



EMPLOYMENT TRIBUNALS

Claimant

Respondent

**Mr Muhammed Irshard Osman
Fouz**

v

**Columbus UK Holdings Ltd t/a
RightSpend**

Heard at: London Central
On: 22 to 29 February 2024

Before: EJ G Hodgson
Ms Sandra Campbell
Mr Michael Cronin

Representation

For the Claimant: in person
For the Respondent: Ms R Levene, counsel

JUDGMENT

- 1. All claims of direct discrimination fail and are dismissed.**
- 2. All claims of harassment fail and are dismissed.**
- 3. The claim of wrongful dismissal fails and is dismissed.**

REASONS

Introduction

- 1.1** On 28 April 2022, Mr Fouz brought a claim which alleged unfair dismissal, wrongful dismissal (notice pay), and discrimination.

- 1.2 The claim of unfair dismissal was dismissed on withdrawal prior to the hearing. During previous case management, the issues recorded claims of direct discrimination and harassment. The draft issues identified the claimant relied on the protected characteristics of race, religion, and age.

The Issues

- 2.1 On the first day, we considered the issues in this case.
- 2.2 At a case management discussion, on 21 August 2023, EJ Nash sought to clarify the issues. The claimant had previously been ordered to prepare a schedule of complaints. Following receipt, the respondent produced a list of issues. The order states the tribunal “finalised the list of issues which is attached to this order.”
- 2.3 It is apparent that list of issues contained a number of allegations of discrimination which had not been set out in the original claim form. It is unclear why. No amendment was sought or granted.
- 2.4 Only those claims which are pleaded can be determined by the tribunal. The tribunal should not look to documents other than the pleadings to identify the claims.¹ When new facts are introduced, that generally requires amendment. When those new facts are cited as claims of discrimination, they will form new claims, and cannot proceed absent amendment. When considering whether any claim should be allowed to proceed by amendment, it may be relevant to consider whether it is objected to, but a lack of objection does not remove the need for an application and a judicial decision.
- 2.5 This claim is poorly pleaded. The claim form contains many bare allegations and it is unclear what if anything was advanced as an act of discrimination.
- 2.6 It may be possible for there to be clarification without introducing new claims. However, an informal process of clarification should not be permitted to become unbridled licence whereby new claims are introduced by particularisation, when amendment would be required.
- 2.7 It is unclear from the claim form what is said to be an act of direct discrimination. Harassment is not adequately identified at all.
- 2.8 The claimant now relies on the protected characteristics of race, religion, and age. The claimant describes himself as “Asian – Sri Lanka” and compares himself to someone who is not Asian or someone who is white. The religion relied on as is Islam. The claimant, who is age 32, compares himself to someone over 40.

¹ See *Chandhok v Tirkey* EAT 190/14 and in particular paragraphs 17 and 18.

- 2.9 Each of the allegations is also put as an act of harassment, and the issues purport to identify further acts of harassment, albeit these are not clearly set out in the claim form.
- 2.10 The alleged allegations of direct race/religious discrimination, as identified in the draft list of issues are set out below. The respondent was asked to clarify the following: whether the allegation appeared in the claim form, and if so where; if the allegation was new, whether there had been an amendment granted, and in any event whether the respondent objected to dealing with the allegation. The respondent's comments by way of response have been included, and identified in italics. Whilst the respondent has not objected to dealing with a number of these allegations, it is clear that many are new and were not pleaded.
- 2.11 These are the allegations of direct discrimination as they appear in the draft issues, with the respondent's comments set out in italics.

12.1 The claimant was excluded from the meetings relating to ISO mentioned in paragraph 5.1. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Paragraph 4 of ET1 (no amendment, no objection)*

12.2 On 28 September 2021, Mr Hughes arranged for a pen test. Mr Hughes did not include the claimant and instead included his team member when the responsibility and remit for the completion of the test was within the claimant's job description and accountable for the outcome. *Not contained in the ET1 (no amendment, no objection)*

12.3 On 5 November 2021, Mr Hughes told the claimant he would send an addendum to Code Apogee which the claimant had asked him to send in October 2021. The claimant, having being excluded from the ISO meetings referred to in paragraph 7.1, was asked by Mr Hughes to 'take the lead' on the addendum without being part of those meetings. The comparators relied upon re Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

12.4 The claimant was excluded from the Audit prep meeting on 16 November 2021. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

12.5 On 25 November 2021, the claimant was asked to action the filled ISO questionnaire from Code Apogee by Mr Hughes on short notice. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

12.6 From October 2021 to 4 January 2022, the claimant was not allowed to hire his direct reports independently and Dermot Hough and Dominic Hughes wanted to be present at all the interviews the claimant was performing for his team. The comparators relied upon are Tiffany Crow and George Roumanis). *Paragraph 5 of ET1 (no amendment, no objection)*

12.7 From April – November 2021, the claimant was not given access to the respondent's internal team resources in SharePoint. The claimant alleges that junior colleagues and new starters were given immediate access to the SharePoint and his repeated requests to gain access were ignored. This led the claimant to not being able to perform specific tasks required by his role efficiently. The comparators relied upon are Tiffany Crow, Mareike Ahner, Claudette Pierre, Jamie Pierre and Maria Overthrow. *Paragraph 6 of ET1 (no amendment, no objection)*

12.8 From April 2021 to January 2022, the claimant was not given access to the wide range of technical portals. Dominic Hughes had access but would ask the claimant to perform tasks which required him to verify that his direct reports were accessing the portal securely. The comparator relied upon is Diganta Mandal. *Not in ET1 although claimant had stated it was in paragraph 6 of ET1 (no amendment, no objection)*

12.9 On 29 September 2021, the pen test caused issues with the respondent's server. Mr Hughes asked the claimant's team member to act on it as he had access to the server. The claimant's access was withheld, and the claimant's team member was unreachable. The comparators relied upon is Ganesh Pandi. *Not contained in the ET1 (no amendment, no objection)*

12.10 On 30 September 2021, the claimant's team member shared issues with the ServiceChoice service provider with the claimant but he was unable to view this as he did not have access. The claimant had responsibility for this task but could not action it as his access to the server was withheld by Dominic Hughes. The comparators relied upon is Diganta Mandal. *Not in ET1 although claimant had stated it was in paragraph 6 of ET1 (no amendment, no objection)*

12.11 On 7 October 2021, Mr Hughes only shared screenshots of two slides/pages without giving the claimant access to SharePoint. He later shared links to SharePoint that the claimant could not access. The comparator relied upon is everyone else in the business except the claimant. *Paragraph 6 of ET1 (no amendment, no objection)*

12.12 On 26 October 2021, the ISO consultant shared documents with the claimant that should have been filed a long time

previously. However, the claimant did not have access to the server. On 26 October 2021, the claimant mentioned this to Dominic Hughes and he was granted access to only two files rather than the whole folder as requested. The comparator relied upon is everyone else in the business except the claimant. All ISO auditees had access except the claimant. *Paragraph 6 of ET1 (no amendment, no objection)*

12.13 On 17 November 2021, the claimant's access to SharePoint was revoked/lost one day before the audit. The claimant reported this to Mr Hughes but was met with no response. The claimant also followed up with a Microsoft Teams message to Mr Hughes but was met with no response. All ISO auditees had access except the claimant. *Not contained in the ET1 (no amendment, no objection)*

12.14 On 25 November 2021, the claimant's access to security management of his remit was restricted but all his team members and direct reports had full super-admin access. The claimant was asked to manage and regulate the security access with his team despite not having access himself. As the claimant was not given access to the portal, he was unable to verify if the access was legitimate and had to repeatedly ask Mr Mandal for confirmation. *The comparator relied upon is Diganta Mandal. Not contained in the ET1 (no amendment, no objection)*

12.15 On 15 December 2021, Mr Hughes shared a report with the claimant, detailing the items related to his remit, but he did not have access to the Password Policy due to having no access to SharePoint. All ISO auditees had access except the claimant. This specific allegation relating to the Password Policy is not in the ET1 although a general complaint of not being granted access to *SharePoint is at paragraph 6 of the ET1 (no amendment, no objection)*

12.16 During the period 15 – 22 December 2021, the claimant was given artificial deadlines and demands two days prior to his annual leave contrary to what the respondent's auditors had said. The claimant alleges that the certification was already submitted prior to 22 December 2021, but he was emailed during his annual leave when Ganesh Pandi could have assisted the respondent. The respondent wanted the claimant to work during his annual leave. The comparators relied upon are Iain Seers and Dominic Hughes. *Paragraph 9 of the ET1 (no amendment, no objection)*

2.12 In addition, the draft issues identify an allegation of direct age discrimination as follows:

15.1 From November 2021 – September 2022, the shares that were identified to be allotted to the claimant were not promptly registered in his name at Companies House. The comparators

relied upon are Dermot Hough, Gehan Talwatte, John Hornby, Tiffany Crow and Dominic Hughes). *Paragraph 7 of ET1 (no amendment, no objection)*

- 2.13 The draft list of issues includes allegations of harassment. Those include all the allegations under paragraph 12. In addition, numerous matters are said to constitute, collectively, a breach of contract, as set out between 5.1 and 5.13. Each is said to be an act of harassment. The draft issues record the alleged acts of harassment as follows:

5.1 The claimant was intentionally prevented from performing his role by Dominic Hughes. Dominic Hughes withheld information from the claimant and refused to share it. The claimant communicated this to Dermot Hough but this conversation was then "leaked" to the CEO, Iain Seers. The claimant was excluded from certain meetings relating to ISO27001 ("ISO") where task ownership was mentioned against his name without his knowledge during the period between 5 May 2021 and 16 November 2021. *Paragraph 3 of ET1 (no amendment, no objection)*

5.2 From May 2021 to December 2021, the claimant was excluded from the ISO27001 project by Dermot Hough and Iain Seers and replaced by someone else in an unofficial capacity. *Paragraph 4 of ET1 (no amendment, no objection)*

5.3 During the same period, the claimant was unfairly asked to perform at short notice without being given visibility over the responsibility and tasks. The claimant was excluded from over 20 meetings where task ownership was mentioned against his name without his knowledge for 7 months. *Paragraph 4 and 4.1 of ET1 (no amendment, no objection)*

5.4 On 28 September 2021, Dominic Hughes (Operations Director) arranged for a pen test. Mr Hughes did not include the claimant and instead included his team member when the responsibility and remit for the completion of the test was within the claimant's job description and accountable for the outcome. *Not in the ET1 (no amendment, no objection)*

5.5 On 5 November 2021, Mr Hughes told the claimant he would send an addendum to Code Apogee which the claimant had asked him to send in October 2021. The claimant, having been excluded from the meetings referred to in paragraph 5.1, was later asked by Mr Hughes to 'take the lead' on the addendum without being part of those meetings. *Not in the ET1 (no amendment, no objection)*

5.6 The claimant was excluded from the Audit prep meeting on 16 November 2021, despite being one of the auditees. *Not in the ET1 (no amendment, no objection)*

5.7 On 25 November 2021, the claimant was asked to action the filled ISO questionnaire from Code Apogee by Mr Hughes on short notice. *Not in the ET1 (no amendment, no objection)*

5.8 From June 2021 – January 2022, the claimant reached out to the Board of Directors (namely Dermot Hough (CFO), Iain Seers (CEO) and Gehan Talwatte (Non-Executive Director) via Microsoft Teams and email for assistance in relation to alleged harassment and bullying but his concerns "fell on deaf ears.". The claimant also regularly discussed this with Tiffany Crow (Director of Client Services). *Paragraph 8 of the ET1 (no amendment, no objection)*

5.9 Mr. Hough, who was responsible for HR matters, asked the claimant to follow the company's grievance procedures and withdraw his resignation. However, Mr. Hough forwarded every communication from the claimant to Mr. Seers, the person against whom the grievance was made. Mr. Hough then asked Mr. Seers to draft the response and, in some cases, even edited and confirmed the response before sending it back to the claimant. *Paragraph 12.5 refers to asking the claimant to follow the Company's grievance procedure. The rest of 5.9 does not appear in the ET1 (no amendment, no objection)*

5.10 The HR also discussed the grievance with the people who were the subject of the grievance. Then arranged a meeting with these individuals to discuss the grievance raised and terminated all access to limit evidence collection or fair process. *Paragraph 12.5 and 12.5.2 of the ET1 (no amendment, no objection)*

5.11 The claimant repeatedly informed HR that the grievance process was not independent, and that the individuals against whom the grievance was made could not be involved in conducting or overseeing the grievance procedures. The claimant requested an independent process, but this request was denied. *Paragraph 12.6.1 of the ET1 (no amendment, no objection)*

5.12 The respondent, after initially denying the claimant's request for an independent grievance process, finally agreed to set up an independent process by hiring someone in their network. However, it was later discovered that this independent HR consultant was also drafting responses and advising the respondent in the grievance raised by the claimant. The respondent also engaged in fraudulent practices during this series of events, including tampering with evidence. As a result, the claimant was denied the right to a fair and impartial grievance procedure. *Paragraph 14, 14.1, 14.4.1, 14.4.2 of the ET1 (no amendment, no objection)*

5.13 The claimant, after being denied a fair and impartial grievance process by the respondent, suggested that the Board of Directors conduct an independent investigation. However, the Board sided with the CEO, CFO, and HR, the individuals against whom the claimant had a grievance. The Board failed to conduct their own fact-finding and provide an impartial grievance procedure. As a result, the alleged individuals were allowed to continue their fraudulent practices. *Paragraph 14.3 although there is no reference to the claimant suggesting the Board of Directors conduct an independent investigation.*

- 2.14 It is the claimant's case that he resigned on 6 January 2022 because of a breach of the term of mutual trust and confidence.
- 2.15 The respondent alleges that all allegations of discrimination and harassment which predate 26 October 2021 have not been brought in time and should be dismissed. It is the respondent's case that there is no continuing course of conduct.
- 2.16 The claim of unfair dismissal was previously dismissed on withdrawal.
- 2.17 The alleged dismissal was not cited as an act of discrimination, albeit the claimant stated that each of the matters relied on were each individually discriminatory.
- 2.18 It follows that the issues, as adopted by the tribunal, in August, are unsatisfactory. The respondent has identified, correctly, numerous allegations which were not contained in the claim form. They should not have been included in any list of issues adopted by the tribunal. As no amendment was allowed, I assume inclusion in the list of issues of claims that were not pleaded was a mistake. The issues cannot stand as a definitive statement of case and are subject to the observations of the respondent as set out above.
- 2.19 Only those allegations which are contained in the claim are allegations that may be decided by the tribunal.² However, in considering the claim, we will have regard to all of the matters raised which appear in the draft issues.

Evidence

- 3.1 The claimant filed a witness statement.
- 3.2 For the respondent, we received witness statements from Mr Dominic Hughes (operations director), Mr Iain Seers (chief executive officer), and Mr Dermot Hough (chief financial officer).

² This point was addressed at paragraph 9 in *Anya v University of Oxford and another* 2001 IRLR 399, CA (per Sedley LJ)

- 3.3 The claimant and the respondent both filed chronologies and cast lists
- 3.4 We received written submissions, and then further written submissions following our request.

Concessions/Applications

- 4.1 On day one, the respondent applied to amend the response. During the course of disclosure, the claimant disclosed 78 documents which were either video recordings or audio recordings of business discussions. It is the respondent's position that these were illicit and unauthorised and the conduct amounted to repudiatory breach of contract. The amendment sought to plead a defence to any claim of wrongful dismissal based on the subsequently discovered alleged repudiatory breach. The respondent relied on the case of **Boston Deep Sea Fishing and Ice Company Ltd v Ansel** (1888) 39 CHD 339.
- 4.2 We considered the application to amend. The defence could not have been pleaded prior to disclosure, as the recordings were illicit and were only brought to the respondent's attention on disclosure. The matter had been raised in correspondence. There was no reason why the claimant could not deal with the defence at the hearing. There would be hardship to the respondent if it could not rely on the defence. The balance of hardship favoured allowing the amendment. In any event, this amendment is concerned with remedy. It is not relevant if the claimant fails to show he was not constructively dismissed. Further evidence can be produced at any remedy hearing.
- 4.3 The respondent alleged that the claimant was dishonest, as demonstrated by his covert recording of numerous meetings. There was some dispute as to the evidence given on this. The parties were requested to provide further written submissions in relation to the allegation of dishonesty.

The Facts

- 5.1 The respondent's business concerns marketing procurement and marketing consultancy. The respondent employed the claimant from 15 March 2021 until his resignation, with immediate effect, on 6 January 2022. He was employed as chief product officer.
- 5.2 The business involves bench marking marketing salaries across 75 territories. It does this through a procurement platform which enables clients to identify, evaluate, and select marketing agencies more efficiently and confidentially.
- 5.3 The claimant was appointed as chief product officer for the platform known as RightSpend. He was to assist the senior team with the technical aspects of RightSpend. Creation of RightSpend was outsourced to a team based in India, Code Apogee, which consisted of two developers.

The claimant was to work alongside Code Apogee. Code Apogee would report to the claimant.

- 5.4 The respondent's business was young and expanding; it had few employees. It did not have a formal HR department. To assist in bids for work, by demonstrating proof of stability and adequate control mechanisms, it was decided to seek an ISO accreditation. This involved drafting procedures, and seeking accreditation. Mr Iain Seers, chief executive officer, nominated Mr Dominic Hughes, to oversee and implement the ISO accreditation project.
- 5.5 The ISO project covered a number of sectors, and generated significant volumes of work. The claimant's involvement was limited, and related only to the product sector, with which he was concerned. The claimant did not have responsibility for, or overview, of the ISO accreditation product. There were many meetings and discussions concerning aspects of ISO accreditation, the interaction with various sectors of the respondent's business, for which the claimant had no responsibility and had their involvement.
- 5.6 On 6 January 2022, the claimant resigned. When he resigned, he had given no prior indication to the respondent's senior management that he had any work concerned for that he was unhappy. His resignation letter stated as follows:

This is to inform, I'm made to resign with no choice, from the position of Chief Product Officer at RightSpend effective today.

It has been a constant struggle to continue working with the toxic culture and two-faced approach primarily from Iain and Dom. I have been facing bullying, harassment, and discrimination. Blatant misuse of power and complete disregard for the responsibility they possess and involved in unethical and deceptive practices while thinking they are immune. Not only Iain continued doing those, but also condoned and made others do it for him, and it was a tool/method to constantly put me under stress, unfair treatment, sidelining, and undermining. There were deliberate tactics to put me under stress and set me up to fail. Iain and Dom were involved in serious gross misconduct by any rule book and it is evident there was concerted effort on this for the eventual outcome of pushing me out.

Number of these happened with your own awareness and for some you were a party to and for some you were a witness of and some you were aware of, and you still turned a blind eye and supported their conduct - while being the HR. Without any support, this has pushed me to a lonely zone at work. These are not the values of any organisation or leadership and work doesn't have to feel this way or make someone's life outside work to be negatively influenced or put under stress.

I wouldn't be making these statements without careful consideration and evidence to back those. However much I have tried to put on a brave face and tried to continue the work, it has reached a tipping point and having a negative impact on my mental health and life outside work.

I haven't lined up another job and then resigned. I am pushed towards making a choice between an aggravating deliberately toxic environment or health and life outside work - left with no choice but to resign. The deliberate games and tactics to put me under stress unfairly has made my position untenable. You may understand how seriously this has impacted me to consider quitting without a job lined up.

If you require any info from me, I'll be sharing it via email during the next three months. However, I'm not in the right frame of mind to continue any engagements with Iain and Dom.

- 5.7 The claimant gave no proper detail of his reason for resigning. Mr Dominic Hughes responded on 7 January 2022 stating the resignation was a surprise.
- 5.8 Mr Hughes referred the claimant to the grievance policy and stated, "I would kindly ask you to reconsider your resignation and raise a grievance." He confirmed that whilst the matter was resolved, the claimant's access to the respondents systems would be suspended.
- 5.9 On 11 January 2022, the claimant responded stating he did not wish to follow the grievance procedure. As any grievance would be against the senior management, he stated that it could not be a fair process. He rejected the request to withdraw his resignation stating it was "beyond common sense."
- 5.10 On 13 January 2022, the claimant was asked to comply with his contract, including deleting confidential information and the return of company property. He was asked to give details of any matter that may constitute a grievance. He was told an independent external party would be appointed to hear the grievance.
- 5.11 The claimant responded on 17 January 2022. He provided no details of his complaints. He stated "Your insistence of asking to provide details of my grievance while choosing to ignore my explanation around why I did not do that in the first place, makes me question your motives." The claimant indicated that he would proceed with tribunal proceedings. He stated he held "some information to defend this matter."
- 5.12 The respondent approached, and appointed, an independent HR company to conduct the grievance. The claimant chose not to engage, and provided no details as grievance at any time.
- 5.13 As part of these proceedings, the claimant has identified a number of areas of concern. It is appropriate to deal with these thematically. The claimant has provided limited evidence, and in relation to some of the matters raised, no evidence at all. We will consider each of the matters thematically. To the extent further facts need to be found, we will consider those in our conclusions.

The claimant's role in ISO accreditation

5.14 The claimant had some responsibility for assisting in ISO accreditation to the extent where impinged on his product sector. He was not required to attend all meetings. He did attend some meetings. The claimant's complaints are limited to the period from 5 May 2021 to 16 November 2021. He refers to being excluded from numerous meetings. The claimant failed at all times to identify those meetings he was excluded from. There is no credible evidence that he was excluded from any meeting. Throughout that period, the claimant was invited to meetings including invitations on 5 May 2021, 22 June 2021, 9 July 2021, 30 July 2021, 19 August 2021 (he clearly attended that meeting, as it is referred to in the subsequent email of 23 August 2021), 6 October 2021, and 18 November 2021. It is clear other senior managers were not invited to all of those meetings. For example, Mr Dominic Hughes was not invited to the meeting on 6 October 2021.

The claimant's role in penetration testing

- 5.15 The claimant was required to provide assistance in matters relating to RightSpend; first, to progress multifactor authentication safeguarding access to the system; second, to produce a business continuity plan (BCP) for the product, RightSpend. The BCP is a disaster recovery plan for RightSpend in the event of a cyber security attack.
- 5.16 As part of the accreditation, in order to establish vulnerabilities, the respondent arranged a "penetration" test. This involved instructing a third party company, Bulletproof, to actively seek to compromise the respondent's IT system. The claimant was informed of this on 20 September 2021 by Mr Dominic Hughes. The test was to take place between 25 October and 29 October. The claimant gives no evidence to demonstrate that he was not informed of the test.
- 5.17 At paragraph 26 of his statement the claimant says:

On 02 November 2021 - Regarding the Penetration Testing Result, we cam[e] out with zero issues. This is another clear example that since I joined I have migrated the platform to a robust, stable and secure one. Gradually the results started to speak for itself.

- 5.18 It is apparent the claimant is taking credit for the work undertaken.
- 5.19 Mr Dominic Hughes praised the claimant for his involvement on 2 November 2022. He stated:

Yes, good result. Well done to you and the team. It feels like we have finally made a leap forward and resolved some of those long standing historical issues. This will put us onto a much better footing for 2022!

- 5.20 The emails do not show the claimant complaining that he was, in any manner, excluded from the process.

Code Apogee

- 5.21 Code Apogee were responsible for the initial development of RightSpend. Mr Danip Mandal was a developer and he reported to the claimant. He remain involved day-to-day. He was supported by Mr Ganesh Pandi, an engineer for Code Apogee.
- 5.22 The claimant maintained oversight. In evidence the claimant says:
- 22. Supplier questionnaire and the return of that from CodeApogee. Dermot asks are they compliant on ISO. For which I mentioned they are thin on that. I say to Dermot that we take advise from Arnie (ISO Consultant) on that on 25 Nov 2021. Please refer to pages 539 and 605 in the bundle.**
- 5.23 In the issues, there is reference to events of 5 November 2021.
- 5.24 On 5 November 2021, Mr Dominic Hughes sent an email to the claimant and concerning the need to demonstrate how and why the business was “comfortable with the security processes.” He noted that the historical documentation did not deal with the matter adequately. There was reference to the need to send the security questionnaire the claimant was asked to action it.
- 5.25 On 25 November 2021, the claimant sent the completed supplier questionnaire from code Apogee to Mr Dominic Hughes.

Hiring individuals

- 5.26 The claimant was involved in the process of hiring individuals relevant to his sector. We accept the respondent’s evidence that the final decision on hires, in that sector, was the claimant’s.
- 5.27 It was standard practice for potential new employees to be interviewed by more than one person. The way in which that policy was implemented varied from time to time.
- 5.28 Around October 2021, it was decided to hire a developer who would be based in the UK. The respondent wished to limit its dependence on Code Apogee. By December 2021, the claimant was dealing directly with the recruiter. The claimant conducted an initial interview with the candidate. He asked Mr Dominic Hughes to be present at a second interview to see if the candidate was a good fit.
- 5.29 There was a subsequent discussion about the potential salary for a candidate. She was seen to be good technically but light on experience, albeit she had been involved in an appropriate mix of tasks in her past roles. We have not been provided with details of her salary, the sound requested, or the salary range. Mr Hughes noted that she was relatively junior. Her age was approximately 30. He considered the salary she was requesting was higher than market value given her experience. We have been taken to no specific correspondence concerning this.

- 5.30 In another interview, with a different candidate, Mr Kettle, around 15 November 21, Mr Dominic Hughes was also present at the interview. The claimant asked a question along the lines of “Are you happy that the team in India may take umbrage with you and leave the business, leaving you to pick everything up and deal with it.” Mr Dominic Hughes did not find the question appropriate. He thought it was unduly negative and off-putting. He discussed the matter with Mr Seers. Mr Kettle chose not to proceed with the appointment.
- 5.31 Mr Seers spoke to the claimant afterwards to indicate that he should not scare people off.

Access to SharePoint

- 5.32 The claimant’s evidence on this point has been limited and at times the respondent used Microsoft SharePoint to support its business. SharePoint was used across the business and supported platforms. Administration access would give the right to view all parts of SharePoint, including all sales information and or confidential business matters. Full access was not needed to view the parts of SharePoint relevant to the ISO accreditation project, or matters relevant to RightSpend .
- 5.33 The claimant has given contradictory and incomplete evidence. At paragraph 16 of his statement he says

16. I asked Dominic and Iain that I need Admin access to the Microsoft account. The request went unheard and I had to make other workarounds to complete the implementation, which was against the ISO rules anyways.

- 5.34 At page 379 Is an email of 10 August 2021 from the claimant to Mr Hughes which states:

We are working on a POC for SSO with barebones.

It requires admin access on our Microsoft subscription to continue with that. Can you please add me as an admin?

- 5.35 During his evidence, the claimant stated that he had never asked for administration access to SharePoint. His oral evidence is contradicted by his written evidence and by the email above.
- 5.36 We accept the respondent’s evidence that the claimant asked for administration access to SharePoint. We accept the respondent’s evidence that it was not necessary for the claimant to have that access in order to perform those functions and access was denied. This was in accordance with the respondent’s overriding policies which allow access only as necessary.
- 5.37 We asked the claimant to confirm when he made requests for access, and what access he requested. The claimant failed to deal with that in his oral

evidence, his written evidence, or by way of submission of further evidence afterwards.

Relevant policies

5.38 The claimant did request access to certain documents. We accept the respondent's evidence that he was given access to all documents which were appropriate to his duties when he requested them. For example, on 4 January 2022 the claimant made the following request:

**I've got the Secure Development Policy.
Can you share the other policy files they should adhere to? Thanks.**

Mr Hughes responded

**Hi Irshard, I believe it is IS-DOC-5.2 - Information Security Policy Statement v1.1 which is also in the same folder. But give it a quick read through before sending to code to make sure it all makes sense. Let me know if you think we need to change anything.
Best**

5.39 On another occasion, on 7 October 2021, Mr Hughes shared a further document by SharePoint. The documents were developing. We accept the respondent's evidence that it is often easier to share the most up-to-date document.

5.40 The claimant has pointed to no documents where he suggests that he found this approach unsatisfactory, either in principle, or in the nature and extent of disclosure.

5.41 We find the respondent's approach was consistent with its own policies. It provided the claimant access to documents, as and when required

5.42 Shortly before the audit which commenced on 4 November 2021. The claimant was given access to all of the policy documents relevant to ISO. It is the claimant's case that he made a request on 3 November 2021, as set out in his chronology. However, the claimant's evidence on this point is unclear and unsatisfactory. He says this at paragraph 23.1 –

You can note from MS teams chats on 03 November 2011 that my sharepoint access was revoked one day before Audit and I never had full access to the sharepoint until ONE day before the audit. I have been asking for this access ever since joining and it is evident I had various requests as detailed in paragraphs above.

5.43 It remains unclear what rights the claimant believes were revoked. It remains unclear what requests he made, and when.

Being asked to work over Christmas

5.44 Production of a BCP for RightSpend spend was the claimant's responsibility and have been a fundamental duty since his employment in

March 2021. By December 2021, the claimant had not produced an appropriate policy or procedure.

- 5.45 Mr Seers anticipated the claimant should produce a document of approximately six pages identifying the relevant product, the potential threats, and the specific way in which it could be recovered in the event of problems such as a cyber-attack.
- 5.46 This lack of policy was noted as a weakness as part of the audit process. On 17 December 2021, the claimant sent evidence and notes for the ISO audit remediations.
- 5.47 Mr Seers called the claimant. Mr Seers was not aware the claimant was recording the conversation. He was surprised that on several occasions the claimant asked whether he was required to work over Christmas. We accept Mr Seers told the claimant he was not so required, and this is consistent with the later emails are set out below.
- 5.48 Mr Seers considered the position to be unsatisfactory and he wrote to the claimant on 20 December 2021. He stated that there still did not appear to be “a step-by-step process for BCP in the event the RightSpend server is down.” The text of a policy provided by the claimant was brief and Mr Seers found it unsatisfactory. The totality of the text as supplied by the claimant appeared to be as follows:

Alternatively we can spin up a new environment from the master ISO and initiate a new EC2 instance from the Master ISO of the application within one hour and continue to serve the clients.

- 5.49 The claimant responded on 20 December 2021 saying “let me pass this requirement to Ganesh.”
- 5.50 On 21 December 2021, Mr Seers noted that he had requested the information the week previously, and the matter had been flagged post audit. Mr Seers was, essentially, asking the claimant to perform his duties, and pointing out to the claimant that he had had time to do so, but it failed.
- 5.51 The claimant responded by saying he was not “clear” on the “expectations.” In the same email of 21 December 2021, the claimant asked “Do you want me to come back to work this week?”
- 5.52 On 22 December 2021, Mr Seers made it clear that the claimant was to pick the matter up in the New Year. He was not required come back. He was not required to work over Christmas.

Shares

- 5.53 As part of his financial package, the claimant was awarded shares. He was sent the equity documents in April 2021. The shares were his. The claimant did not sign the documents. He deliberately delayed, but failed to

tell the respondent that he was delaying or why. On 16 April, the claimant's email stated he had a few questions but would sign once they were cleared. It is unclear what those questions were. Before us, the claimant suggested that he needed to make some payment and did not have the money. We do not need to resolve this. The claimant chose to delay. The respondent contacted the claimant on a number of occasions seeking return of the documents. The lawyers sent the documents on 16 April 2021. He was contacted again on 19 April 2021.

- 5.54 The claimant eventually signed the relevant documentation in November 2021; this perfected his legal ownership, as he held the share certificate.
- 5.55 The shares were registered at Companies House. On 20 October 2021, shares were issued to other members of staff. Registration at Companies House was an administrative matter. The claimant shares, and those of other members were registered on 7 September 2022.

The law

- 6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

(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.

- 6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)

- 6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

- 6.4 Harassment is defined in section 26 of the Equality Act 2010.

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

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

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

(i) violating B's dignity, or

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

(3) ...

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

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are--

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

- 6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.
- 6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.
- 6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.
- 6.12 Section 23 refers to comparators in the case of direct discrimination.
- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
- 6.13 Section 136 Equality Act 2010 refers to the reverse 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;
- (b) ...

6.14 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258**. We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246**. The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.15 There is a dismissal when the employee terminates the contract, with or without notice, in circumstances in which he or she is entitled to terminate it, with or without notice, by reason of the employer's conduct.

6.16 The leading authority is **Western Excavating ECC Ltd -v- Sharp [1978] ICR 221**. The employer's conduct which gives rise to constructive dismissal must involve a repudiatory breach of contract Lord Denning stated:

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does then that terminates the contract by reason of the employer's conduct. He is constructively dismissed.

6.17 In summary there must be established first that there was a fundamental breach on the part of the employer; second, the employer's breach caused the employee to resign; and third, the employee did not affirm the contract as evidenced by delaying or expressly.

6.18 In so called last straw dismissals there can be a situation where individual actions by the employer, which do not in themselves constitute a breach of contract, may have the cumulative effect of undermining the implied term of mutual trust and confidence. One or more of the actions may be a fundamental breach of contract, but this is not necessary. It is the course of conduct which constitutes the breach. The final incident itself is simply the last straw even if in itself it does not constitute a repudiatory breach. The last straw should at the least contribute, however slightly, to the breach of the implied term of trust and confidence.

6.19 There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA**). The legal test entails looking at the circumstances objectively,

i.e., from the perspective of a reasonable person in the claimant's position. (**Tullett Prebon PLC v BGC Brokers LP** [2011] IRLR 420, CA.)

- 6.20 The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (**Nottinghamshire County Council v Meikle** [2004] IRLR 703, CA; **Wright v North Ayrshire Council** UKEATS/0017/13)
- 6.21 **Omilaju v London Borough of Waltham Forrest 2005 ICR 481 CA** is authority for the proposition that the last straw does not have to be of the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of mutual trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw. The test is objective. It is unusual to find a case where conduct is perfectly reasonable and justifiable, but yet satisfies the last straw test.
- 6.22 In **Malik v Bank of Credit and Commerce International SA 1997 IRLR 462**. The House of Lords confirmed that there is an implied duty of mutual trust and confidence as follows:
- the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.**
- 6.23 We would note that it is generally accepted that it is not necessary that the employer's actions should be calculated *and* likely to destroy the relationship of confidence and trust,³ either requirement is sufficient.
- 6.24 Where an employee is constructively dismissed, the employee may be entitled to be paid for the notice period.

Conclusions

- 7.1 We first consider the allegations of discrimination which are found at paragraph 12 of the draft list of issues, as set out above.
- 7.2 To succeed in a claim of direct discrimination we need to consider the following steps. First, what is the act or omission, as pleaded, which is said to amount to a detriment? Only those alleged detriments set out in the claim form can be adjudicated. Second, has the claimant proven that the act or omission happened at all? If not, there is no action or omission capable of being a detriment. Third, if the potential detriment is established factually, is it detrimental treatment at all? Fourth, are there facts from which we could conclude that the treatment contravened the relevant provision? Fifth, has the respondent established, on the balance of probability, an explanation for the treatment which in no sense

³ See, for example *Baldwin v Brighton & Hove City Council* [2007] IRLR 232

whatsoever is a contravention the provision, in this case section 13 Equality Act 2010?

7.3 With those points in mind, we consider the various alleged allegations of detrimental treatment as set out in paragraph 12 of the draft list of issues, as reproduced above.

12.1 The claimant was excluded from the meetings relating to ISO mentioned in paragraph 5.1. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Paragraph 4 of ET1 (no amendment, no objection)*

7.4 The claimant fails to establish he was excluded from any ISO meetings and this claim fails. To establish exclusion he would have to show he had a reasonable expectation of inclusion. Establishing that there were meetings and that he did not attend all of them does not establish exclusion.

12.2 On 28 September 2021, Mr Hughes arranged for a pen test. Mr Hughes did not include the claimant and instead included his team member when the responsibility and remit for the completion of the test was within the claimant's job description and accountable for the outcome. *Not contained in the ET1 (no amendment, no objection)*

7.5 The claimant fails to establish that the alleged detrimental treatment occurred. It is wrong to say the claimant was not included. He knew the pen test was to take place. He had been informed in advance. It is apparent, from the subsequent documentation, that the claimant took credit for the process. There is no indication in the contemporaneous documents that the claimant was excluded.

12.3 On 5 November 2021, Mr Hughes told the claimant he would send an addendum to Code Apogee which the claimant had asked him to send in October 2021. The claimant, having being excluded from the ISO meetings referred to in paragraph 7.1, was asked by Mr Hughes to 'take the lead' on the addendum without being part of those meetings. The comparators relied upon re Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

7.6 It is unclear what is said to be the detrimental treatment the claimant was not excluded from ISO meetings.

7.7 On 5 November 2021, the claimant was asked to send a security questionnaire to Code Apogee. This was a simple task. He agreed to do it. He later sent the completed document to Mr Hughes. In no sense whatsoever was he inhibited in this process by involvement with, or non-involvement with the ISO meetings.

7.8 As to why the individuals are cited as comparators, there is no adequate explanation from the claimant. There is no explanation for why the

claimant alleges the comparators were in the same material circumstances; they were not.

- 7.9 It follows it is unclear what is said to be the detrimental treatment. The claimant was asked to do a simple task which was in accordance with his duties, which presented no difficulties, and to which he did not object. The treatment was in no sense detrimental. The explanation is simple: the work was required and it was within the claimant's duties. We accept that explanation. As an act of discrimination, this fails.

12.4 The claimant was excluded from the Audit prep meeting on 16 November 2021. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

- 7.10 It is accepted the claimant was excluded from the audit preparation meeting on 16 November 2021. This was attended only by Mr Hughes, who was leading the process, and Mr Arnie Owen (an external ISO expert). The purpose was to go over all the documents created prior to the review starting on 8 December 2021 and to check everything was in place. By that time, the documents had been created and there was no need to involve any further members of the team. The claimant refers to Mr Hough and Mr Seers as comparators. They did not attend either. There are no facts from which we could infer this was discrimination because of any of the protected characteristics relied on. The explanation is established: the claimant wasn't needed, he had no responsibility for this part of the process, and there was no reason to invite him.

12.5 On 25 November 2021, the claimant was asked to action the filled ISO questionnaire from Code Apogee by Mr Hughes on short notice. The comparators relied upon are Dominic Hughes, Dermot Hough, and Iain Seers. *Not contained in the ET1 (no amendment, no objection)*

- 7.11 This is a repetition of matters raised in 12.3. We need considered it no further.

12.6 From October 2021 to 4 January 2022, the claimant was not allowed to hire his direct reports independently and Dermot Hough and Dominic Hughes wanted to be present at all the interviews the claimant was performing for his team. The comparators relied upon are Tiffany Crow and George Roumanis). *Paragraph 5 of ET1 (no amendment, no objection)*

- 7.12 We accept that the claimant was not allowed to hire his direct reports entirely independently. He had the final decision. We do not accept that Mr Hough and Mr Hughes insisted on being present at all the interviews. We have referred to a specific instance, above, where the claimant interviewed alone.

- 7.13 The claimant has given no evidence to establish that the comparators were in a the same material position as him. We accept the respondent's

evidence that hiring staff is always scrutinised to some degree by more than one person.

- 7.14 If an explanation is needed, it is established. The claimant was treated the same as everyone else. At some stage of the process, there was always oversight by another individual. This may involve observation, discussion, or joint interview. That was standard practice. It would be unusual for an employer to delegate hiring staff to one person. We accept the respondent's evidence that it would be poor practice. We accept the explanation that the respondent was seeking to ensure appointment of individuals appropriate to the business.

12.7 From April – November 2021, the claimant was not given access to the respondent's internal team resources in SharePoint. The claimant alleges that junior colleagues and new starters were given immediate access to the SharePoint and his repeated requests to gain access were ignored. This led the claimant to not being able to perform specific tasks required by his role efficiently. The comparators relied upon are Tiffany Crow, Mareike Ahner, Claudette Pierre, Jamie Pierre and Maria Overthrow. *Paragraph 6 of ET1 (no amendment, no objection)*

- 7.15 This allegation is imprecise. The claimant was given access to SharePoint resources, and the general allegation that he was not fails. Junior employees were not given total access to the entirety of SharePoint. There is no evidence juniors were given access more expediently than the claimant was given access. That allegation fails. There is no evidence that the claimant was unable to perform specific tasks because of not being able to access SharePoint or otherwise. He did not identify any specific document that was not disclosed which would have been necessary to the performance of his duties. There is a lack of contemporaneous evidence suggesting that there was any difficulty. The evidence which is available demonstrates that the claimant, when he requested specific documents, was sent those documents.
- 7.16 The claimant's statement would suggest that he objected to not being giving administrative access.⁴ That is consistent with the respondent's evidence that the claimant requested administrator's rights on several occasions.
- 7.17 During the hearing the claimant's position changed. The claimant sought to resile from the position adopted in his statement. The respondent's reason for not giving administration access is clear and is an answer to any claim. The claimant did not need administrator's access to do his job, and giving him that access would have compromised the respondent's business and been inappropriate in accordance with their policies.

⁴ Paragraph 16 of his statement.

12.8 From April 2021 to January 2022, the claimant was not given access to the wide range of technical portals. Dominic Hughes had access but would ask the claimant to perform tasks which required him to verify that his direct reports were accessing the portal securely. The comparator relied upon is Diganta Mandal. *Not in ET1 although claimant had stated it was in paragraph 6 of ET1 (no amendment, no objection)*

7.18 The nature of this allegation became tolerably clear during the hearing. As part of the work undertaken by Bulletproof, they provided a service called target defence. This monitored the RightSpend platform for suspicious activity. Any suspicious activity would lead to an alert which would be forwarded to a portal. This would also generate email alerts. Mr Hughes decided that the initial alerts, through the portal, should be accessed by Mr Diganta Mandel, as he had designed the system and he was in the best position to action any response. It was not necessary to send the initial alert to the claimant. Mr Hughes had overview of any alerts, and he would send notification of any alerts to the claimant. The claimant would then have overview, so that he could perform his duties by checking Mr Mandel had dealt with the problem.

7.19 The claimant's evidence fails to deal with this matter adequately or at all. He does not explain what is meant by the portal. There is no evidence at all that there was a wide range of technical portals to which he was denied access. The suggestions he could not verify the work of his direct reports is without foundation. Mr Hughes sent specific notification to the claimant and the claimant was required to confirm the problem had been addressed. It follows that he had all the relevant tools to perform his duties.

7.20 It is for the respondent to organise itself in the way it considers most appropriate. The approach the organisation chose was rational and reasonable. In no sense whatsoever was the claimant excluded. We accept the explanation and it is an answer to this claim.

12.9 On 29 September 2021, the pen test caused issues with the respondent's server. Mr Hughes asked the claimant's team member to act on it as he had access to the server. The claimant's access was withheld, and the claimant's team member was unreachable. The comparators relied upon is Ganesh Pandi. *Not contained in the ET1 (no amendment, no objection)*

7.21 The claimant has given no evidence in support of this allegation. He fails to establish that his access was withheld. He fails to establish any treatment capable of being detrimental

12.10 On 30 September 2021, the claimant's team member shared issues with the ServiceChoice service provider with the claimant but he was unable to view this as he did not have access. The claimant had responsibility for this task but could not action it as his access to the server was withheld by Dominic Hughes.

The comparators relied upon is Diganta Mandal. *Not in ET1 although claimant had stated it was in paragraph 6 of ET1 (no amendment, no objection)*

- 7.22 This allegation is not in the claim form and it is not addressed in the claimant's statement. The claimant has failed to give any adequate or appropriate evidence on this point.
- 7.23 To the extent that there is detrimental treatment alleged, it appears to be that access to the server was withheld by Mr Hughes. It may be that this is reference to the pen test. It may be that it reference to the portal. It is simply not set out adequately or at all by the claimant. We have considered the pen test and the portal issues above. We found there was no detrimental treatment.
- 7.24 We can only decide claims which are pleaded. This allegation is not in the claim form. In the draft issues it is so poorly articulated that it cannot be understood, and it is not supported by any evidence. This claim fails.
- 7.25 We would note that the claimant cannot put the claim as most suits the claimant from time to time. The claim must be pleaded and the respondent must know the case that it is to answer.

12.11 On 7 October 2021, Mr Hughes only shared screenshots of two slides/pages without giving the claimant access to SharePoint. He later shared links to SharePoint that the claimant could not access. The comparator relied upon is everyone else in the business except the claimant. *Paragraph 6 of ET1 (no amendment, no objection)*

- 7.26 This is another allegation which is insufficiently particularised and which cannot be easily understood. The claimant fails to address it in his evidence. It is not addressed in the submissions.
- 7.27 We accept the respondent's evidence that the claimant was given access to SharePoint as necessary. There is no suggestion the claimant made requests for specific documents in SharePoint which he did not receive. We accept there may have been problems with individual links. What is clear is that when the claimant raised problems, any response was helpful and almost instantaneous. In no sense whatsoever was it detrimental treatment. It may be that the claimant is complaining about not having administration access, but we have considered this above. This allegation does not demonstrate treatment which is capable of being a detriment.

12.12 On 26 October 2021, the ISO consultant shared documents with the claimant that should have been filed a long time previously. However, the claimant did not have access to the server. On 26 October 2021, the claimant mentioned this to Dominic Hughes and he was granted access to only two files rather than the whole folder as requested. The comparator relied upon is everyone else in the business except the claimant. All ISO auditees had access except the claimant. *Paragraph 6 of ET1 (no amendment, no objection)*

7.28 At 17.5 of his statement, the claimant refers to two documents being user access reviews and information security risk assessment and SoA. He says they were drafted in July 2020 and 1 September 2021. It is unclear why the claimant says they should have been filed previously. It is clear the claimant asked for access and received the two files as requested. It is unclear that he needed them. Nevertheless, access was granted. We do not accept that there is clear evidence that “everyone else in the business” except the claimant had access. There was insufficient evidence to demonstrate that. We accept the respondent’s general position that documents are only shared with those individuals who need to see them. It is unclear what is said to be the detrimental treatment. In any event, we accept the respondent’s explanation. Only relevant documents would be shared. The documents were shared with the claimant when he made requests. There is nothing to suggest that any of that was because of any of the relevant protected characteristics.

7.29 The claimant’s email 6 October 2021 refers to access being denied. Mr Hughes replied stating that was odd, but gave immediate access. There is no evidence of the claimant’s being denied access to the server in this manner or at all.

7.30 We do not accept that all ISO auditees had access except the claimant. This allegation fails.

12.13 On 17 November 2021, the claimant's access to SharePoint was revoked/lost one day before the audit. The claimant reported this to Mr Hughes but was met with no response. The claimant also followed up with a Microsoft Teams message to Mr Hughes but was met with no response. All ISO auditees had access except the claimant. *Not contained in the ET1 (no amendment, no objection)*

7.31 This is not set out adequately in the claim form. It is not addressed in the claimant’s evidence. The respondent denies that there is any revocation of access to SharePoint on 17 November and we accept the respondent’s evidence on this. This allegation fails.

12.14 On 25 November 2021, the claimant's access to security management of his remit was restricted but all his team members and direct reports had full super-admin access. The claimant was asked to manage and regulate the security access with his team despite not having access himself. As the claimant was not given access to the portal, he was unable to verify if the access was legitimate and had to repeatedly ask Mr Mandal for confirmation. *The comparator relied upon is Diganta Mandal. Not contained in the ET1 (no amendment, no objection)*

7.32 This is not set out adequately in the claim form. To the extent the claimant argues that all team members and direct reports had administrative access, that is wrong. They did not. We have already considered Mr Mandal’s access to the portal and the reasons for it; we do not need to consider that further. It was appropriate to limit access to the security

system. It did not prevent the claimant from undertaking his duties, for the reasons given already. This allegation fails.

12.15 On 15 December 2021, Mr Hughes shared a report with the claimant, detailing the items related to his remit, but he did not have access to the Password Policy due to having no access to SharePoint. All ISO auditees had access except the claimant. This specific allegation relating to the Password Policy is not in the ET1 although a general complaint of not being granted access to *SharePoint is at paragraph 6 of the ET1 (no amendment, no objection)*

7.33 This allegation is not in the claim form. There is nothing about it in the claimant's statement. The claimant was asked to create a password policy for RightSpend in line with the corporate policy. He did not object to doing this. It was part of his role. To the extent there is a general complaint about access to SharePoint, we have considered that elsewhere. We reject any suggestion that there is evidence that the claimant could not undertake his duties in relation to the creation of a password policy. If there had been difficulties, on the balance of probability, he would have raised them. He did not. This allegation fails.

12.16 During the period 15 – 22 December 2021, the claimant was given artificial deadlines and demands two days prior to his annual leave contrary to what the respondent's auditors had said. The claimant alleges that the certification was already submitted prior to 22 December 2021, but he was emailed during his annual leave when Ganesh Pandi could have assisted the respondent. The respondent wanted the claimant to work during his annual leave. The comparators relied upon are Iain Seers and Dominic Hughes. *Paragraph 9 of the ET1 (no amendment, no objection)*

7.34 This concerns Mr Seers' requirement of the claimant to produce a BCP⁵ for RightSpend. The claimant was not placed under artificial deadlines. Production of the BCP had been part of his duties since he started his employment. The need to complete this had been flagged after the audit, but the claimant had not dealt with this. The matter was raised again shortly before the claimant's holiday. It was discussed. There was an exchange of emails. It was made plain the claimant did not have to deal with the matter until his return.

7.35 The suggestion the claimant had already submitted sufficient information is unsustainable. We have noted that the claimant's contribution was a brief paragraph, which was clearly inadequate. Mr Seers dissatisfaction was justified.

7.36 We accept the respondent's explanation. The claimant was asked to do a BCP for RightSpend because it was needed and it was within his agreed duties. He had more than adequate time.

⁵ Business continuity plan.

7.37 We accept the claimant's evidence that he was on leave from 17 December 2021. Therefore, the contact starting 20 December 2021 was within his holiday. The claimant was a senior member of staff. It is not unusual for senior members of staff to be contacted during holiday. There is nothing to suggest that any senior member of staff was treated differently. There are no facts which we could find that this was an act of discrimination. This allegation fails.

7.38 There is a specific allegation of age discrimination at 15.1

15.1 From November 2021 – September 2022, the shares that were identified to be allotted to the claimant were not promptly registered in his name at Companies House. The comparators relied upon are Dermot Hough, Gehan Talwatte, John Hornby, Tiffany Crow and Dominic Hughes). Paragraph 7 of ET1 (no amendment, no objection)

7.39 It is wrong to say that the shares were not properly registered in the claimant's name. They were registered in September 2022. It is difficult to see what is said to be the detrimental treatment. The shares had been supplied to the claimant. He was responsible for the initial delay from April 2021, as he failed to sign the documentation. When he signed it, the shares were his. This was not dependent upon registration. Registration was an administrative task, and it may have been overlooked. In any event, registration was delayed for two other individuals who signed share documentation at a similar time. There is nothing to suggest that the treatment was detrimental. To the extent that it was in some manner unwelcome to the claimant, he was not treated differently to others. There were two other individuals, who were essentially in the same material position, whose registration was equally delayed. The explanation is that if there was a delay, it was an administrative oversight. We accept that explanation. This allegation fails.

Harassment

7.40 When considering harassment, the following steps must be taken into account. First, did the alleged treatment occur. Second, are there facts from which it could be decided harassment was the purpose. Third, if harassment was not the purpose, did it have the effect of harassing. Fourth, did the conduct relate to the protected characteristic. The claimant relies on the protected characteristics primarily religion and race. I have also considered age.

7.41 With this in mind, we consider each of the allegations.

5.1 The claimant was intentionally prevented from performing his role by Dominic Hughes. Dominic Hughes withheld information from the claimant and refused to share it. The claimant communicated this to Dermot Hough but this conversation was then "leaked" to the CEO, Iain Seers. The claimant was excluded from certain meetings relating to ISO27001 ("ISO") where task ownership was

mentioned against his name without his knowledge during the period between 5 May 2021 and 16 November 2021. Paragraph 3 of ET1 (*no amendment, no objection*)

7.42 We have explored the claimant's role. For the reasons we have already given, he was not prevented from undertaking his role. There is no evidence the respondent withheld information relevant to the claimant's role. There is no evidence that the respondent failed to share information relevant to his role. The claimant was not excluded from meetings. He was not asked to perform tasks in any inappropriate manner. There is no treatment capable of being harassment. The treatment received did not relate to a protected characteristic. This claim fails.

5.2 From May 2021 to December 2021, the claimant was excluded from the ISO27001 project by Dermot Hough and Iain Seers and replaced by someone else in an unofficial capacity. Paragraph 4 of ET1 (*no amendment, no objection*)

7.43 The claimant does not address this in his statement. The claimant was not excluded from the ISO compliance project. He was not responsible for the project. It was not within his job remit. He was involved to the extent appropriate to his duties. The treatment neither had the purpose of harassing, nor the effect. The treatment was not related to any protected characteristic.

5.3 During the same period, the claimant was unfairly asked to perform at short notice without being given visibility over the responsibility and tasks. The claimant was excluded from over 20 meetings where task ownership was mentioned against his name without his knowledge for 7 months. Paragraph 4 and 4.1 of ET1 (*no amendment, no objection*)

7.44 This is a wide-ranging allegation. It is not adequately particularised. It is not adequately dealt with in the claimant's evidence. It was not adequately put to any of the respondent's witnesses. We find the claimant was not asked to perform tasks, unreasonably, at short notice. We find there was no evidence that he was not given sufficient visibility over the task for which he was responsible. There is no basis on which we could find the claimant was excluded from any meeting to which he had a legitimate expectation of attendance. The treatment received did not have the purpose of harassing him and it did not have the effect. The treatment did not relate to any protected characteristic.

5.4 On 28 September 2021, Dominic Hughes (Operations Director) arranged for a pen test. Mr Hughes did not include the claimant and instead included his team member when the responsibility and remit for the completion of the test was within the claimant's job description and accountable for the outcome. Not in the ET1 (*no amendment, no objection*) 5.5 On 5 November 2021, Mr Hughes told the claimant he would send an addendum to Code Apogee which the claimant had asked him to send in October 2021. The claimant, having been excluded from the meetings referred to in paragraph 5.1, was later asked by Mr Hughes to 'take

the lead' on the addendum without being part of those meetings. *Not in the ET1 (no amendment, no objection)*

7.45 This allegation is not adequately pleaded. It was not dealt with adequately in the claimant's evidence. The claimant did not adequately challenge any of the respondent's witnesses. We have considered the pen test. We have limited information. We find the claimant was kept informed. The claimant knew it was happening. He claimed responsibility for the successful outcome. This treatment did not have the purpose of harassing the claimant and it cannot be said to have had the effect. The treatment did not relate to any protected characteristic. This allegation fails.

5.5 On 5 November 2021, Mr Hughes told the claimant he would send an addendum to Code Apogee which the claimant had asked him to send in October 2021. The claimant, having been excluded from the meetings referred to in paragraph 5.1, was later asked by Mr Hughes to 'take the lead' on the addendum without being part of those meetings. *Not in the ET1 (no amendment, no objection)*

7.46 This allegation is not in the claim form. The claimant does not give evidence in his statement. We have considered this allegation in the context of direct discrimination. The treatment received by the claimant was not detrimental. The treatment had neither the purpose nor the effect of harassing. It was not related to any protected characteristic.

5.6 The claimant was excluded from the Audit prep meeting on 16 November 2021, despite being one of the auditees. *Not in the ET1 (no amendment, no objection)*

7.47 the position in relation to the audit preparation meeting of 16 November 2021 has been considered in the context of the direct discrimination claim. This allegation is not in the claim form. The alleged circumstances are not dealt with in the claimant's statement. The claimant had no expectation of being involved in the meeting on 16 November 2021. The treatment had neither the purpose nor the effect of harassing the claimant. It was not related to a protected characteristic.

5.7 On 25 November 2021, the claimant was asked to action the filled ISO questionnaire from Code Apogee by Mr Hughes on short notice. *Not in the ET1 (no amendment, no objection)*

7.48 This allegation is not contained in the claim form. It was not in the claimant's statement. It was not put to any witness. This appears to concern the security questionnaire. We have considered it above. This was part of the claimant's legitimate duties. The treatment had neither the purpose nor the effect of harassing the claimant. It did not relate to a protected characteristic.

5.8 From June 2021 – January 2022, the claimant reached out to the Board of Directors (namely Dermot Hough (CFO), Iain Seers (CEO) and Gehan Talwatte (Non-Executive Director) via Microsoft Teams and email for assistance in relation to alleged harassment and bullying but his concerns "fell on deaf ears." The claimant also regularly discussed this with Tiffany Crow (Director of Client Services). *Paragraph 8 of the ET1 (no amendment, no objection)*

7.49 The claimant has given inadequate evidence. Neither the manner in which he alleges he reached out, nor the response he received, is dealt with adequately in the claim form or the witness evidence.

7.50 Prior to 9 April 2021, the claimant indicated to Mr Hough there were some teething problems. There is no suggestion that the problems continued or that Mr Hough failed to respond. The claimant did not reach out to Mr Seers at all. The respondent accepts the claimant may have emailed Gehan Talwatte, a non-executive director, but any conversations were project related. Ms Tiffany Crowe was a director of client services and had no oversight on the claimant's role. It appears that he had private conversations with her and that she sought to reassure him. She did not know that she was being covertly recorded. In no sense whatsoever did she fail to respond. We have considered the transcripts of the calls with Tiffany Crowe, insofar as the claimant has referred to them. We find they are not supportive of any assertion that the claimant was treated in any manner either because of or related protected characteristics.

7.51 It is unsustainable for the claimant to say that he reached out in relation to alleged harassment but his concerns "fell on deaf ears." There is no evidence on which we could reach those conclusions. We find the treatment had neither the purpose nor the effect of harassment. The treatment did not relate to a protected characteristic.

5.9 Mr. Hough, who was responsible for HR matters, asked the claimant to follow the company's grievance procedures and withdraw his resignation. However, Mr. Hough forwarded every communication from the claimant to Mr. Seers, the person against whom the grievance was made. Mr. Hough then asked Mr. Seers to draft the response and, in some cases, even edited and confirmed the response before sending it back to the claimant. *Paragraph 12.5 refers to asking the claimant to follow the Company's grievance procedure. The rest of 5.9 does not appear in the ET1 (no amendment, no objection)*

7.52 We have considered the potential grievance procedure. The claimant did not raise a grievance, albeit one was indicated in his letter of resignation. He failed to adequately set out the basis of his grievance at any time. It was reasonable for the respondent to suggest that he follow the grievance procedure. It was the claimant who objected to the respondent's grievance procedure. The respondent went further than it need to by proposing that it employ an independent HR consultant to hear the grievance. There is evidence that there was some discussion between the respondent's senior managers and the HR consultant. However, the

discussions were administrative and in no sense whatsoever support a conclusion that there was an attempt to influence the HR consultant.

7.53 The respondent's approach to the potential grievance neither had the purpose nor the effect of harassing the claimant. It was not related to any protected characteristic.

5.10 The HR also discussed the grievance with the people who were the subject of the grievance. Then arranged a meeting with these individuals to discuss the grievance raised and terminated all access to limit evidence collection or fair process. *Paragraph 12.5 and 12.5.2 of the ET1 (no amendment, no objection)*

7.54 we do not accept there is adequate evidence that there was any improper discussion between the HR consultant and any senior manager. This treatment neither had the effect nor the purpose of harassing. It was not related to a protected characteristic.

5.11 The claimant repeatedly informed HR that the grievance process was not independent, and that the individuals against whom the grievance was made could not be involved in conducting or overseeing the grievance procedures. The claimant requested an independent process, but this request was denied. *Paragraph 12.6.1 of the ET1 (no amendment, no objection)*

7.55 The claimant complains that no independent grievance process was put in place. We do not accept that assertion. An independent process was put in place, albeit the respondent had no obligation to do so. The claimant chose not to engage. He did not send proper details of his grievance. The claimant's action stopped any grievance proceeding.

7.56 The respondent's approach did not have the purpose of harassing nor did it have the effect. It was not related to protected characteristic.

5.12 The respondent, after initially denying the claimant's request for an independent grievance process, finally agreed to set up an independent process by hiring someone in their network. However, it was later discovered that this independent HR consultant was also drafting responses and advising the respondent in the grievance raised by the claimant. The respondent also engaged in fraudulent practices during this series of events, including tampering with evidence. As a result, the claimant was denied the right to a fair and impartial grievance procedure. *Paragraph 14, 14.1, 14.4.1, 14.4.2 of the ET1 (no amendment, no objection)*

7.57 This is repetition. For the reasons we have given, the respondent's approach to the potential grievance was not an act of harassment.

5.13 The claimant, after being denied a fair and impartial grievance process by the respondent, suggested that the Board of Directors conduct an independent investigation. However, the Board sided with the CEO, CFO, and HR, the individuals against whom the claimant had a grievance. The Board failed to conduct their own fact-finding and provide an impartial grievance procedure. As a

result, the alleged individuals were allowed to continue their fraudulent practices. *Paragraph 14.3 although there is no reference to the claimant suggesting the Board of Directors conduct an independent investigation.*

7.58 This is repetition. For the reasons we have given, the respondents approached the potential grievance was not an act of harassment.

Wrongful dismissal

7.59 It is the claimant's case he resigned because the respondent was in breach of contract. The claimant relied on the implied term of mutual trust and confidence. He stated that there was no breach of an express term of the contract. He essentially relies on the allegations of harassment and/or discrimination as cumulative acts which when taken together led to a breach of the implied term of mutual trust and confidence.

7.60 We find there were no acts of direct discrimination. There were no acts of harassment. As for each of the alleged detrimental acts and the alleged acts of harassment, we have rejected them; we found that the respondent behaved reasonably and appropriately. The emails to the claimant were unfailingly reasonable, supportive, and appropriate. When the claimant indicated that he could not get access to documents, the respondent's senior managers, particularly Mr Hughes, were helpful and supportive. The respondent was reasonable in denying the claimant administrator status on SharePoint. The respondent's reasons were rational and appropriate. We find that at no time was the respondent in breach of contract. As the respondent was not in breach of contract, it was not open to the claimant to accept a breach and treat himself as dismissed. It follows that his resignation was not a dismissal.

7.61 The respondent alleges the claimant was in breach of contract. The definition of confidential information in the claimant's contract was wide. At paragraph 9.3 it referred to goods and services, business methods, know-how, suppliers and customers, and affairs generally.

7.62 Paragraph 9.5.1 of his contract concerns using and disclosing confidential information. He was not permitted to make any recordings of any confidential information.

7.63 Paragraph 9.5.2 forbade the claimant from removing, recording or copying confidential information.

7.64 Paragraph 11.1.2 allowed the respondent to terminate the contract with immediate effect for any serious or persistent or material breach of obligation.

7.65 At the start of his employment, the claimant used his own laptop. This was permitted. He immediately commenced to record every Teams meeting and every conversation. When he received the employer's laptop, he downloaded, without the employer's consent, a program called

“Glean.” This allowed him to record all conversations which went through the computer. He recorded Teams meetings and telephone calls. Those recordings included at least one confidential board meeting.

- 7.66 The claimant breached his contract in numerous ways. Downloading and using Glean without the respondent’s permission had the effect of covertly recording confidential information. Recording that confidential information was in breach of contract. The fact that the recording was covert may have been a breach of contract in itself. The claimant suggests that the recordings were held on the respondent’s One Drive. The claimant accepts that at some point he downloaded recordings onto his own devices. He suggests that he was justified in doing so, as they formed evidence in this case. We find he was not justified in doing so. If those documents remained on the respondent’s One Drive, they were documents which should have been disclosed during the course of this hearing, and the claimant would have been entitled to them. The fact that his intention was to use the documents in these proceedings did not permit the claimant to circumvent the judicial process of disclosure. His action was a breach of contract. It had the effect of obtaining, and retaining, confidential information in a way which was forbidden by his contract. This was a serious breach and we find it was fundamental.
- 7.67 The respondent has alleged the claimant was dishonest. It relies on alleged covert recording and the claimant’s alleged destruction of his computer by wiping the operating system. The claimant denies any dishonesty. We do not need to resolve this, as the respondent was not in breach of contract, and the claim for wrongful dismissal fails in any event.

Employment Judge Hodgson

Dated: 19 April 2024

Sent to the parties on:

8 May 2024

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For the Tribunal Office