against the claimant:

    97.1. Ms Oakley found that the 23 January 2020 [340] email was, on balance, sent by the claimant [900]. She also found that the 23 January email was harassing in nature, and that its tone and language were aggressive and threatening, and created an intimidating and hostile environment that was unwanted.

98. We find that the relevant part of the claimant's witness statement was contained in paragraphs 65 to 98 but that these paragraphs also contained information that was not relevant to the issue that we had to determine in the victimisation allegation. We have only considered evidence that relates to the decision to uphold the allegation about the letter of 23 January 2020 and whether it was because he did the protected acts that we have found he did.

99. The respondent conceded that the decision to uphold part of Ms Shaukat's grievance was a detriment (§21 of Mr Holloway's skeleton argument).

100. The detriment must be because of the protected act. It is insufficient for the detriment to flow from the protected act. It must be because of it. The test is set out in **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065, HL that the question in a case about victimisation is what was the 'reason' that the respondent did the act complained of.

101. There is no requirement, in victimisation claims, for a claimant to show that the alleged discriminator was wholly motivated to act by the claimant's behaviour in carrying out a protected act (**Nagarajan v Agnew** [1994] IRLR 61, EAT.) Where there are mixed motives for an employer to subject an employee to detriment, the discriminatory reason has to be of sufficient weight (**O'Donoghue v Redcar and Cleveland Borough Council** [2001] EWCA Civ 701.)

102. The claimant's case is that he did not send the email. He swore an affidavit to that effect. His case is bolstered by the report of the respondent's Cyber Security Team who reported to the respondent that "*From this investigation I found no evidence that JA was responsible for the emails or anything that would indicate an attempt to test FCAs email protections.*"

103. The claimant also makes a legitimate point about the delay in producing the report, but we note that the investigation was taking place during the worst of the pandemic and find that at least some of the delay could be attributed to that factor. We found Ms Oakley's evidence on the point to be credible. The email did not say it was from the claimant but he is an intelligent man and we doubt he would have put his name on such an email if he had written it.

104. It is correct for the claimant to point out that Ms Oakley did not ask Ms Shaukat if she had written the email, but we find that to be understandable given her emotional reaction to the situation. The failure to ask Ms Shaukat the question did not invalidate Ms Oakley's process or the conclusion she came to,

105. We find, however that it was reasonable for Ms Oakley to come to the conclusion that the claimant **had** sent the email on 23 January 2020 for the following reasons:

    105.1. In an email from Ms Gregory on 8 June 2021 [661], the claimant was asked for his thoughts on the email of 23 June 2020 and its content and confirmation of whether the email was sent by him. The claimant responded approximately 90 minutes later that said:

    > *"No thoughts or comments on the attached email.*
    >
    > *The last email I sent to Amna's FCA email address was the one sent to was on 29 Jan 2020 titled "Informal Steps to Resolve Issue(s)" and the one before that on 21 Jan 2020 congratulating Amna for getting onto the MSc. Both of these emails were sent from my FCA email address."*

105.2. Ms Oakley found the response to be "… a strange and evasive reply to a straightforward question…" (§34 of her witness statement).

105.3. Ms Gregory emailed the claimant again on 9 June 2021 [661] and asked if he did or did not send the email. The claimant's response was sent within 25 minutes [661] and stated, "I would have thought my reply was clear enough to state that I did not send that email?"

105.4. We find the claimant's first response to be a less than emphatic denial. We do not find anything unusual about the question mark used in the second response. The claimant asked a question. However, we find it was reasonable for Ms Oakley to include the first response in her consideration of the question of whether the claimant had sent the email and for her to find that it was one of the matters that tipped the scales against the claimant.

105.5. The claimant did not suggest to Ms Oakley on receipt of the report [888-910] that her decision had been because he had done a protected act.

105.6. On 29 January 2021, the claimant emailed Ms Gregory, copying Ms Oakley asking questions about the grievance outcome [963-965] but none of his nine questions suggested that the reason that Ms Oakley had made the decision she did was because the claimant made a protected disclosure.

105.7. The claimant did not appeal against the outcome of the report.

105.8. Ms Oakley only found a single instance or harassment proven against the claimant, which indicates to us that she considered things with a neutral mind and had not predetermined the outcome.

105.9. Ms Oakley was not challenged in cross-examination by the claimant about her motive for making the decision. He was aware that unchallenged evidence was likely to be found to be credible. Ms Oakley's evidence (§§ 64 and 65 of her witness statement) was that she was not aware of any specific complaints that the claimant had raised in around April 2016 or April 2017 or related appeals in around September 2016 and February 2018 I connection with pay and award. She was not aware that the claimant had submitted an ET1 in September 2018. We find Ms Oakley's evidence about her lack of knowledge of the protected acts to be credible.

105.10. There was no evidence presented to us that someone else in the respondent's organisation had created and/or fed false information to Ms Oakley.

105.11. We find that the email of January 2020 could only have been written by the claimant or Ms Shaukat. We make that finding because the detail in the email could only have been known by them.

105.12. It was agreed evidence that the claimant and Ms Shaukat had a heated argument in the canteen on 23 January 2020, the day that the email was sent.

105.13. On 29 January 2020, the claimant emailed Ms Shaukat [341-343] (§62 of the claimant's witness statement) accusing her of leaving him feeling upset and belittled after their altercation on 23 January 2020. He accused Ms Shaukat of "…spreading false, malicious rumours about myself to the FCA security team." We find this to be a similar tone and style of language to that used in the 23 January 2020 email. The 29 January email offered to resolve their differences informally through mediation by their direct line managers. The claimant included a draft email to their managers.

105.14. We have reproduced the 23 January 2020 [340] email in full in this Judgment and Reasons. It uses similar syntax and narrative style to other examples of the claimant's correspondence and some of the documents created for this Tribunal. We find it highly unlikely that Ms Shaukat would have written the email in anticipation of making a false claim against the claimant because the email includes an allegation that she cheated in preparing a 300-word submission to get a job. The claimant admitted that he wrote that submission. Ms Shaukat would have been opening herself up to potential action by her employer, which we find to be unlikely.

105.15. We also find it highly unlikely that Ms Shaukat's boyfriend was the author of the email because we find it unlikely that he would have had the information contained in it and it would be highly unlikely that he would address such things in an anonymous email to his girlfriend.

105.16. We find that the claimant did not produce a credible alternative scenario to his having been the author of the email.

105.17. The email of 23 January said that the meta data on the 300-word document would prove who the author was.

105.18. The claimant's email to Amanda Jackman dated 9 September 2020 [817] contains similar tone of language to that in the emails of 23 January and 29 January 2020. The context of the email is that it was written as part of the claimant's complaint against Ms Shaukat. We find it remarkable that the claimant should include the following sentence (our emphasis):

> *"The entire Contact Centre Department can attest to how the **hungry little Nazi leech was joined to my hips since June 2018, begging for attention in all forms** and then she's got the cheek to go to both FCA HR and the MPS and knowingly LIE in order to intimidate me, threaten me and get me into trouble??"*

105.19. In his statement to the disciplinary hearing [1108-1116] the claimant's case that Ms Shaukat was the author is expressed in a very equivocal

tome, *"I do not believe that it is entirely outside of the realm of possibility that Amna Shaukat had constructed and sent that email to herself, along with the other emails and then faking her 'upset' and 'distress' to NO* [Ms Oakley]*."*

105.20. Taken as a whole, our findings above lead us to the conclusion that the claimant is, on the balance of probabilities, the author of the 23 January email.

106. We therefore conclude that, in all the circumstances, Ms Oakley's decision to uphold the complaint that the claimant had written the email on 23 January was not an act of victimisation. We find that the evidence does not reveal, on the balance of probabilities a causal link between Ms Oakley's decision to uphold part of Ms Shaukat's grievance and the claimant's protected disclosures.

Mr McLean's decision on 1 April 2021 to dismiss the claimant (List of Issues §§1.1.8. and 5.3.1.)

107. The claimant's evidence concerning the dismissal is contained in paragraphs 99 to 111 of his witness statement but is also touched on in the section about Ms Oakley's grievance hearing.

108. We find that the claimant's evidence in support of his assertion that Mr McLean decided to dismiss him because of protected acts is almost entirely based on unfounded speculation and assertion.

108.1. We find Mr McLean's evidence that he was not substantively aware of the claimant's history of protected acts to be credible. We find that the 2018 ET1 was mentioned in the disciplinary hearing. There was no evidence presented to us that someone else in the respondent's organisation had created and/or fed false information to Mr McLean.

109. It was agreed evidence that the claimant had received pay awards and promotion after he had issued his 2018 ET1. That is not consistent with an employer that was waiting for its opportunity to dismiss the claimant as an act of retribution for bringing the claim for two and a half years.

110. We find the evidence about the claimant being the author of the email of 23 January 2020 to be compelling. The claimant accepted in cross-examination that the email was sufficient to justify dismissal if he had written it. We concur with that assessment of the seriousness of the disciplinary offence alleged.

111. We find that it was reasonable for Mr McLean to conclude that the claimant had written the email. The claimant admitted writing the email of 27 January 2021. We therefore find that the overwhelming reason for dismissal was the claimant's conduct, not his protected disclosures.

112. We find that Mr McLean conducted the hearing properly and applied himself to the task of determining the claimant's case with due diligence. We find his outcome letter to be as thorough as could reasonably be expected given the large volume of information that he had to consider. It was written with care and detail.

We find that Mr McLean took steps that were in the band of reasonable options available to him in investigating and determining the disciplinary hearing.

113. There were some small procedural errors. The process took too long, but we repeat the points made above about the impact of the pandemic. It was accepted that the appeal should have gone to the Equal Opportunities Officer, but this did not materially affect the fairness of the procedure.

114. We find that the evidence does not reveal, on the balance of probabilities a causal link between Mr McLean's decision to dismiss the claimant (the detriment) and the claimant's protected disclosures.

Mr Aladhal's decision on 30 June 2021 to reject the claimant's appeal against dismissal (List of Issues §§1.1.9. and 5.3.1.)

115. We repeat the findings made above about the dismissal in respect of the likelihood of an employer waiting two and a half years to exact retribution and giving the claimant pay rises and promotion in the interim.

116. We find that the claimant's case on appeal is first set out in his appeal email of 11 April 2021 [1279-1280].

117. The claimant sent Mr Aladhal an 18-page document [1289-1306] on 17 May 2021 with several supporting documents. At paragraphs 9.1.8. and 9.1.9. [1300], the claimant raises the issue of victimisation and names thirteen FCA staff who he says have been part of the victimisation (the list includes all the witnesses in this case.)

118. The claimant raised his medical situation with Mr Aladhal (§3.1 [1293-1294]) and provided him with a heavily redacted copy of a medical report by Professor Khalida Ismail dated 12 August 2019 [335-336] that described the Professor's first contact with the claimant in 2017. The diagnosis in 2017 was of severe adjustment reaction that led to depression and agitation with generalised anxiety.

119. The claimant suggests that Ms Oakley was not aware of his diagnosis of general anxiety disorder (GAD) [1292] and suggests that this is an explanation for his evasiveness in his email of 9 June 2020. He says that he had not specifically mentioned his GAD to Mr McLean. We find that the medical report of Professor Ismail does not make anu connection with the condition diagnosed in 2017 in the report and the claimant's behaviours that he sought to attribute to GAD.

120. We do not find that the links that the claimant sent to Mr Aladhal about his health carried any evidential weight as they do not relate to the claimant and have no certified medical provenance.

121. We also find that the claimant was in possession of the report at the date of his disciplinary hearing before Mr McLean but made no mention of it or of his medical condition being an explanation for any of his behaviours. That adversely affects his credibility on the point.

122. Among the documents sent by the claimant to Mr Aladhal to support his appeal were WhatsApp exchanges with an unidentified third party [1101-1103] from

March 2021. The claimant made references to Ms Shaukat that were partially redacted. We find that the redactions were of derogatory terms because of their context and demonstrate the strength of the claimant's enmity towards her. They included:

122.1. "All I'm saying is that Amna Shaukat the dirty little harassing [redacted]" [1101]; and

122.2. "[redacted]g twisted little [redacted]" [1103].

123. On 26 June 2021, the claimant emailed the HR officer that was supporting Mr Aladhal [1381-1382] with what he describes as "…the current situation:". In the following 8 numbered paragraphs, the claimant does not suggest that the reason why Ms Oakley had made her decision on Ms Shaukat's grievance or the reason that Mr McLean had dismissed him was because he had raised complaints about acts of discrimination and/or issued an ET1 in 2018.

124. We find that Ms Aladhal conducted a thorough and fair appeal. He conducted a proper and reasonable investigation and went back to reinterview Mr McLean and Ms Oakley after hearing what the claimant had to say at the appeal. We find that the evidence does not reveal, on the balance of probabilities a causal link between Mr Aladhal's decision to reject the claimant's appeal (the detriment) and the claimant's protected disclosures.

Direct race discrimination and harassment related to race

125. The remaining allegations of direct race discrimination and harassment related to race also concern the decision of Mr McLean to dismiss the claimant and the decision of Mr Aladhal to reject the claimant's appeal against dismissal.

126. We repeat our findings of fact in respect of the dismissal and appeal made in the victimisation claims above.

127. The claimant did not challenge Mr McLean on the issue of race discrimination.

128. We note that in the 23 pages of his written closing submissions, the claimant did not mention any form of race discrimination.

129. In his oral submissions, the claimant did not mention his claims of race discrimination. We pointed out to him that he had not produced any 'smoking gun' evidence of direct race discrimination or harassment related to race. His response was to invite us to draw inferences from the circumstances of the matter he had raised.

130. The difficulty with that suggestion was that the claimant had presented nothing from which we could draw inferences. The claimant's written evidence about the disciplinary hearing was at pages 35 to 39 of his statement (§§99-111) contained nothing about direct race discrimination or harassment. The claimant did not raise the issue of his race in the disciplinary hearing [1143-1186].

131. We find that the claimant presented no facts from which we could decide in the absence of any other explanation that the respondent had contravened section

13 or section 26 of the EqA. The burden of proof therefore did not switch to the respondent and the claims fail in respect of the dismissal.

132. We find that the claimant's case on appeal is first set out in his appeal email of 11 April 2021 [1279-1280]. He does not allege that his dismissal is because of or related to his race.

133. The claimant sent Mr Aladhal an 18-page document [1289-1306] on 17 May 2021 with several supporting documents. His lengthy written statement makes no allegation of race discrimination.

134. On 26 June 2021, the claimant emailed the HR officer that was supporting Mr Aladhal [1381-1382] with what he describes as "…the current situation:". In the following 8 numbered paragraphs, the claimant does not suggest that the reason why Mr McLean had dismissed him was because of or related to his race.

135. In the appeal meeting on 17 May 2021 [1307-1330] the claimant did not allege he had been discriminated against because of his race.

136. We find that the claimant presented no facts from which we could decide in the absence of any other explanation that the respondent had contravened section 13 or section 26 of the EqA in relation to his appeal. The burden of proof therefore did not switch to the respondent and the claims fail in respect of the appeal.

Unfair dismissal

137. We repeat our findings of fact in respect of the dismissal and appeal made in the victimisation and discrimination claims above.

138. We find that the respondent has shown on the balance of probabilities that the reason for dismissal was the claimant's conduct. That is one of the five potentially fair reasons for dismissal in section 98 of the ERA. We make that finding because:

    138.1. We have discounted the possibility that the reason was the claimant's race or because he did protected acts;

    138.2. The compelling evidence of the respondent was that it was a conduct dismissal;

    138.3. We have found that the claimant probably sent the email of 23 January 2020 [340] and that it was reasonable for Mr McLean to draw that conclusion;

    138.4. We find that the email, if sent by the claimant to a colleague, was an act of gross misconduct due to its harassing nature;

    138.5. The claimant agreed that if he had sent it, the email was an act of gross misconduct; and

    138.6. The claimant agreed that he had sent the email of 27 January 2021 [916-917]. The respondent found this to be a breach of its confidentiality policy, which was an act of misconduct.

139. We find that the respondent genuinely believed in the claimant's guilt. We make that finding because:

    139.1. We have rejected the claimant's assertions that the respondent's actions were motivated by his race or by his protected acts;

    139.2. We repeat our findings above relating to the reason for dismissal; and

    139.3. We have found that the claimant probably committed an act of gross misconduct and an act of misconduct.

140. We find that the decision to dismiss was based on reasonable grounds. We make that finding because:

    140.1. Our findings of fact above demonstrate that the claimant had reasonable grounds to believe that the claimant had committed the two disciplinary acts for which he was dismissed because;

    140.2. He probably sent the first email;

    140.3. He admitted sending the second email;

    140.4. The first email was accepted by the claimant and found by us to warrant dismissal as an act of gross misconduct;

    140.5. We find the second email to be a breach of the confidentiality of Ms Shaukat that was contrary to the respondent's policy on confidentiality in Equality complaints [113-116];

    140.6. We find that the claimant should have been aware of the policy, given that he had been part of three grievances and a grievance appeal in 2020 and 2021 and that it was part of his terms and conditions of employment that were readily available to him;

    140.7. The claimant makes several allegations that his own confidentiality was breached by the respondent, but did not accept his own responsibility to others;

    140.8. The claimant accepted that he sent the second email, at least partly, in an emotionally charged state; and

    140.9. The claimant expressed no remorse.

141. We find that the decision to dismiss followed a reasonable investigation. In making that decision, we used the guidance in **Sainsbury's Supermarkets Ltd v Hitt** [2002] EWCA Civ 1588, that:

    > *"The range of reasonable responses test (or to put it another way the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."*

142. We find that the investigation was reasonable because:

    142.1. The errors made by the respondent that we highlight above made no material difference to the decision to dismiss;

    142.2. Ms Oakley's investigation into the claimant's alleged sending of the email of 23 January 2020 was reasonable in the circumstances and formed the basis of the investigation that Mr McLean and Mr Aladhal relied upon;

    142.3. The investigations that preceded Mr McLean's disciplinary hearing and outcome were conscientious and thorough. He took on board what the claimant was saying and addressed himself the matters that the claimant raised;

    142.4. The investigations that preceded Mr Aladhal's appeal decision were also conscientious and thorough. He too considered the large amount of information put forward by the claimant and addressed it in his decision. He took the time to interview Ms Oakley and Mr McLean after the first appeal hearing, which indicates to us that he took the duty to investigate seriously; and

    142.5. Below, we explain why we did not find that the respondent's search of the claimant's work computer and emails to be a breach of his Article 8 rights.

143. We find that the dismissal itself was fair because the respondent met the three **Burchell** tests and that the respondent acted reasonably as taking the reason of conduct as a sufficient reason the dismiss when bearing in mind:

    143.1. The circumstances of the case;

    143.2. The size and administrative resources of the respondent (that are considerable);

    143.3. Equity; and

    143.4. The substantial merits of the case.

144. We find that the decision to dismiss was within a band of reasonable responses, given the seriousness of the two disciplinary matters found against the claimant. There was some mitigation that came from his service with the respondent, but we do not find that a reasonable employer would not have dismissed the claimant in these circumstances.

Breach of Article 6 and Article 8 rights

145. The claimant asserted in his written submissions (§§25, 26, 28, 34, 35, and 36) that his Article 8 right, the right to respect for private and family life, home, and correspondence, was breached by the respondent in the way it conducted the disciplinary process against him generally and the searches undertaken of his work emails and computer files. The respondent undertook searches of the

claimant's work emails and the files on his work computer. It gave the search the name "Operation Orion".

146. The claimant cited the ECHR case of **Bărbulescu v Romania** ECtHR Grand Chamber 61496/08 [2017] IRLR 1032 regarding Operation Orion. The claimant stated in his written submissions (§26) that he was not claiming or seeking remedy for any Article 8 violation regarding the respondent's search of his work email traffic and computer or for the way in which the respondent dealt with his disciplinary process (§§34-36).

147. He also asserted (§32) that his Article 6 right, the right to a fair trial, may have been breached in the way that the respondent conducted the disciplinary process, but again confirmed that he was not claiming or seeking remedy for any violation of Article 6.

148. No details of the alleged breaches as set out in the claimant's closing submissions were contained in the claimants witness statement or the List of Issues. The claimant's witness statement made numerous references to Articles 3, 6 and 8, but gave little actual detail of the breaches alleged.

149. In paragraph 26 of his closing submissions, the claimant did not object to the stated aims of Operation Orion of attempting to trace the source of the anonymous emails). The allegation relating to Operation Orion was that the review of emails between the claimant and Ms Shaukat in order to analyse the extent of their professional and personal relationship, in addition to reviewing his unsent draft emails, attachments, documents and the associated meta data was a breach of Article 6 and impacted on the reasonableness of the respondent's investigation.

150. We have found above that the claimant was, on the balance of probabilities, the person who sent the email of 23 January 2020 [340] to the claimant. We have also found that it was within the band of reasonable responses for the respondent to dismiss the claimant for the act of sending the email.

151. The claimant asserts (§25 of his closing submissions) that the decision to dismiss was predetermined and that this was a breach of his Article 8 rights.

152. The claimant assets at paragraph 28 of his closing submissions that the respondent's disciplinary process was "…infected with bad faith…" and that the subsequent dismissal, which made his dismissal, for the reason that he had harassed a colleague, visible to others, breached his Article 8 rights.

153. The claimant asserts (§34 of his closing submissions) that Article 8 is engaged and that the decision to dismiss was not proportionate to the offence. The reason given for the decision to dismiss not being proportionate was that it was not compatible to his right to a family and private life. The claimant's argument is that the impact of the dismissal on his "…psychological integrity, …career, reputation and identity…" and the financial hardship on his family and the serious repercussions on his enjoyment of his private life was not proportionate. He also argues that the summary dismissal had interfered with his ability to establish,

develop, and maintain relationships with other human beings within his chosen profession and his chosen community and network within the workplace.

154. The claimant goes on to assert (§35 of his closing submissions) that his dismissal was premeditated and that had the same effect on him as set out above - the impact of the dismissal on his "…psychological integrity, …career, reputation and identity…" and the financial hardship on his family and the serious repercussions on his enjoyment of his private life was not proportionate. He also argues that the summary dismissal had interfered with his ability to establish, develop, and maintain relationships with other human beings within his chosen profession and his chosen community and network within the workplace.

155. The claimant argues (§36 of his closing submissions) that as his Article 8 rights were engaged, the question of whether the decision to dismiss fell within the band of reasonable responses falls away and the decision to dismiss should be whether dismissal was proportionate to the offence.

156. We find that in the case of **X v Y** [2004] EWCA Civ 662, Mummery LJ gave the following guidance to Tribunals when questions about the Human Rights Act 1998 ("HRA"), which embodies the United Kingdom's law on the European Convention on Human Rights:

> *"Whenever HRA points are raised in unfair dismissal cases, an employment tribunal should properly consider their relevance, dealing with them in a structured way, even if it is ultimately decided that they do not affect the outcome of the unfair dismissal claim. The following framework was suggested:*
>
> *(1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.*
>
> *(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.*
>
> *(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.*
>
> *(4) If it is not, was there a permissible reason for the dismissal under the ERA 1996, which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.*
>
> *(5) If there was, is the dismissal fair, tested by the provisions of ERA 1996 s 98, reading and giving effect to them under HRA 1998 s 3 so as to be compatible with the Convention right?"*

157. The Court of Appeal has considered whether the band of reasonable responses test must be modified in circumstances where the employee's rights under Article 8 are engaged as a consequence of the dismissal. In **Turner v East Midlands**

Trains Ltd, the Court of Appeal rejected the argument that where Article 8 is engaged, it is for the court to determine whether the Article 8 right has been infringed; it is not enough for the court simply to review the decision taken by the employer. The Court of Appeal accepted that where Article 8 interests are engaged, matters bearing on the culpability of the employee must be investigated with a full appreciation of the potentially adverse consequences to the employee. However, the band of reasonable responses allows for a heightened standard to be adopted where those consequences are particularly grave. **A v B and Salford Royal NHS Foundation Trust v Roldan** [2010] ICR 1457 exemplify that approach. The assessment of the procedure is made by the Tribunal and not the employer, and in making it the tribunal is adopting an objective test of whether the employer has acted as a reasonable employer might do. The Court of Appeal concluded that the band of reasonable responses test provides a sufficiently robust, flexible, and objective analysis of all aspects of the decision to dismiss to ensure compliance with Article 8.

158. Harvey on Industrial Relations and Employment Law at paragraph [985] states:

"The exercise of a disciplinary process by an employer, whether in the public or private sector, which leads to the decision to dismiss an individual from his employment, does not involve the determination of that individual's civil rights under Article 6 of the ECHR. Such a process involves only the determination of private contractual rights between the parties. This is so even if the fact of the dismissal occurring will effectively prevent the employee from gaining other employment in his profession or field of employment. Article 6 is however engaged subsequently at the stage that the individual brings tribunal proceedings, and so such court or tribunal proceedings must comply with its requirements: ***Mattu v University Hospitals of Coventry and Warwickshire NHS Trust*** *[2012] EWCA Civ 641."*

159. We therefore find that the claimant's allegation of a breach of Article 6 cannot succeed.

Procedural fairness

160. We were mindful of the guidance provided by the Court of Appeal in **X v Y** and **Turner v East Midlands Trains Ltd**. We find that the adverse effects of dismissal on the claimant as set out above are capable of engaging Article 8, as the aspects of private and family life falling within Article 8 are wide and not exhaustively defined. However, in the circumstances of this case, we find that the claimant has, by his own conduct in sending the email of 23 January 2020 [340] and the email of 27 January 2021 [918], brought the consequences upon himself. We rely on the words of Elias LJ in **Turner** (§52):

"…Like Mummery LJ in the case of ***X v Y*** *(para 59(4)) I find it very difficult to see how a procedure which could be considered objectively fair if adopted by a reasonable employer could nonetheless be properly described as an unfair procedure within the meaning of Article 8. I accept that where Article 8 interests are engaged, matters bearing on the culpability of the employee must be investigated with a full appreciation of the potentially adverse consequences to the employee. But the band of reasonable responses test allows for a heightened*

standard to be adopted where those consequences are particularly grave. ***A v B*** *and the* ***Roldan*** *cases exemplify that approach. The assessment of the procedure is made by the tribunal and not the employer, and in making it the tribunal is adopting an objective test of whether the employer has acted as a reasonable employer might do. Accordingly, I see no breach of Article 8."*

161. We find that, in this case, there was no breach of Article 8 and it was not engaged on the findings of fact that we have made.

Operation Orion

162. We find that the respondent's Handbook included the following section on Monitoring 141:

> *"The FCA's systems enable us to monitor email, internet and other communications. To carry out our legal obligations as an employer (such as ensuring compliance with the FCA's policies) and for other business reasons, we may monitor use of systems including telephone and computer systems and any personal use of them, by automated software or otherwise. Monitoring is only carried out to the extent permitted or as required by law and as necessary and justifiable for business purposes."*

163. We find that the claimant can have no reasonable expectation of a right to privacy relating to documents created on or stored on a work computer. Whilst the decision of the ECtHR in **Bărbulescu v Romania** is noted, we also took account of the case of **Garamukanwa v Solent NHS Trust** [2016] IRLR 476, which was an EAT decision that the claimant attempted to appeal to the Court of Appeal. The Court of Appeal rejected the appeal and the claimant took the case to the ECtHR. It is reported as **Garamukanwa v United Kingdom** [2019] IRLR 853, which determined that the claimant had no right to expect privacy on the following four factors:

    163.1. He had had notice for at least a year after the original complaints of harassment were made that this material was the basis for the complaints and that the employer was going to investigate. On this basis, Bărbulescu was distinguishable because there the employee did not have notice of the nature and extent of the employer monitoring.

    163.2. He knew that the communications were not going to be kept private.

    163.3. He had not challenged the use of this material at the disciplinary hearing.

    163.4. In fact, at that hearing he had volunteered further communications from the same source.

164. In this case, the claimant was notified of the respondent's intention to search his computer to determine if he had sent the anonymous emails. The claimant had no objection to the search. He knew that the respondent reserved the right to search his work IT equipment. He also knew that the investigation included allegations that he had harassed the claimant. The claimant did not challenge the

use of the material at the disciplinary or grievance hearings. The claimant volunteered further information from his own mobile device.

Applying findings of fact to the issues

Relevant issues

165. The relevant issues in the direct race discrimination claims were:

2.1 Did the Respondent subject the Clamant to the following treatment, as alleged or at all?

2.1.1 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

2.1.2 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

2.2 Was this treatment less favourable?

2.3 If so, was it because of the Claimant's Race?

2.4 The Claimant relies upon a hypothetical non-BAME White employee.

166. The relevant issues in the harassment related to race claims were:

4.1 Did the Respondent act as follows:

4.1.1 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

4.1.2 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

4.2 If so, were these actions 'unwanted conduct related to Race'?

4.3 Did they have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account:

4.3.1 The perception of the Claimant;

4.3.2 The other circumstances of the case; and

4.3.3 Whether it is reasonable for the conduct to have that effect.

167. The relevant issues in the victimisation claims were:

5.1 Did the Claimant carry out a protected act? The Claimant alleges that the following were protected acts:

5.1.1 In or around April 2016 and April 2017 submitting two internal discrimination-related Stage 1 Equality Complaints and in or around September 2016 and February 2018 subsequent Stage 2 Equality Complaint Appeals, in connection with pay and award.

5.1.2 Submitting an ET1 Employment Tribunal claim in September 2018 alleging direct Race Discrimination, direct Disability Discrimination and Unlawful Deduction from Wages.

5.2 Were these protected acts? In particular, were they false allegations made in bad faith?

5.3 Did the Respondent subject the Claimant to the following treatment, as alleged or at all?

5.3.1 Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's complaint against the Claimant.

5.3.2 Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

5.3.3 Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

5.4 Did the treatment alleged amount to a detriment?

5.5 Was the detrimental treatment because the Claimant had done the protected act or acts?

168. The relevant issues in the unfair dismissal claim were:

4.1 What was the reason for the dismissal? The Respondent asserts that it was misconduct.

4.2 If yes:

4.2.1 Did the Respondent genuinely believe in the Claimant's guilt?

4.2.2 Was that belief based upon reasonable grounds?

4.2.3 Was it following a reasonable investigation?

4.3 Did the decision to dismiss (and the procedure adopted) fall within a range of reasonable responses open to the Respondent?

4.4 If the dismissal was unfair, what, if any, Polkey reduction should be made?

4.5 If the dismissal was unfair, what, if any, reduction should be made to reflect the Claimant's contribution to his dismissal.

169. In respect of the claim of direct race discrimination, we make the following findings in relation to the issues:

169.1. The claimant was subjected to the detriment of dismissal by Mr McLean and the rejection of his appeal by Mr Aladhal.

169.2. The claimant did not show facts from which the Tribunal could decide, in the absence of any other explanation that the respondent had

treated him less favourably because of race by dismissing him and/or rejecting his appeal against dismissal .

169.3. Those claims fail.

170. In respect of the claim of harassment related to race, we make the following findings in relation to the issues:

170.1. The claimant did not show facts from which the Tribunal could decide, in the absence of any other explanation that the respondent subjected the claimant to unwanted conduct related to race by dismissing him and/or rejecting his appeal against dismissal.

170.2. Those claims fail.

171. In respect of the claimant's claims of victimisation, we make the following findings in relation to the issues:

171.1. The claimant did the two protected acts contended for.

171.2. The respondent subjected the claimant to the following treatment:

171.2.1. Natasha Oakley's decision in January 2021 to partially uphold Amna Shaukat's complaint against the Claimant.

171.2.2. Graeme McLean's decision on 1 April 2021 to dismiss the Claimant.

171.2.3. Emad Aladhal's decision on 30 June 2021 to reject the Claimant's appeal against the decision to dismiss him.

171.3. All three instances of treatment were detriments.

171.4. None of the treatment was because the claimant had done the protected acts.

171.5. Those claims fail.

172. In respect of the claimant's claim of unfair dismissal , we make the following findings in relation to the issues:

172.1. The reason for dismissal was conduct.

172.2. The respondent had a genuine belief in the claimant's guilt.

172.3. That belief was based on reasonable rounds.

172.4. There was a reasonable investigation.

172.5. The respondent used a fair procedure.

172.6. The decision to dismiss fell within a band of reasonable responses.

172.7. This claim fails.

173. As we have dismissed all the claims that the claimant did not withdraw, there is no requirement for us to consider any issues on **Polkey** or contribution or in respect of remedy.

Employment Judge Shore
Dated: 16 February 2024