Case Number: 2205945/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr F Ansari		**Korea Trade-Investment Promotion Agency**

REASONS FOR THE JUDGMENT
GIVEN ORALLY ON 21 DECEMBER 2023

Introduction

1 The Respondent, which trades as Korea Trade Centre, describes itself as a state-funded, not-for-profit trade and investment promotion organisation operated by the Republic of Korea.

2 The Claimant, who describes himself as being of Pakistani/Asian origin, entered the employment of the Respondent on 4 April 2002 as a Trade Promoter based at their London office and remained so employed until his summary dismissal with payment in lieu of notice on 15 July 2022.

3 By a claim form presented on 17 August 2022 the Claimant brought complaints of unfair dismissal and direct race discrimination based on a number of alleged detriments. The Respondent resisted all claims, contending that he had been fairly dismissed on performance grounds and denying discrimination in any form.

4 The dispute has a rather involved case management history, which we do not think it necessary to recite in any detail. Suffice it to say that:

(1) The alleged detriments were identified as: (a) being kept on the same pay scale for 11 years; (b) not being promoted for 11 years; and (c) underpayment in respect of an annual bonus;

(2) On 15 June 2023 EJ Brady struck out (or dismissed) the detriment claims as being outside the Tribunal's jurisdiction on time grounds, but granted the Claimant permission to amend the claim form to add a new complaint of direct race discrimination based on the dismissal.

5 Accordingly, the result of the case management history was that the Tribunal was left with claims for unfair dismissal and direct race discrimination, the latter being based exclusively on the dismissal.

6 The matter came before us on 19 December 2023 in the form of a final hearing, held 'face to face', with three days available (the original allocation had been for four days). The Claimant appeared in person and Ms Sophia Berry, counsel, represented the Respondent. Having devoted day one to preliminaries and reading-in, we heard evidence and closing argument over day two and the morning of day three. Following private deliberations, we gave a reasoned oral decision on the afternoon on the afternoon of day three, by which we:

(1) Upheld the complaint of unfair dismissal;
(2) Dismissed the race discrimination complaint; and
(3) Ruled that the Claimant was entitled to no remedy for unfair dismissal.

7 These reasons are given in writing pursuant to a written request of the Claimant dated 25 December 2023.

The Legal Framework

Unfair dismissal

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

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

9. Although our central function is simply to apply the clear language of the legislation, we are mindful of the guidance provided by the leading authorities. From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, we derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to

him in the circumstances. That rule applies as much to the procedural management of the case as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

10. The only remedy claimed in respect of unfair dismissal is compensation, which consists of a basic and compensatory award (the 1996 Act, s118(1)).

11. The basic award is calculated by reference to weekly pay (capped) and years served, in accordance with s119 (which we need not set out), subject to s122, which is concerned with reductions. By s122(2) it is stipulated that, where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be 'just and equitable' to reduce the amount of the basic award, it must reduce it accordingly.

12. The compensatory award, intended to compensate the complainant for monetary loss, is governed by s123(1), which states that the award is to be, 'such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'

13. In *W Devis & Sons Ltd v R A Atkins* [1977] IRLR 314, the House of Lords held that information coming into the possession of the employer after the dismissal cannot be relied upon as a defence to a complaint of unfair dismissal. But, in the event of the claim succeeding on liability, such material may certainly be admissible in relation to the assessment (in accordance with what is now the 1996 Act, ss 123(1) and 122(2)) of any basic and/or compensatory award and, in a proper case, the after-discovered misconduct may warrant a reduction of any basic or compensatory award to nil. As the House of Lords explained, whether any award is to be extinguished or reduced turns upon the proper application of the statutory language, which has at its heart the requirement for compensation to be 'just and equitable'. Self-evidently, the central consideration will be the gravity of the misconduct in question.

14. A fundamental obligation of any employee is to render faithful service to his or her employer. This is commonly known as the 'duty of fidelity'. Because it is a central term, any material breach is inherently serious and likely to stand as a repudiation of the contract entitling the employer to dismiss without notice. A celebrated illustration is *Boston Deep Sea Fishing and Ice Co v Ansell* [1888] 39 ChD 339 CA, in which it was held that, in seeking to derive undisclosed profits from his employer's business, the plaintiff was in breach of the duty of fidelity and accordingly his summary dismissal (albeit not based on any knowledge of his wrongdoing) had been lawful.[1]

15. *Devis v Atkins* is an example of one kind of case in which it may be appropriate, pursuant to the 1996 Act, s123(1), to adjust compensation for unfair dismissal, but not the only one. Cases of after-discovered misconduct arise quite

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[1] The case illustrates the difference between a common law claim for wrongful dismissal and a statutory claim for unfair dismissal: as *Devis v Atkins* shows, an employer in comparable circumstances today would not be entitled to resist a complaint of unfair dismissal on the strength of of information of which he/she was unaware at the time of the dismissal.

rarely. Much more common are those where, for some other reason, justice requires some downward adjustment of the compensatory award in order to reflect fairly what the employee has lost through being dismissed and so satisfy the obligation to award 'just and equitable' compensation. One example (not the only one) is where the Tribunal finds that the dismissal was procedurally unfair but a fair process would have resulted in a substantively fair dismissal in short order. There, 'just and equitable' compensation in respect of lost earnings and other benefits is likely to be measured by reference to the period which it would have taken to complete a fair procedure. The profession tends to refer generally to adjustments of compensatory awards under s123(1), other than of the *Devis v Atkins* kind, as *Polkey* reductions.[2] We will follow suit.

16. The 1996 Act, s123(6) requires the Tribunal to make a quite different kind of reduction of a compensatory award where it finds that the dismissal was to any extent caused or contributed by any action of the complainant. Again, it must be guided by what is 'just and equitable'.

Direct race discrimination

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

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

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

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

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

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

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

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[2] After *Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL.

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B …**

Parallel protection against harassment is enacted by s40.

20. 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

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

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

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

Evidence

21. We heard oral evidence from the Claimant and, on behalf of the Respondent, Mr Woohyung Jun, Mr Simon Park and Ms Yunji Chang. We also read a statement in support of the Claimant in the name of Ms Sophia Sharp.

22. In addition, we read the documents to which we were referred in the substantial two-volume bundle.

23. The paperwork was completed by certain documents prepared to assist us, including a chronology and Ms Berry's helpful written submissions.

The Issues

24. The unfair dismissal claim turned on two questions. First, what was the true reason for dismissal? Second, if the Respondent could demonstrate the true reason and it was a potentially fair reason, did it act reasonably in treating the reason as sufficient?[3]

25. The race discrimination claim turned on whether, in dismissing the Claimant, the Respondent treated him less favourably because of race than it would have treated an hypothetical comparator of different race.

26. By agreement, we considered one remedy point alongside the liability issues, namely whether, if the unfair dismissal claim succeeded, any award of compensation should be reduced on account of the Claimant's conduct and if so, by how much?

The Facts

27. Because of the way in which we have decided the case, we can state the material facts quite shortly.

Facts relevant to the unfair dismissal claim

28. The Claimant's role as a Trade Promoter involved a range of duties for the purposes of promoting Korean customers' products and services, including arranging meetings with potential UK buyers and organising trade fairs and other events.

29. The Respondent's Disciplinary and Capability Procedure, which was not contractual, was annexed to the Claimant's most recent statement of main terms and conditions of employment. On the subject of disciplinary hearings, it states: 'We will give you written notice of the hearing, including sufficient information about the alleged misconduct or poor performance and its possible consequences to enable you to prepare …' Under the heading, 'Disciplinary Action and Dismissal' it provides for a three-stage graduated scheme of penalties for 'misconduct or poor performance', namely first written warning, final written warning and 'dismissal or other action'. As to the latter, it states, 'You may be dismissed for further misconduct or failure to improve where there is an active final written warning on your record, or for any act of gross misconduct … You may also be dismissed without a warning for any act of misconduct or unsatisfactory performance during your probationary period.' Under the heading 'Gross Misconduct', a list of examples of forms of gross misconduct is set out. Ms Berry did not rely upon any of those examples as applying in this case.

[3] This is the statutory question. As explained above, it is to be addressed by applying the 'band of reasonable responses' test.

30. It is clear that the Respondent did not at all times judge the Claimant's performance and attitude in the workplace to be satisfactory. He received first and final formal written warnings for poor attendance and timekeeping on 16 September and 16 November 2015 respectively, both of which lapsed a year after they were given. In November 2017 he received an 'official warning letter' for a performance matter to do with missing a deadline. The document does not seem to have amounted to a formal warning under the Respondent's disciplinary procedure (to which it made no reference). It was not in the same form as the 2015 letters, did not refer to the possible consequences of further infringements, did not specify an expiry date and made no provision for appeal. It also gave notice of a proposed further 'warning letter' directed to timekeeping, but none seems to have materialised. On 20 May 2019 the Claimant received a further first formal written warning for poor timekeeping, this time with a six-month expiry date.

31. At the time of the disciplinary proceedings with which we are concerned the Claimant was not the subject of any 'live' disciplinary warning.

32. At some point in 2019 the Claimant was moved into the Respondent's Jisahwa team, which was managed by Mr Simon Park, a witness before us. That unit is designed to operate as a UK sales office for its (Korean) customers, who pay a fee for its services, which include undertaking market research, visiting exhibitions, helping with brand marketing, checking and advising on product regulations and making links with potential buyers.

33. There were a lot of complaints about the Claimant from Jisahwa customers in 2019 and 2020. The gist of most was that the services that the Respondent were supposed to be supplying (through him) had not been supplied at all. There were also complaints about errors which he was alleged to have made. When these matters were drawn to his attention his response was largely to blame any problems on the disruption resulting from the Covid-19 pandemic. His line manager, Mr Ikkeun Choi, voiced concern and sought to impress on him the need to satisfy the customers. But no formal action was taken.

34. In early 2021 the Respondent decided that, apparently because of continuing dissatisfaction on the part of customers, the Claimant should be 'phased out' of the Jisahwa team. Most of his portfolio of customers was assigned to another member of staff. Again, no formal action was taken against him.

35. Also in 2021, or perhaps in early 2022, line management responsibility for the Claimant passed from Mr Choi to Ms Minjung Kim and Ms Yunji Chang. At around the same time, the Claimant was assigned to work on two start-up companies. It seems that these were not customers of the sort which he had been servicing as a member of the Jisahwa team in that they did not pay the Respondent for its services. He was also given certain other tasks to perform.

36. On 16 June 2022, without warning, the Respondent sent a letter to the Claimant inviting him to attend an investigation meeting to be held on 17 June 2022 to consider three 'issues', *viz* 'breakdown in working relations with colleagues', 'complaints from customers' and 'performance and conduct issues'. It was explained that the investigation did not in itself amount to disciplinary action

but that disciplinary proceedings might follow, depending on whether it was found that there was a case to answer.

37. Also on 16 June 2022, after he had received the letter just mentioned, the Claimant was involved in a tense exchange with Ms Yunji Chang, which began with him approaching her in the office and alleging that the invitation to the investigation meeting amounted to harassment. She judged his behaviour to be aggressive and inappropriate.

38. The investigation meeting proceeded on 17 June 2022. It was chaired by Ms Chang and the Claimant was present and participated. Mr Taehee Park, a manager at the London office since early 2022, also attended. The matters identified in the letter of 16 June seem to have been explored to some extent, but given the failure to make a proper record of the meeting we are unable to make detailed findings. We can say that there was some discussion of complaints (or alleged complaints) about the Claimant by four customers, Crucialtrak, EOS, CubeBio and Endovision. Of these, the first three, which dated from June 2020, August 2021 and April 2022 respectively, had been made the subject of investigation at the behest of the Respondent. Crucialtrak and EOS were two of the original portfolio of Jisahwa customers; CubeBio was one of the start-up companies mentioned above. The Claimant himself raised the subject of Endovision, which had terminated its contract with the Respondent in the first or second quarter of 2020 (we do not seem to have been given the precise date). He appeared to maintain that documentary evidence appearing to show that company's dissatisfaction with his services had been fabricated.

39. On 22 June 2022, the Claimant did not attend the workplace until the afternoon. This was contrary to an instruction which had been sent to staff the day before, requiring all to be present in the office unless excused under some special dispensation. When questioned on the matter, he explained that he had not received the instruction on his home laptop. According to the Respondent, this raised an issue as to whether he had been attending to his work duties when away from the office.

40. By a letter dated 24 June 2022, Ms Chang invited the Claimant to attend a disciplinary hearing to consider 'issues and allegations' against him specified as, 'Customer complaints'; 'Breakdown in working relations with colleagues'; and' Your conduct and performance issues'. Ms Chang went on to say that possible outcomes included dismissal, that the hearing would be conducted by Mr Jun, the Director General (and a witness before us), and that she would attend only 'in a fact-giving capacity. She also drew attention to the Claimant's right to be accompanied. Nowhere did the letter set out any specific charge or allegation of misconduct, let alone gross misconduct.

41. Attached to the letter was a four-page summary prepared by Ms Chang, which gave some details relating to the three matters for consideration at the disciplinary hearing. These were prefaced by the following comments under the heading, 'Background': 'The Company has decided to investigate the issues detailed in this report because there has been a consistent and high level of dissatisfaction among our customers and your colleagues about you, and for some

time'. On the subject of complaints, Ms Chang referred to the dissatisfaction of the three customers identified by the Respondent at the investigation stage, mainly about paltry and inattentive service and poor communication, aggravated by the Claimant's long and defensive responses when taken to task for his perceived deficiencies. Under the subject of the alleged breakdown in working relations with colleagues, Ms Chang referred to the Claimant's alleged failure to respond adequately or appropriately to managerial prompts and instructions, and general indolence and obstructiveness. Under 'Conduct and performance issues' reference was made to the incidents of 15 and 22 June 2022, the Claimant's failure to meet a particular target for 2021 and his stated poor performance to date against the 2022 target. Documentary evidence was also attached.

42. The disciplinary hearing duly took place on 1 July 2022. Those present were Mr Jun, Mr Choi, Ms Chang and the Claimant. The meeting seems to have lasted about an hour. On the third day of the hearing before us, Ms Chang produced a typed note, which purported to be a precise record the Claimant's evidence at the meeting. She could not explain why it had not been produced on disclosure. She said that it had been prepared after the meeting, but on the same day. She seemed to say that it was based on a handwritten note taken at the hearing but could not explain why that note had not been produced. Nor could she explain why her note was incomplete in that it only included evidence given by the Claimant (on her own account, Mr Choi and Mr Jun also made material contributions at the meeting). We read the note for what it is worth but we cannot place any confidence in it.

43. Doing the best we can on the strength of the entirety of the oral and documentary evidence before us, we find that the meeting addressed the main areas covered at the investigation stage and that the Claimant strenuously disputed that he had provided inadequate service and argued that the disciplinary proceedings, and in particular the fact that they rested in significant part on matters and events dating back a long way, were driven by some form of malign motivation.

44. By letter dated 15 July 2022, the Claimant received notice of his summary dismissal with pay in lieu of notice. The letter purported to come from Mr Jun. It began with this:

> **I am writing to confirm that, following the disciplinary hearing held on 1 July 2022, it was decided that your employment with [the Respondent] will terminate due to customer complaints and pressure, and breakdown in working relations and difficulties with your colleagues, resulting in a complete breakdown of trust and confidence in you by the Company.**

On customer complaints, the point was made that these were harmful to the Respondent's reputation, that the Claimant's response to them had been unsatisfactory and that he had failed in the disciplinary proceedings to explain why the customers had been dissatisfied. It was also said that he had failed to make use of the Respondent's support and to avail himself of 'chance after chance' to remedy matters (for example by being placed with new customers). The letter also stated that there had been a breakdown in working relations and that he was oblivious to how he was viewed by colleagues. In particular, it was said that the

efforts of Mr Choi and Ms Kim to engage with him had been unavailing and that his colleagues in the Jisahwa team had complained of his 'lack of teamwork'. There was also reference to the incidents of 15 and 22 June 2022 which, it was said, '[fed] into the other allegations and [had] led to a complete breakdown in trust and confidence in [him] as an employee.'

45. We heard chaotic evidence on behalf of the Respondent concerning the dismissal and the authorship of the letter of 15 July 2022. Mr Jun told us that he had taken the decision to dismiss but that it had been based on the views of the 'disciplinary committee', which seems to have consisted of five people in total, including Mr Jun. Among these, on his case, were Mr Choi, Ms Chang and Mr Park. As for the letter of dismissal, Mr Jun said that it had been written by the Respondent's lawyer and that he (Mr Jun) believed that the lawyer had relied on notes of the investigation and disciplinary proceedings (whether he meant the notes disclosed on day three of the hearing before us or some other notes, we have no idea). Mr Jun said that he did not give the lawyer specific instructions as to what the letter should say. At one point in his evidence before us he sought to defend the dismissal on the ground that the Claimant had committed 'gross misconduct'. He did not try to explain why the letter nowhere referred to gross misconduct. Ms Chang was adamant that she was not part of the decision to dismiss. She was there to provide advice and support. She told us that she did not know what had happened after the meeting but also said that she was involved in helping Mr Jun with a draft of a letter of dismissal. (As we have noted, Mr Jun denied taking any part in the preparation of the letter of dismissal.)

46. The Claimant appealed against the dismissal. The appeal, which took the form of a review rather than a rehearing, was entrusted to Mr Shakil Butt, an external HR consultant. In several emails the Claimant raised challenges to the dismissal on both procedural and substantive grounds. He was given the chance to develop his appeal in a 'remote' meeting with Mr Butt on 28 August 2022.

47. Mr Butt did not think it necessary to hear from any witness or advocate on behalf of the Respondent. His reading prior to determining the appeal, in addition to the Claimant's emails just mentioned, was confined to the Respondent's letters of 15 and 24 June and the 'report' accompanying the latter, together with the letter of dismissal dated 15 July 2022.

48. Mr Butt dismissed the appeal in a document dated August 2022 (it did not bear a precise date). His statement of the background facts was tolerably clear but his reasoning, in so far as there was any, was obscure. At all events, he must be taken to have concluded, on grounds that eluded us, that the Respondent had followed an adequate procedure and the dismissal had been proper, or at least permissible.

49. Long after the dismissal, in the course of disclosure in these proceedings, two important pieces of information emerged. The first was that, in email correspondence with a representative of Endovision between 9 and 27 May 2020, the Claimant had attempted to negotiate a commission for himself in respect of a particular transaction. He conducted these exchanges through his work email account, using the Respondent's hardware. He did not seek the Respondent's

permission to enter into any form of business relationship with Endovision, let alone one entitling him to a personal commission. Nor did he disclose to the Respondent his intention to do so or the fact that he had done so. He told us that he saw no harm in what he had done because Endovision had taken the decision not to renew its contract with the Respondent (we are uncertain whether the contract expired before or after 9 May 2020), although he did accept that he ought not to have used the Respondent's equipment and email account.

50. The second piece of information was that, again using the Respondent's communication systems and technology, he had written to Endovision on 24 September 2019 stating, 'I hate the people I work for … They are liars … and lazy …'

Facts relevant to the race discrimination complaint

51. Our findings here will be concise. This is because the Claimant's case rested primarily on unsubstantiated assertions of a 'racist' culture and/or 'racist' behaviour within the Respondent's organisation, rather than evidence. The fact that mere assertions are repeated many times does not give them the character of evidence or lend any cogency to them. We will not recite mere assertions here.

52. We refer to our narrative above concerning the judgment of EJ Brady dismissing the detriment claims. Although the judge based his decision squarely on the finding that those claims were outside the Tribunal's jurisdiction on time grounds, he also drew attention to undisputed or established facts which argued against the theory of unlawful discrimination. The Claimant cannot rely on the struck-out allegations as lending meaningful support to the remaining dismissal-based claim.

53. The Claimant claimed that the Respondent had removed two white British employees to make way for a Korean replacement. On examination, it emerged that the appointment of the Korean employee had been made several years after the two British employees had been made redundant.

54. There was an allegation that the Respondent wrongfully failed to discipline Mr Simon Park for an act of misconduct. His evidence was that he committed no such act. We were shown no evidence to call his account into question, and we accept it.

55. The Claimant complained about an alleged failure to discipline a Mr Solomon Kim (Korean or of Korean descent) for poor attendance. In fact, that individual was dismissed for poor attendance at a disciplinary hearing in 2016.

56. The Claimant purported to complain about a Ms Lee (presumably Korean or of Korean descent) being promoted over him in 2014. On the evidence presented, we are in no position to make any worthwhile finding on this point. The complaints of detrimental treatment in respect of promotion were struck out by EJ Brady and cannot be relied upon as evidential support for the dismissal-based claim. In any event, the Claimant's central case appears to be that the dismissal was the culmination of a number of acts of race discrimination by Mr Jun and Mr Choi.

They joined the London office in 2021 and 2019 respectively, years after the event relied upon. We find in it no evidential support for the Claimant's discrimination complaint.

57. The Claimant drew attention to messages from Mr Choi to Mr Lee of Crucialtrak and Mr Kim of EOS in February 2021 and August 2021 respectively, expressing regret about their dissatisfaction with the service offered by the Claimant and expressing the hope that, with a Korean member of staff replacing him, matters would improve. We will return to this aspect in our secondary findings below.

58. The Claimant's supporting witness, Ms Sharp, did not provide evidence that assisted him on the subject of race discrimination. Rather to the contrary. Her statement referred to Mr Jun being behind a plan to get rid of both the Claimant and a Korean member of staff. Its general trend was to complain of rude, boorish and, if anything, sexist behaviour. And in any event it was not tested in cross-examination and, on that ground alone, very little weight could be attached to it.

59. Despite apparent suggestions to the contrary in his written case, the Claimant accepted in evidence that there had been an increase in the number of white British employees working at the London office over the previous two years.

Secondary Findings and Conclusions

Rationale for primary findings

60. We felt unable to place confidence in the oral evidence of the witnesses who appeared before us. Mr Jun and Ms Chang, in particular, gave every impression of weighing their answers to questions put to them according to where they thought advantage to the Respondent lay, rather than having regard to their solemn duty to give truthful and candid evidence. The result was a bizarre mix of irreconcilable and, at times, rather absurd accounts. The Claimant was also unimpressive as a witness, having been prepared to make numerous wild and unsubstantiated allegations in his written case. We do, however, give him some credit for being willing to give ground under cross-examination and to retreat from some of the untenable positions which he had taken up.

61. Faced with unreliable oral evidence, we have sought to base our findings, so far as possible, on what may be gleaned from the documentary evidence.

Unfair dismissal - liability

62. The first question is whether the Respondent has demonstrated a potentially fair reason for dismissal. Not without hesitation, we have concluded that it has. We find that the reason was the perception (shared by Mr Jun and other senior managers) that the Claimant's performance in his role, his attitude to the Respondent and his behaviour in the workplace had deteriorated to the point at which his retention in the organisation should no longer be tolerated. We classify that as a reason relating to conduct and/or capability and, as such, a potentially fair reason for dismissal. (We say, 'Not without hesitation' because the evidence on

behalf of the Respondent was so poor and so confused and so unreliable that we have come close to holding that it falls short of establishing any coherent reason and so necessarily fails to meet the requirements of the 1996 Act, s98(1)).

63. Although we have (just) concluded that a reason (or composite reason) relating to capability and/or conduct is established, we firmly reject the Respondent's primary case, that the reason for dismissal was 'some other substantial reason', namely, as Ms Berry put it in her written submissions (para 16), 'a complete breakdown of trust and confidence in the employment relationship'. There simply was no such breakdown. Relations between the Claimant and those around him, and in authority over him, were certainly not of the best, but matters had not become unworkable or anything like it. Testament to that (if it were needed) is the undisputed fact that no 'live' warning was in place when the disciplinary proceedings were commenced.

64. Did the Respondent act reasonably or unreasonably in treating the true reason as a sufficient reason to dismiss? Having reminded ourselves that this question must be addressed by applying the 'band of reasonable responses' approach and scrupulously avoiding a 'substitution mindset', we unhesitatingly find that the statutory question must be answered with a resounding 'no'. This was, in our judgment, a spectacularly unfair dismissal, both procedurally and substantively.

65. As to procedure, the list of the Respondent's errors begins with the failure to identify the core case against the Claimant. He was not told that he was being disciplined for doing something wrong, let alone what that act or omission might be. He was not told that he was being put through a capability procedure, let alone how his performance had warranted such a process. He was not told that he had become unmanageable or that his relationship with the organisation and/or those in authority over him had reached the point at which it was necessary to consider whether he should remain an employee, let alone what acts or omissions had brought about such a state of affairs. In short, he was not told what case he had to meet.

66. The procedural failings did not end there. The process to be followed after the investigation had been completed was not explained. The Claimant was not advised of his right to call evidence or produce witnesses. Nor was he made aware of who would be deciding his fate (perhaps this is not surprising since it appears that the Respondent itself remained uncertain about that point all the way up to and through the hearing before us). No proper note of the investigatory and disciplinary hearings was made or retained. The appeal appears to have been a window-dressing exercise. Certainly, it got nowhere near to recognising, let alone remedying, the obvious defects in the process at first instance.

67. We turn to substance. Even if the disciplinary process had been impeccable in every respect, we would unhesitatingly have held that the dismissal was unfair purely on substantive grounds. The Claimant was an employee of 20 years' standing. He had what amounted to a property right in his job. The Respondent needed a valid ground to dismiss him. It had none. There was no question of gross misconduct (we draw a veil over Mr Jun's unedifying attempt in the course of his evidence to dredge up for the first time a gross misconduct justification for the

dismissal). And we have found that the 'complete breakdown of trust and confidence' plea was simply spurious. That left the Respondent with what appear to have been arguable grounds for activating the disciplinary/capability procedure in the conventional way, by imposing a first written warning and taking such other steps as might have been appropriate to support the Claimant and encourage him to improve his performance and behaviour. Plainly and obviously, dismissal at the first stage of the disciplinary/capability procedure would have fallen a long way outside the 'band of reasonable responses' and been anything but a permissible choice.

68. For completeness, we would add that it is not for us to consider whether the Claimant could, or ought, to have been subjected to disciplinary proceedings earlier. That question is simply not relevant to the liability issue. What is abundantly clear to us is that the dismissal which was visited upon the Claimant was, for the reasons which we have given, profoundly unfair.

Race discrimination - liability

69. As we have noted, the Claimant has made numerous assertions of 'racism' within the Respondent's organisation, but provided precious little evidence to make them good. Two points which may be seen as lending *some* support to his case merit brief comment. The first is the oddness of the Respondent's behaviour in its precipitate and disproportionate launch of disciplinary proceedings, apparently out of nowhere, in June 2022. The second is the apparent emphasis in Mr Choi's correspondence with disappointed customers in February and August 2021 on the Respondent envisaging replacing the Claimant with a Korean member of staff. As the first point, we are mindful of the fact that oddness (like unreasonableness) cannot be seen as by itself pointing to discrimination, but it is fair to say that it does, or may, at least raise a question in the mind. The oddness is not explained. The second point is material because, here and here only, we have a piece of race-specific evidence which may be seen as consistent with (although certainly not probative of) the Claimant's theory of a policy within the Respondent of favouring persons of Korean nationality or descent.

70. On the other hand, there are several considerations which argue against the proposition that the dismissal was motivated to any material extent by a race-based desire to get rid of the Claimant. We will mention only three. The first and most obvious is that, had there been such a motivation, one would have expected it to be manifested in the Respondent's treatment of him long before the disciplinary proceedings were brought. But the record shows that the Respondent's treatment of him was, if anything, indulgent.[4] And even if one assumes a discriminatory motivation only after the arrival of Mr Jun and/or Mr Choi, the question still arises as to why no step was taken until June 2022. The litany of customer complaints from 2019 onwards would surely have provided any malevolent and/or discriminatory manager with ample grounds for launching a disciplinary investigation without significant delay, but no such step was taken. Second and more generally, as our primary findings show, there is simply no pattern established in evidence of adverse treatment of non-Korean employees or

[4] See, for example, the feeble steps taken to enforce timekeeping discipline, to which we have referred.

favourable treatment of Korean employees. Third, the recent trend in the racial make-up of the London office workforce argues, if anything, against the discrimination which the Claimant asserts.

71. In our judgment, the 'oddness' point and Mr Choi's emails must yield second place to these powerful considerations. As to the former, perhaps it must be left as something simply unexplained. The Respondent's employee relations practice seems to us to be fertile ground for odd decision-making, if the disciplinary history in this case is anything to go by. But we have no material on which to base a theory that the oddness has some sinister discriminatory foundation. As for Mr Choi's messages, we are confident that they were designed to reassure two deeply disgruntled customers who had had enough of what they regarded as fecklessness and a lack of commitment on the Claimant's part. Mr Choi may well have thought that they would be comforted to know that his replacement would be someone with whom they had more in common, including Korean as a first language. They do not seem to us to suggest that Mr Choi was personally disposed to discriminate against the Claimant on account of his race.

72. In all the circumstances, we are satisfied to a high standard that the dismissal, although grossly unfair, was not unlawful under the 2010 Act. In arriving at this view, we have not judged it necessary to apply the burden of proof provisions, since we have been provided with sufficient evidence to enable us to make findings on all necessary matters. But had we applied those provisions, the result would certainly have been the same. We would have found that the Claimant had not made out a *prima facie* case and that, even if the burden had shifted to the Respondent, it had been amply discharged by the evidential material tending against the theory of unlawful discrimination.

Unfair dismissal - remedy

73. The only remedy claim is for compensation (the Claimant makes no claim for any form of re-employment order). We are satisfied that no compensatory award should be made under the 1996 Act, s123(1) because, in light of the Claimant's after-discovered conduct which came to light in the course of these proceedings, it would not be 'just and equitable' to make any award. As we have recorded, he secretly sought to make use of his connection with the Respondent's customer (or former customer) Endovision[5] to secure a pecuniary advantage for himself. And for good measure he aggravated the offence by using its email account and hardware (which was and at all times remained its property) for the purpose. That was an obvious and gross breach of his duty of fidelity. The fact that the Respondent's contract with the customer may (or may not) have been brought to an end shortly before the conversation about commission began does not afford him a defence, or even worthwhile mitigation. The precise timing of the ending of the contract is, we think, immaterial. If the contract was still on foot, nothing more need be said. If it had recently come to an end, that did not, in any event, bear upon his duty of fidelity, which continued to preclude him from seeking a personal advantage through his employer's commercial connection with Endovision, at least without seeking and obtaining permission to do so. Indeed, on this hypothesis, his

[5] As noted above, we are not clear whether the contract between Endovision and the Respondent had come to an end by the time of the negotiations over the proposed secret commission.

breach was in one respect *more* serious in that he used his working time, throughout which he was under a duty to provide loyal service to the Respondent, to continue to communicate with a former customer, purely to further his own personal advantage, in circumstances where (on these assumed facts) the Respondent could not conceivably benefit from the continued contact.

74. The Claimant's conduct in seeking to negotiate a secret commission also placed him in breach of cl 2.4 of his contract of employment which explicitly prohibited him from engaging in 'any other business' while employed by the Respondent, except with written permission. He was also in breach of the Respondent's 'Code of Conduct and Ethics'. Whether or not that document had contractual force, it purported to prohibit employees from pursuing 'illegal personal gains' or accepting 'money or goods or entertainment' and required them to pursue their work 'fairly and transparently'.

75. In our judgment, it would also be 'just and equitable' to reduce the Claimant's basic award to nil under s122(2), for the reasons we have given in respect of the compensatory award. As *Devis v Atkins* shows, in the present context there is no good reason for the Tribunal to differentiate between the adjustments to be made to the two awards.

76. In short, we are satisfied that it would be entirely unconscionable for the Claimant to receive *any* compensation in circumstances where, long before the dismissal, he had dishonestly misconducted himself in repudiation of his contract of employment and in circumstances which richly merited summary dismissal and would in all probability have resulted in that penalty had he not compounded his wrongdoing by keeping from the Respondent all knowledge of what he had done.

77. We will refer to the conclusion just stated as 'the *Devis v Atkins* finding'. It disposes entirely of the Claimant's remedy claim (as we have noted, he rightly seeks compensation only).

78. In the circumstances, we will say no more about the further remedies points advanced by Ms Berry other than to make the provisional observation that there appears to be force in the contention that, but for the *Devis v Atkins* finding, any award of compensation would have faced the risk of being extinguished or very substantially reduced on account of one or more of the following three matters: first, a separate *Devis v Atkins* point (relevant to both basic and compensatory awards) based on the Claimant's messages of 24 September 2019 (see our findings above)[6]; second, the *Polkey* argument (relevant to the compensatory award only) that, given the Claimant's evident disaffection and the severely damaged relationship between the parties, any compensation for loss of earnings should reflect the probability that his employment would have ended without liability attaching to the Respondent within a relatively short period of the date of dismissal; and third, the proposition (relevant to both basic and compensatory awards) that the Claimant contributed to his dismissal by failing to dedicate himself to his duties as he should have and by his openly unco-operative attitude to those around him (particularly those seeking to manage him). We stress that we have

[6] It might be argued that besmirching one's employer's reputation and calling its integrity into question in such terms was as clear a breach of the duty of fidelity as the first.

made no findings of fact on these matters (other than those set out above) and reached no concluded view on these points. But the obstacles with which the Claimant would be faced had we not made the *Devis v Atkins* finding should be obvious.

Outcome and Postscript

79. For the reasons stated, the unfair dismissal claim succeeds and the complaint of direct race discrimination fails.

80. As for remedy, the Claimant must content himself with the finding that his dismissal was unfair. No compensation is payable.

81. Finally, we feel bound to say that this is a regrettable case which reflects poorly on all concerned. We hope that they learn valuable lessons from it.

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EMPLOYMENT JUDGE SNELSON

29 February 2024

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Reasons entered in the Register and copies sent to the parties on 12 March 2024

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