EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr M Mwangi	**AND**	(1) D Monitoring Ltd
		(2) Mr P Salah

Heard at London Central Employment Tribunal by cloud video platform
Date: 5-16 February 2024 and 18 March 2024

Before: Employment Judge Nash
Members: Mr Benson
` Mr Fryer

For the Claimant: In person
For the Respondents: Mr P Sands, Solicitor

JUDGMENT having been sent to the parties and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Following ACAS early conciliation against the First Respondent from 11 December 2020 to 22 January 2021 and against Mr Salah (originally the Fourth Respondent now the Second Respondent) from 10 December 2020 to 21 January 2021, the Claimant presented his first claim on 19 February 2021. He then started ACAS early conciliation again against the First Respondent on 1 December 2022 and received a conciliation certificate on 12 January 2023. He presented a second claim on 10 February 2023 against the First Respondent only.

2. In this Judgment when the Tribunal refers to "the Respondent" this refers to the First Respondent unless otherwise stated.

3. This case has had an unfortunate procedural history including significant delays. There have been a number of case management order and case management hearings, which includes the case being postponed at a hearing on 3 May 2023 when the claims were consolidated.

4. The Claimant had originally claimed against the First Respondent, its French parent company, and eight other individuals - including Mr Salah. The Claimant withdrew his claims against all Respondents, save for the First Respondent and Mr Salah.

5. This hearing was recorded. The Tribunal was subsequently informed that the recording had stopped for one hour at 15:30 on 9 February 2024 due to an unexplained technical issue.

Timetabling

6. The hearing suffered from a significant number of preliminary and logistical issues. The hearing was listed for eleven days to determine liability and remedy, but due to a shortage of judicial resources only ten days were available. Much of the first day was lost due to the Tribunals service double booking and the Tribunal not having any employer Member; fortunately, a replacement Member was sourced.

7. Further considerable delay was caused by the failure by both parties to prepare effectively for the hearing. This caused numerous preliminary and other logistical issues at the beginning of and during the hearing. In addition, the tribunal was interrupted and delayed by significant IT and logistical shortcomings on the part of the Tribunal Service, particularly the operation of the cloud video platform.

8. The Claimant who was unrepresented explained that he had significant mental health issues and needed frequent breaks including three times a day to take medications. The Tribunal adjusted its procedure by breaking each day at the specific times for the Claimant to take his medication, reminding the Claimant, when necessary, with the assistant of Mr Sands. It further checked with the Claimant as to whether he was able to proceed after reconvening.

9. On the sixth day the Claimant informed the tribunal that he was feeling ill but wished to continue. The Tribunal proposed and the claimant agreed an adjustment whereby he answered questions for 45 minutes with a 15-minute break. Upon hearing the Claimant give evidence, the Tribunal amended this with the claimant's consent to 30 minutes of questions with a 15-minute break. In the event, the Claimant was able to give evidence within the allotted timeframe.

10. Finally, the listing proved short, and the case went part heard on discrete points to 18 March 2024.

Disclosure and documents

11. The Tribunal had sight of a bundle to 1164 pages and all references are to this bundle unless otherwise stated. The hearing was significantly delayed by a number of disclosure issues as follows. The claimant was unrepresented and found it difficult at

times to explain what the issue was. The tribunal spent considerable time going through his concerns to ascertain the true position.

12. Firstly, the Claimant sought to persuade the Tribunal to draw adverse inferences from the Respondents' failure to comply with a subject access request under Data Protection legislation and his request for specific disclosure in these proceedings.

13. The Tribunal from the file established the following chronology with which the parties did not disagree. The Claimant sent a subject access request contained in his grievance to the Respondent on 19 June 2020. The respondent refused this on a number of grounds. During proceedings on 1 August 2022 the Claimant asked the Respondent to disclose all WhatsApp messages between him and Mr Salah. On 17 October 2022 the Claimant emailed the Respondents including a request for all (unspecified) emails. There were a number of further requests from the Claimant to the Respondents for specific disclosure including on 27 December 2022, but none included WhatsApps and emails. The Claimant made a further application for specific disclosure to the Tribunal at the 3 May hearing 2023 before Employment Judge Baty, not in respect of WhatsApps and emails, but for an HR file. The tribunal had refused this application.

14. The second issue was the Tribunal's order to the Respondent to provide the claimant with access to what was described as its TRM (sometimes referred to as CRM) system in respect of his calculation of commission. The Respondent purported to comply with this order. The Claimant contended that the compliance was not effective. The Tribunal made an unless order on 26 April 2022 against the respondent in this respect:

> 1.Unless by 13/5/22 the First Respondent has allowed the Claimant access in London (not exceeding two consecutive working days from 9am to 5pm and if necessary remotely and if necessary under supervision) to its TRM client management system from 19/7/2019 to 25/4/22 including sales data so that he can formulate and quantify his commission claim, the First Respondent's defence to the commission claim may be struck out both as to liability and quantum and judgment maybe entered for damages/wages in relation to that claim to be assessed on the Claimant's evidence/estimates only.

15. The claimant contended that the respondent had failed to comply with the unless order, so the response to the commission claim should be struck out. This issue had been set aside for this Tribunal to determine.

16. None of the manifestly relevant documents including the order itself were contained in the bundle. The tribunal sought to establish the chronology from the tribunal electronic files, which it could not be confident were complete, and which took some time.

17. The tribunal directed itself in line with *Minnoch and ors v Interserve FM Ltd 2023 ICR 861*. The tribunal did not find that it was easy to determine whether there had been

material noncompliance with the unless order. It was unclear what was included in the term "access" for a particular purpose, that of quantifying a claim. After considering the correspondence on the tribunal file (none of which was included in the bundle and which it was unclear if it was complete), the tribunal was not satisfied that there had been material non-compliance. The file indicated that the respondent contended that it had complied. There was correspondence in which the parties disputed what was meant by "access", for instance did it include the generation of documents which did not already exist, and whether or not the data supplied was sufficient to allow the claimant to quantify his claim.

18. The tribunal directed itself in line with *Wentworth-Wood and ors v Maritime Transport Ltd EAT 0316/15*, that the subject of the unless order 'must be able to see from its terms what is required to comply with it; an order cannot be read expansively against the party who has to comply'.

19. The tribunal also applied *Uwhubetine and anor v NHS Commissioning Board England and ors EAT 0264/18* that if there is any doubt as to what constitutes compliance, this should be resolved in favour of the party subject to the order. In the circumstances and bearing in mind the "draconian" consequences for the commission claim, the tribunal was not satisfied that there was material noncompliance with a clear unless order and refused the strike out.

20. The tribunal reminded the parties that they might make submissions and invite the tribunal to draw inferences in respect of access to the respondent's system. In the event, neither party drew the tribunal's attention to this order during evidence or submissions, nor asked the tribunal to draw any inferences from any failure to comply.

21. Thirdly, the Claimant told the tribunal that the respondent had failed to include all the documents he requested in the bundle. The Tribunal accordingly directed him to provide a list of those documents. The Claimant listed specifically three documents: -

a. a transcript of a video recording. It transpired that the transcript of half the recording was in fact in the bundle whilst there was no transcript of the second half.
b. a pension scheme document which had not been disclosed before both parties agreed would only be relevant to remedy and
c. the contract of employment, which was in the bundle.

<u>Witnesses and evidence</u>

22. The Tribunal heard on behalf of the Respondents from the following witnesses who swore to their written statements: -

a. Mr Jako Vanjole, the respondent's EMEA Sales Director at the material time.
b. Ms Beatrice Vassay, Chief Financial Officer,

c. Mr Matthew Harpe at the time Global Head of Sales and Director of Sales for Emea,
d. Mr Theo Naccache, Vice President for the Respondent's parent company who heard the grievance,
e. Ms Oceane Russier a HR Generalist for the Respondent's parent company and
f. Mr Phillipe Salah the Second Respondent, the CEO of the First Respondent and its parent company.

23. All witnesses swore to their written statement.

24. The witness statements did not all comply with tribunal orders. All parties provided statements which breached the case management order as to statement length. No party had applied for permission to rely on a statement which did not comply with the tribunal order.

25. For the Respondent, Mr Harpe's statement was considerably over length. The Claimant's statement was over four times the permitted length. The Claimant's statement was at the beginning chronological and coherent, but as it went on, it became notably less coherent, and the chronology broke down. The statement did not cover all the issues. Further, the claimant's statement was not cross referenced to the bundle. Following the tribunal's order, the Claimant provided a cross referenced version during the hearing.

26. The Claimant also relied on a statement dated 20 August 2021 from a Mr Sennhauser who was Global HR Director for the First Respondent and its parent company at the material time. The Claimant at the Tribunal's direction sent an email at the beginning of the hearing to ask Mr Sennhauser to confirm that he was in fact attending. The Claimant told the Tribunal that he received no reply from Mr Sennhauser who did not in the event attend the hearing. No explanation for his non-attendance was provided.

27. There were a number of issues with Mr Sennhauser's statement. The Claimant made allegations of race discrimination against Mr Sennhauser in his witness statement which the Claimant expressly confirmed he still relied on. Mr Sennhauser was one of the original individual Respondents in these proceedings, which claim was later withdrawn. Unfortunately, it was not possible from the Tribunal file to ascertain if Mr Sennhauser had been served with proceedings prior to the withdrawal of the claim against him.

28. In the circumstances as he had failed to attend without explanation, was not cross examined or on oath, and the Claimant had made allegations of race discrimination against Mr Sennhauser, the Tribunal was unable to attach meaningful weight to Mr Sennhauser's statement.

29. Although both parties were in breach of the Tribunal order as to statement length the Tribunal in line with the overriding objective permitted the parties to rely on their

witness statements, but reminded the parties that oral evidence must be strictly limited to the issues.

30. There was an issue as to the order of witnesses. The majority of the Respondent witnesses lived abroad and had to travel specifically to the United Kingdom to give evidence, as their respective countries had failed to give the necessary permission.

31. Following discussion with the parties and with their consent the Tribunal scheduled witness evidence as follows. It first heard from the Claimant who would then be released from his oath before he finished his evidence. It next heard from Mr Vanjole, Mr Naccache, Ms Vassay and Mr Harpe. Then the Claimant went back on oath to give further evidence. He was then released again over the weekend and his evidence finished on the sixth day, the Monday. Finally, the Respondent final witnesses Ms Russier and Mr Salah gave evidence. The Tribunal determined that this was a proportionate way of dealing with both the Respondent availability and providing the Claimant with significant breaks during his evidence.

The Claims

32. There were three claims before the Tribunal under the first claim: -

a. direct race discrimination under s.13 Equality Act 2010
b. racial harassment under s.26 Equality Act 2010
c. unlawful deductions from wages under s.13 Employment Rights Act 1996.

33. At the beginning of the hearing the Respondent invited the Tribunal to dismiss the second claim 2201331/2023 because the Claimant was in material noncompliance with an unless order dated 10 January 2024.

34. The Respondent took no issue with any failure to comply with the first and second limbs of the order as in effect this did not put it to any material disadvantage. However, it took issue with the Claimant's noncompliance with the third limb of the order, which stated: -

> unless by seven days from the date of this order the Claimant sends to the Respondent and the Tribunal his witness statement in his second claim number 2201331/2023 which relates to his dismissal. His second claim was then dismissed WITHOUT FURTHER ORDER.

35. The unless order also provided a short synopsis of the Claimant's failure to comply with orders.

36. Accordingly, Claimant was ordered to provide a witness statement in respect of his second claim no later than 17 January 2024. The Claimant contended that he had complied with this unless order by virtue of his witness statement dated 17 February 2021. However, he had no reply to the Tribunal's queries to how a statement of that

date could relate to a dismissal which occurred on 4 November 2022. The witness statement did not refer to the dismissal. The Tribunal was accordingly satisfied that the Claimant was in material noncompliance.

37. The Tribunal directed itself in line with the authorities referred to above. It found that the unless order was drafted in clear and unambiguous terms. It required a statement referring to dismissal and the order did not refer to any other documents. Everything the Claimant needed to understand to enable him to comply was clear on the face of the order itself. Further, he had first been ordered to provide this statement by 11 December 2023, at the case management hearing which he had attended on 3 May 2023. This hearing had addressed the second claim at some length.

38. The Respondent contended that witnesses going to the second claim were abroad and calling them to give evidence would put the respondent to prejudice. Further, the respondent would be severely prejudiced by the Claimant's failure to provide witness evidence going to the second claim.

39. The Tribunal was satisfied that respondent witnesses going to the dismissal had not been called to give evidence at this hearing because their evidence did not go to the first claim.

40. The Claimant contended that the claim should not be struck out because the Respondent should have phoned him, rather than contacted him in writing, about his failure to comply with the order.

41. He further contended that he was unable to comply with the unless order due to illness. There was no explanation as to why he had been unable to provide a witness statement before the date of the unless order. The Tribunal noted that the Claimant had written to the Tribunal on 18 January - one day after the expiry of the unless order - making representations but failing to provide his witness statement. Accordingly, he was able to engage on his case with the order at least one day after its expiry date. Despite this by the date of this hearing, he had still failed to provide his witness statement.

42. Accordingly, the tribunal struck out the second claim because of the claimant's material non-compliance with the unless order.

43. The Tribunal reconsidered its decision as to strike out as it transpired that the claimant had sent a message to the Tribunal on 11 January, and neither party had taken the Tribunal to this. Upon reconsideration, the tribunal did not vary or revoke its decision. The 11 January message did not alter the fact that the Claimant was in material noncompliance with the unless order, and although he was sufficiently recovered to write to the Tribunal on the 18th, he remained in material noncompliance up to the date of the hearing.

The Issues

44. The Tribunal had sight of an agreed list of issues in the bundle.

45. In respect of the acts of discrimination relied on there were some amendments such as dates and duplications and the Tribunal will deal with these amendments in its reasons.

46. The Tribunal granted an amendment issue 11.2 in the list of issues to enable the Claimant to bring a claim for salary up to May 2022, in line with the existing case management order that commission was claimed up to this date.

47. The issues are referred to in *underlined italics* within the judgment.

The Facts

48. The Respondent is an English company which is a wholly owned subsidiary of a French company Dental Monitoring SAS. The Respondent's business model is essentially remote orthodontics. A dentist sets up a patient with the respondent's teeth straightening system and thereafter the straightening is remotely monitored with the patient seeing the dentist rarely or not at all. Dentists firstly sign up with the Respondent for access to the products, and then the dentists sign up their individual patients to use those products.

49. The tribunal was not informed of when the French company set up its English entity, the respondent. However, it was a relatively new entity when Mr Harpe, who was at that time the Respondent's Global Head of Sales and based in Spain, head hunted the Claimant in November 2018. The Claimant had previously worked with Mr Harpe in another company. Mr Harpe thought the Claimant would be a good fit for a product specialist, which is essentially a salespersons role.

50. The Claimant started work as a contractor with the Respondent on 28 January 2019. The written contract stated that they had a "work relationship". The Tribunal was not taken to any TOIL clause or policy in this or any contract.

51. At first, the respondent's head count was only Mr Harpe with the Claimant reporting directly to him. The tribunal accepted the Claimant's evidence that his base salary of £40,400 was supplemented by up to about 20% in respect of commission and incentives. The incentive scheme was at page 554 and there were two types of incentive as follows.

52. Firstly, when a salesperson signed up a dentist and the dentist paid for a welcome pack - which permitted the dentist to access the Respondents products - the salesperson would receive a one-off incentive payment of two hundred euros. The incentive would be reduced in line with any discounts given.

53. Secondly, when that dentist signed up individual patients, the salesperson was entitled to commission depending on the number of patients who were being actively monitored at any one time. Essentially the more patients the dentist was monitoring, the higher commission the salesperson would receive, up to a maximum.

54. There was some disagreement between the Claimant and Mr Harpe about incentives being correctly monitored and paid they both blamed the other. Mr Harpe referred to an incentive spreadsheet created by the Claimant as "a big mess", but he did not provide any template spreadsheet to assist salespeople in calculating their commission.

55. On 17 June 2019 Mr Harpe was promoted and the European Sales Director role fell vacant. The Claimant gave unchallenged evidence that the Respondent took on Mr Sanjay Jariwala as chief strategy officer. Mr Jariwala became in effect the number two to Mr Salah as CEO. The Claimant's contention was that Mr Harpe felt slighted because he previously been number two to Mr Salah. The Claimant referred to this as in effect a turf war between Mr Harpe and Mr Jariwala.

1.2 On 1 July 2019 members of the sales team were informed by Sanjay Jariwala that the Claimant was the Product Specialist Lead UK to the client, but he was not told about this and did not receive any pay increase or promotion.

56. On 1 July 2019 Mr Jariwala sent an email to an important potential client referring to the Claimant as Product Specialist Lead UK. The Respondent's case was this was little more than a mistake in the email. In his witness statement the Claimant said that this gave him a boost as it was a senior role, although he was aware that this role did not exist.

1.3 On 3 July 2019 the Claimant was promoted to Head of UK Sales by the Fourth Respondent, but he never received his pay increase and this was later revised to a 3 month secondment until someone else was recruited for the role (in November 2019). The Claimant alleges that Sanjay Jariwala/Mathew Harpe were responsible for this.
1.4 From 3 July 2019 the Claimant did not receive the pay rise and promotion which had been promised.

57. On 3 July 2019 Mr Salah visited from Paris and met with the Claimant and Mr Jariwala. Mr Salah told the Claimant he was extremely impressed with the Claimant's performance. There was a conflict as to what happened next. Mr Salah's account of the conversation is that he intended to offer the Claimant a role of UK Sales Manager, but he had told the Claimant this was expressly subject to the approval of Mr Harpe, and salary was not fixed. The Claimant's account was that he was offered and accepted the promoted role. His pay was agreed to be £80,000, the only thing which remained to be agreed was the exact pay and benefit - because this was an issue with respect to budgets.

58. In the Claimant's witness statement, he stated that Mr Salah had said the salary would be £80,000 but he might not be very generous in respect of commission. (When another candidate was later appointed to the UK Sales Manager role, the salary was £80,000 basic.) According to Mr Harpe's witness statement, Mr Salah had offered the Claimant the role and Mr Harpe then intervened. There was no mention in Mr Harpe's statement of any conditionality as to the offer of the promotion, still less Mr Harpe in effect having a veto. Mr Harpe told the Tribunal that Mr Salah was excited and impulsive, but in Mr Harpe's view, performance in one meeting was an insufficient basis for such a significant promotion. He said Mr Salah was not used to hiring salespeople, being the CEO.

59. The Tribunal found that Mr Salah did make an offer of the role of UK Sales Manager to the Claimant which he accepted. There was no mention of Mr Harpe having a veto, because Mr Harpe did not refer to this. Further, such a veto did not fit with Mr Harpe's evidence that he objected to Mr Salah failing to carry out an informal recruitment process. The Claimant gave consistent evidence as to what happened at this meeting. He unilaterally volunteered that his salary would have been £80,000, which was the correct salary for the role and the Tribunal could not see how he could have known this, unless Mr Salah had told him.

60. Mr Harpe objected strongly to the Claimant being made the UK Sales Manager. By this time there were clear strains in the relationship. Mr Harpe said that he had received complaints from the Australian Branch about the Claimant. The Claimant countered that the Australians put appointments into his diary in the early hours of the morning due to the time difference. According to an email in the bundle, there had been complaints from various dentists about the Claimant not turning up and one dentist saying that he did not trust having the Claimant in his clinic. The Claimant says that he told Mr Harpe that Mr Harpe was making his life a "living hell" and how did Mr Harpe expect him to be in Newcastle as well as being in London? The Tribunal was unsure if the claimant had said this at the time but found that there was tension in the relationship, and each was blaming the other.

61. Mr Harpe emailed his team on 3 September 2019 in respect of team and business structure in the United Kingdom. He said it was not yet time to have a UK office, and there was no mention of a UK Sales Manager. Mr Harpe further said in his statement that two colleagues including Ms Holland had said they would leave if the Claimant became their Line Manager, as UK Sales Manager. (Ms Holland when spoken to during the grievance investigation stated that she would have been unhappy at having the Claimant as her manager but did not state that she would leave.) In view of the Tribunal Mr Harpe was exaggerating Ms Holland's views but she would have objected to the Claimant's promotion.

62. On 29 September 2019 the Claimant emailed Mr Harpe asking him to add the point of UK Sales Manager to his agenda stating, "I would like to have a clear and defined process, so we are on track". Mr Harpe replied, "in order to be prepared for UK Sales Manager" and set out various tasks. Mr Harpe mentioned that he was concerned

at the Claimant making doubtful claims about his personal life, such as his children playing for premier league clubs or an orchestra or knowing Hollywood stars or having access to private jets. Mr Harpe had strong views on these matters as illustrated during the Claimants grievance when after his interview he ran back to say that the Claimant was boastful. Further, before the Tribunal, he added further allegations of boastfulness against the Claimant. Mr Salah to some extent backed up these allegations by saying that the Claimant had made claims about his personal life in February 2020.

63. The claimant did not know who his employer as UK Sales Manager would be - the English company or the French company. The Claimant stated that he had been WhatsApp(ing) the Senior Leadership Team (SLT) and in effect they kept putting him off. The Tribunal accepted that the Claimant was chasing the Respondent about the Sales Manager position. This would be the logical thing to do in the circumstances.

1.6 Between July and October 2019 the Claimant recommended five candidates for roles who were not appointed by Mathew Harpe (1 – in July/August 2019; 2 –in July 2019; 3 - in July 2019; 4 in October 2019 and 5 - in July 2019).

64. The UK entity - which was to become the Respondent - was meanwhile recruiting and building up its teams. The Respondent paid a £2,500 bonus to staff as a finder's fee for successful candidates. Prior to 3 July Mr Harpe had recruited a candidate recommended by the claimant.

65. From July to October the Claimant recommended a further five candidates and none were recruited by Mr Harpe. The Claimant's view was that he was the UK Sales Manager at this time and Mr Harpe was deliberately preventing him from assembling the team that he wanted. The Claimant stated that no one else apart from his five candidates were interviewed for the five roles. Mr Harpe gave a different explanation for why each candidate was not recruited. Candidate One had not prepared a presentation, although she complained the necessary material was provided too late. Mr Harpe was unhappy about the professionalism of this candidate and the Claimant sent a WhatsApp to Mr Harpe, "I am shocked and utterly disappointed by that message from [candidate one]".

66. Mr Harpe said he could not recall Candidates Two and Three at all in the witness statement, although there was an email in the bundle showing the Claimant had sent in at least one of their CVs.

67. Mr Harpe said that in effect he could get Candidate Four to come to interview because she was reluctant. Mr Harpe said that Candidate Five was a strong candidate and narrowly missed being appointed because they had another candidate with better skills and experience. The Claimant stated that candidate number five did have better experience but had not necessarily worked with the Respondent's technology.

68. The Claimant said that Mr Harpe had told him that he would not appoint anyone the Claimant recommended. The Tribunal did not accept that accept that Mr Harpe had

said this as there is no contemporaneous evidence and it was not consistent with Mr Harpe offering interviews to three of the candidates and having appointed one candidate before July.

69. The Claimant said that he had also successfully recommended a candidate as UK Office Manager, but Mr Harpe was not involved in this recruitment.

70. The Claimant was concerned at the delay in paying his finder's fee. He stated that another employee also experienced delay in receiving their finder's fee.

1.7 On 2 August 2019 the Claimant's performance review was delayed a month by Mathew Harpe and then never took place.

71. Mr Harpe said this review was delayed but it did occur. It was put to the Claimant that the documents showed that the performance review had taken place. He stated under questioning from the Tribunal that he was not referring to a performance review but to the business plan, which was already in the list of issues at 1.10. Accordingly, the Tribunal did not consider the August performance review.

1.8 From September 2019 the Claimant was required to cover two roles without sufficient support and/or remuneration, being required to work very long hours.

72. The Claimant alleged that he was told to cover two roles - UK Sales Manager and Product Specialist. It was not disputed that the Claimant carried out a great deal of training. The tribunal accepted he was working on setting up the respondent's physical office. He with the help from UK office manager - when she was appointed – got the UK office up and running.

1.9 On 4 October 2019 the Claimant was described as Head of Sales by Matthew Harpe despite not being promoted into or paid for that role.

73. It was agreed that this was mis-stated in the list of issues and the correct date was 1 October. However, the Claimant then said that Mr Harpe had announced he was Head of Sales at a meeting on 4 October at a team meeting, which Mr Harpe denied.

74. The Tribunal had sight of Mr Harpe's email of 1 October in which he referred to the Claimant's "pending role". Mr Harpe could not tell the Tribunal what this referred to. The Tribunal found the reference was to the UK Head of Sales. The Tribunal did not accept Mr Harpe's contention that this might have been a later role, a DSO role. Mr Harpe in an email on 7 November 2019 stated he had only come up with the DSO role plan that day. Further, the 1 October email referred to leading from a UK sales perspective which fitted with a UK Sales Manager role.

75. Accordingly, the Claimant at this date could still reasonably think that his promotion was going ahead or was a realistic prospect. Mr Harpe was still leading him to believe this.

76. On 14 October 2019 Mr Harpe sent an email to a senior manager, Mr Van Weelde containing very significant criticisms of the Claimant, which he stated had come to light in the last week or two. He stated that he had a "gut feeling" that something was not right regarding the Claimant's general conduct, his trust in him, the Claimant's relationship with the team and overall integrity. These were the main reasons he was not prepared to promote the Claimant to Sales Manager. Mr Harpe's email went further to state that he was considering managing the claimant for under performance, that the Claimant had been negligent in admin matters, that background and information given from the Claimant's ex colleagues and customers was very negative, and that the claimant had left his previous job on bad terms. Whilst he saw the Claimant work hard and get on very well with customers, he was a strange and complicated character and, "completely fooled most people".

77. In October the First Respondent was incorporated as a UK company.

1.10 From 14 October 2019 the Claimant was supposed to present a business plan to the Fourth Respondent, Mr Jariwala and Mr Harpe ahead of a presentation in Paris; but meetings were cancelled and he was not provided with the necessary information.

78. This was agreed to be the same issue as 1.7. The Claimant was expecting to present a business review for the entire UK as part of his becoming the UK Sales Manager. The meeting was cancelled due to scheduling difficulties and the respondent accepted that after this, the meeting did not occur. The Respondent said that by the time it had overcome the scheduling difficulties it had decided not to promote the Claimant.

79. Mr Harpe's evidence as to the business plan was inconsistent. He stated that the business plan was to help the claimant's personal development towards getting ready for a management role. However, in his witness statement at paragaraph 42 he said the respondent wanted to help the Claimant prepare for an interview for the UK Sales Manager role. The tribunal preferred the evidence in his witness statement as it was consistent with the original plan to promote the claimant. This was further evidence that at the time the Claimant had good reasons to believe that if the Sales Business Manager position was yet his, it would be soon.

1.11 On 29 October 2019 the Claimant Mr Harpe informed the Claimant that he did not support his promotion and had informed the Fourth Respondent of this.

80. On 20 October 2019 Mr Harpe told the Claimant in Paris that he would not support the Claimant's promotion. In his grievance the Claimant said that this meeting happened on 29 November, but the Tribunal found that this was a mistake and he meant 20 October. Both men referred to a lunch meeting in Paris on this date.

81. The Claimant described himself in his grievance, in June 2020 when he was off sick, as being broken by this conversation. He went to say that Mr Harpe had passed on

to him considerable and detailed criticism of his performance, which he sought to counter. For instance, he suggested they both speak to the dentist who had complained, but Mr Harpe refused.

82. The Claimant up to this point had been working on individually owned dental practices. The Respondent was also looking sell to large businesses which owned a number of individual practices, this was referred to as DSO. The main difference between the two customer types was that in DSO there were many fewer clients - only a few corporate entities, but each contract was potentially more profitable as it would cover a number of individual practices.

83. On 7 November 2019 at page 632 Mr Harpe emailed Mr Salah and Mr Jariwala referring to a plan he had put together that day. He stated that Mr Jariwala had done more research on the Claimant, and the feedback was better than from other former colleagues of the Claimant. They were satisfied the claimant was not the "time bomb" they had perhaps feared. Nevertheless, trust and performance issues remained. The Claimant had only managed one person before and was not ready for a management role.

84. Mr Harpe referred to the Claimant as clearly good at sales and training but needed coaching. He proposed a suitable solution - to appoint the Claimant as DSO UK Lead, where there were a least three large clients, potential or current. This would be a three-month secondment and Mr Jariwala could review to see whether the Claimant could be made permanent. Mr Harpe would continue in effect managing sales unless they could find someone new or, otherwise, they would use Mr Vanjole (which was in fact what happened).

85. Mr Salah was surprised at Mr Harpe's change of heart about the Claimant. Mr Harpe stated, I actually think the Claimant can do a good job here with support and monitoring and this is a far more suitable role. He referred to DSO as, booming.

86. In November 2019 the Claimant needed a written contract of employment to secure a mortgage. The First Respondent was now incorporated so it was able to issue contracts in its own name. The Claimant signed a contract of employment with the First Respondent on 1 November 2019 as a Product Specialist at a salary of £40,400.

1.12 On 27 November 2019 Benjamin Jay was promoted to National Sales Manager for France.

87. Mr Jay who was white was appointed National Sales Manager for France. This was announced on 27 November 2019. The Claimant relied on Mr Jay as an actual comparator.

88. The Tribunal did not find that Mr Jay's circumstances were materially the same to those of the claimant. This was a different role in a different country. The tribunal heard no evidence about how Mr Jay was appointed.

89. The tribunal did not understand the claimant to be claiming that the promotion of Mr Jay was a free-standing act of discrimination. In any event, this act was not unfavorable treatment of the claimant who did not apply for this position.

1.13 From November 2019 the Fourth Respondent stopped taking the Claimant's calls and did not return his messages.

90. Mr Salah denied this. His account was that he only received one message which he did fail to reply to, but the claimant did not chase him. The claimant stated that call logs would have proved otherwise and asked the tribunal to draw an inference from the respondent's failure to disclose these. However, there was no evidence that these had been requested from the respondent. Further, the Claimant accepted that he did have some conversations with Mr Salah after November 2019.

1.14 On 5 December 2019 Mr Jariwala offered the Claimant a 3 month secondment into the DSO Team but did not provide the details of this (salary, commission) in writing as requested.

91. The claimant organised an event for the Mysmile Network in London on 5 December 2019. The Claimant said that he signed up a number of individual dentists at this event and sold them welcome packs and would therefore be entitled to incentive payments. The Respondent's case was that the Claimant had not signed up the Mysmile dentists and unidentified other salespeople had done so.

92. Mr Harpe was setting up the logistics to transfer the Claimant to DSO. The claimant was unaware of this until Mr Jariwala told him on 5 December that the respondent was considering his secondment to DSO. The Claimant asked questions about terms and what the effect would be on the UK Sales Manager role. Mr Jariwala said he would come back with details and the Claimant could decide. However, nothing was forthcoming, although Mr Salah told the tribunal the DSO role was a promotion for the claimant.

93. The Tribunal accepted the Claimant asked questions about how the new role would work, as he had been let down over the UK Sales Manager role. He would want things in writing this time.

1.15 On 7 January 2020 Mr Harpe announced to the Respondent that the Claimant had a 3 month secondment to the DSO Team as an Account Executive without him having agreed to the role change.

94. The Tribunal accepted that the Claimant had not accepted this change of role. Whilst he sent a company-wide email saying, thank you for an amazing opportunity, the tribunal accepted his evidence was he felt he had no choice but to comply because the role was already announced.

95. Mr Harpe's evidence before the Tribunal was notably inconsistent. He firstly said that he did not know about the DSO secondment. The tribunal did not accept this because it was entirely inconsistent with the contemporaneous emails. He next said that he had conversations before January with the Claimant about the DSO role, and then said the conversations were with Mr Jariwala. Therefore, the Tribunal accepted that the claimant was in effect "bounced" into accepting the DSO role without knowing any details.

1.17 In February 2020 Jacco Von Jole told the Claimant that he could not hire or support him to be the UK Sales Manager as he did not know the Claimant.

96. The Respondent appointed Mr Vanjole as its European Sales Director from 6 January 2020. He set out to appoint a Sales Manager for the UK. According to his contemporaneous emails, he understood from a conversation with the Claimant and Mr Harpe that there was a difference of opinion about whether that role had been offered to the Claimant or not. The role was not currently being fulfilled.

97. Mr Vanjole suggested to the Respondent by email of 28 January 2020 that the respondent offer the Claimant an interview for the Sales Manager role. The claimant either would be successful or not, and that would be the solution to the situation. However, Mr Vanjole never got an answer.

98. By 3 February 2020 the interview process had started for the UK Sales Manager. Accordingly, the tribunal found that Mr Vanjole made the comment to the Claimant that he could not appoint him, in January before the recruitment started.

99. Mr Vanjole having not received a reply to the messages, did not interview the claimant for the UK Sales Manager role. The Tribunal found that either Mr Harpe told Mr Vanjole not to interview the claimant or Mr Vanjole in was given to understand that the Claimant was not to be interviewed. Therefore, the Respondent failed to follow Mr Vanjole's advice, and accordingly an active decision not to interview the Claimant was made. (In April the Respondent appointed Mr David Drew who was white as UK Sales Manager. Mr Vanjole thought he was interviewed in February / March.)

100. Mr Vanjole and Mr Jariwala in an email referred to a lack of certainty about what was to happen to the Claimant at the end of his secondment to DSO. Mr Jariwala referred to the Claimant needing to be 100% DSO by mid-January and Mr Vanjole made it clear that the Claimant was still doing the Product Specialist role, rather than the DSO role. At least part of the reason was he did not have replacement staff to back fill the Claimant's Product Specialist role, especially if the claimant he might be returning to it. They planned to transfer the Claimant's non-DSO accounts by February.

101. Mr Harpe and Mr Jariwala's plan to move the Claimant to DSO was not working as well as they had hoped. Mr Vanjole said that if they kept the Claimant in the DSO role throughout 2020, there would be plenty of new opportunities by 2021.

102. On 3 March 2020 the Claimant was finally able to hand over his product specialist role, including the Mysmile accounts.

103. Mysmile was a network of individually owned practices which pooled certain functions, such as training. It was therefore a hybrid between individual practices and large corporations. The Claimant had been instrumental in reaching heads of agreement with Mysmile as to the terms on which all Mysmile practices would contract with the Respondent. Mr Jariwala agreed the Claimant would get a benefit from this.

104. The Claimant contended on several occasions that Mr Jariwala had said that he would receive the incentive payments for all Mysmile accounts whether or not he personally signed up the individual practice. The Respondent contended that he was only entitled to payments for those Mysmile accounts he had personally signed up; the incentive went to whoever had signed up the practice.

105. The Tribunal found that Mr Jariwala had not told the Claimant he would receive a benefit when other salespeople signed up a Mysmile practice. This would be unworkable. A salesperson would have little reason to sign up a Mysmile account if the commission went to the Claimant. Further, there was no suggestion the Claimant had the capacity to service all Mysmile practices. This was nothing more than a vague promise by Mr Jariwala.

106. It was clear from the documents that the transfer of Mysmile accounts was a complex process. The Claimant invoiced the respondent for incentive payments for Mysmile practices which he said he had signed up in the December training session and a second training session in February in Manchester.

1.16 In February 2020 on a Google Hangout call Mr Jariwala said that it was a risk to have someone like the Claimant as UK Sales Manager.

107. The Tribunal accepted that Mr Jariwala said this at this meeting. It was plausible in that the Claimant was upset that he had not received the promised UK Sales Manager Role and was continuing to raise this. Mr Jariwala was frustrated by the Claimant not accepting what had happened.

108. The Claimant gave inconsistent evidence as to whether race was mentioned at this meeting. The claimant said that when Mr Jariwala said he was a risk, the Claimant asked whether this was because the Claimant was black? However, his statement at paragraph 322 was drafted so as to suggest that Mr Jariwala had said that a black man was a risk; the Claimant accepted in tribunal that Mr Jariwala had not said that. Under cross examination the claimant accepted that race was not mentioned at all. The claimant had not said that there was any mention of race in this conversation in his grievance in 2020. The Tribunal found the Claimant an unreliable witness in this regard.

1.18 In May 2020 the Claimant had to take sick leave, which impacted his finances.

109. On 4 May 2020 the Claimant asked HR for a formal and confidential meeting. He asked Mr Sennhauser for help. He said that his mental health was adversely affected. He referred to himself as, drowning, and as having broken completely. For the avoidance of doubt the Claimant's email of 4 May was not a grievance. It made no reference to a grievance and was expressly a request for help.

110. Mr Sennhauser organised a meeting but had to cancel for an unavoidable reason. In his absence, Mr Salah instructed Ms Russier to arrange a meeting as a form of mediation. There was a meeting in May between HR, the Claimant, Mr Jariwala and Mr Vanjole. The Claimant was emotional in this meeting. Mr Sennhauser described him in the grievance investigation as shouting. Little if anything was achieved by this meeting. Mr Sennhauser then suggested the Claimant took sick leave.

111. The Claimant said that he spoke to ACAS in May 2020, and they did not mention employment tribunal time limits to him.

112. On 25 June 2020 the Claimant was signed off sick initially for four weeks, in fact never to return.

1.19 On 15 September 2020 the Claimant's grievance, which he alleges was not investigated adequately, was not upheld by Beatrice Vassy/Theo Naccache.
1.1 The Claimant was not paid commission that he was owed from June/July 2019. (see issue 1.5 below)
1.5 From 19 July 2019 the Claimant was not paid commission he was owed and enquiries he made about this were not responded to in a timely manner.

113. On 19 June 2020 the Claimant submitted a grievance in respect of the promotion to Sales Manager, secondment to DSO, Mr Jariwala's conversation on 12 February, his treatment by Mr Jariwala since February, accrued annual leave and commission, and HR treatment of his email of 4 May - essentially a breach of confidentiality. The grievance including a subject access request for all personal data for Mr Salah, Mr Jariwala, Mr Harpe, Mr Vanjole, Mr Sennhauser and Ms Russiea and anyone inside or outside the Respondent who was not referred to in his grievance "where he was discussed". The request expressly included email, skype, text and WhatsApp messages.

114. The Chief Financial Officer Ms Vassay was appointed to hear the grievance. She investigated the commission issue. She obtained data from the respondent and entered it into an excel spreadsheet (page 1072). The parties agreed this spreadsheet to be an accurate record of the commission for Mysmile and non-Mysmile accounts claimed by the Claimant, both at the time and before the Tribunal.

115. Against each non-Mysmile account Ms Vassay set out the respondent's explanation as to why payment was not due to the Claimant. For instance, the payment had already been made, the Claimant was not the owner of the account, the practice

paid late, or the practice never paid at all. (The Respondent paid commission on income not booking.) The parties agreed that the one non-Mysmile account was an error, and that the Claimant should in fact have been paid for this. He was paid in September 2020.

116. The respondent's position was that the claimant had not sold the Mysmile welcome packs in the spreadsheet and so was not entitled to the commission. The claimant said he had sold the packs.

117. The tribunal accepted the claimant's evidence that he sold the Mysmile packs in the spreadsheet at the December and February meetings for the following reasons. The Respondent had invested a considerable amount of its limited resources - the claimant - into two meetings where it trained large numbers of dentists. The tribunal could not see why the respondent would have wasted the opportunity to sign up practices at the meetings. All the Mysmile accounts were invoiced on the same day 1 March 2020, which was consistent with the Claimant handing over the Mysmile accounts around this time. If other salespeople had sold these packs, there was no explanation as to why they would all wait to invoice on the same day. Whilst the spreadsheet contained individual explanations for failure to pay the non-Mysmile accounts, there was no such explanation in respect of the Mysmile accounts.

118. Accordingly, the Claimant was duly entitled to the commission.

119. Ms Vassay invited the Claimant to a grievance meeting. However, he then withdrew his accceptance by way of a letter of 1 July. His stated reasons for refusing were that he had explained his grievance at the mediation meeting and did not wish to go through it again, as it was accepting his ill health. Further he had already provided a very detailed grievance. He also provided further grievance points - that other colleagues did not give him tasks, and his authority was being demeaned. He stated he intended to apply to the Employment Tribunal.

120. The respondent treated this letter as the second part of the grievance.

121. It was considered that Ms Vassay had a conflict and therefore the grievance was moved to Mr Naccache. Mr Naccache had never done a grievance before. The Claimant provided Mr Naccache with a considerable amount of extra material. The Respondent sent him questions to which he did not reply.

122. Mr Naccache interviewed nine people, a tenth Mr Colluci was not willing to speak to the grievance investigation.

123. Mr Naccache spoke to Mr Harpe who said that the Claimant had been bullying team members. No one else including Mr Harpe in his later witness statement or before the Tribunal referred to this. Mr Harpe told the grievance that the Claimant had been aggressive. Mr Harpe misleadingly said that the claimant did not get the chance to present the business plan because he accepted the DSO role, when Mr Harpe and the Senior Leadership Team had decided to prevent the claimant from presenting the plan.

124. Mr Salah said that he offered the Sales Manager role to the Claimant subject to Mr Harpe's veto. Ms Russier told Mr Naccache that the Claimant was very upset and shouting in the mediation meeting. She said that the Claimant had not followed the annual leave application process. He had carried over eighteen days in 2019 and was still accruing leave whilst on sick. Mr Naccache interviewed Mr Jariwala on 2 September 2020. Mr Jariwala denied being present when Mr Salah offered the Claimant the Sales Manager role and denied saying that he had told the Claimant he was a risk.

125. Mr Naccache spoke to Ms Sardo who was a witness to the 12 February conversation. She did not remember it well. She was not asked about the risk comment and did not volunteer it. Mr Naccache did not speak to all witnesses to the conversation. He did not interview Mr Dogra and a black employee Mr Azoua although they were both still in employment.

126. Ms Holland told the grievance that she did not think the Claimant was a good fit for UK Sales Manager, but he was excited about the DSO role, and had told her that he had turned down the Sales Manager role. She found he had become bossy after this, but it did not amount to harassment. She did not say she threatened to leave if he was appointed.

127. Ms Vassay told Mr Naccache the Claimant had been paid all his commission. Mr Vanjole confirmed he did not get an answer to his emails about interviewing the Claimant for the UK Sales Manager.

128. Mr Naccache rejected the Claimants grievance by way of a letter on 15 September 2020. The six plus page letter went through each allegation. Mr Naccache found that Mr Jariwala did not recall the "risk" comment and neither did the witnesses to this conversation.

129. The Claimant appealed the grievance on 9 December 2020. One ground of the appeal was that Mr Colluci, Ms Dogra and Mr Azoua had not been interviewed.

130. Mr Van Weelde - who was the recipient of the negative feedback from Mr Harpe on page 625 – heard the appeal.

1.20 On 4 December 2020 the Claimant was invited to a disciplinary hearing.

131. The Claimant continued on sick leave. The Claimant told the Tribunal that during his sick leave he became extremely ill. Whilst the claimant disclosed his GP notes during proceedings, neither party put them in the bundle. (The claimant did not include these documents in the list of documents he contended the respondent had failed to include in the bundle.)

132. The latest Claimant sick note expired on 15 November 2020. The Respondent wrote a sympathetic letter on 18 November 2020 advising him of this, and asking if he was doing ok - as things were difficult because of Covid lock down. The Claimant did not

reply. The respondent emailed again stating that it had failed to get through on the telephone and he should reply if and when he could. There was no reply. On 26 November 2020 the Respondent emailed the Claimant stating he was unauthorised absent and threatening a disciplinary if he did not contact them.

133. The Claimant told the Tribunal it was very difficult to get a GP appointment. He only got one on 25 November and then emailed the sick note to the Respondent on 27 November 2020. Unfortunately, he sent it to an old email address, and it was not received. The tribunal found that due to his being off sick he did not notice that the respondent had been sending emails from a new HR email address.

134. On 2 December 2020 the respondent invited the claimant to a disciplinary hearing (the list of issues date was incorrect). The claimant re-sent the sick note to the new HR email address and the Respondent cancelled the disciplinary.

135. On 19 February 2021 the Claimant met the Appeals Officer via Zoom. He presented his claim to the Employment Tribunal the same day. He told the tribunal that it was at this time that ACAS first mentioned tribunal time limits to him.

136. The Claimant remained off sick and on 9 March 2021 his GP wrote to the Respondent stating that he was suffering from severe depression which had significantly worsened after a recent meeting with the employer, with whom he should have no further contact. The tribunal understood this to be a reference to the appeal meeting.

137. Mr Van Weelde provided the grievance appeal outcome on 15 March 2021, which was over thirteen pages long. He had not spoken to Mr Jariwala or Mr Sennhauser who had by that time had left the Respondent employment. He had interviewed Ms Dogra and Mr Colluci (who had agreed to cooperate). The Claimant had queried what Mr Jariwala meant by risk and when Mr Jariwala had refused to clarify, the Claimant became upset. Mr Colluci and Ms Dogra said they did not witness anything to suggest racial discrimination in the conversation.

138. Because Mr Colluci and Ms Dogra agreed on the account, he did not consider it necessary to speak to Mr Azoua. He found in respect of the 12 February conversation that Mr Jariwala did say the Claimant was a risk, and he was taking a risk with the Claimant.

139. The Appeal Officer expressly accepted the Claimant's account of the conversation set out in his grievance. (This account made no reference to race.) He found that it was inappropriate for Mr Jariwala to say this and that he had handled the conversation poorly and not offered support that might be expected. This fell below acceptable and expected managerial conduct. However, there was no evidence in respect of race or bullying.

1.20 On 4 December 2020 the Claimant was invited to a disciplinary hearing.

140. It was agreed that the date of 4 December 2020 was an error, and the correct date was 31 March 2021. Although this act occurred after the presentation of the claim, it was included in the list of issues by order of the Judge at an earlier case management hearing.

141. According to the disciplinary letter of 31 March 2021 to the Claimant: -

> "…you posted a comment which directly responded to a comment posted by Philippe Salah (Dental Monitoring CEO) and which made an assertion which was clearly directed at him and the Dental Monitoring leadership team. Your comment asserted that Mr Salah "allows, condones and facilitates racism and discrimination from his most senior leadership team." Your comment clearly identifies you as an employee of Dental Monitoring.
> You made this comment in a public forum (LinkedIn) which is regularly seen by Dental Monitoring colleagues and clients, creating likely severe damage to Dental Monitoring's (and its CEO and leadership team's) reputation,.
> When requested to remove this comment urgently, you refused to do so, albeit we understand you did subsequently remove the post.

142. The Claimant did not attend the disciplinary meeting on sickness grounds.

143. In cross examination he said he did not remember posting these comments. The Claimant's evidence in regard was notably unsatisfactory. He firstly failed to deny posting the comments and said that he did not recollect. He then said that because Mr Salah's name was not mentioned, the postings could not be to do with the Respondent. However, this was incorrect – Mr Salah's name was included. He denied tagging the respondent but was taken to a post where he tagged the respondent. He finally said in terms that the post did not exist and that the Respondent had in effect fabricated it.

144. Due to these inconsistencies and the documentary evidence, the tribunal found that the claimant had posted the comments.

1.22 In April 2021 the Claimant had his use of the company car and mobile phone terminated.

145. On 1 April 2021 the HR Director emailed the Claimant saying that the respondent had hoped he would return to work, but because of his long-term absence it would cease paying his car allowance. On 19 April 2021 it wrote to inform him that the £40 monthly phone allowance would also cease from the same date.

146. On 8 April 2021 the Claimant's GP sent a letter saying he was not fit to attend a disciplinary hearing because his mental health had deteriorated significantly. On 29 April the Respondent wrote again stating that the benefits were provided to permit him to perform his role and were being withdrawn because he was on long time sick. The

Claimant raised a point before the tribunal that he was locked into a phone contract and therefore the withdrawal of the phone benefit was unjust. He did not raise this at time, and the Respondent did not address this.

147. On June 2021 the Respondent received the Claimant's GP records. On 7 June 2021 the GP wrote to the Respondent concerning the Claimant's mental state, saying he was suffering from depression and anxiety and had scored highly for both on questionnaires. He had thoughts of self-harm and was suffering from poor sleep. The doctors were trialing anti-depressant medication. He was unable to concentrate on work or think clearly and was poor at performing daily tasks. It was not possible to provide a prognosis as to recovery.

148. The disciplinary process was accordingly delayed. The Respondent then reinvited the Claimant to a disciplinary meeting on 9 November 2021 stating that he had posted further derogatory comments about the Respondent and Mr Salah on LinkedIn.

149. The Respondent dismissed the Claimant for gross misconduct on the basis of the LinkedIn posts on 4 December 2022, his effective date of termination. The Claimant did not attend the dismissal meeting or make any representations.

The Law

150. The law in respect of race discrimination is found in the Equality Act 2010 as follows:

> *13 Direct discrimination*
>
> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> *26 Harassment*
>
> (1)A person (A) harasses another (B) if—
>
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b)the conduct has the purpose or effect of—
>
> (i)violating B's dignity, or
>
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B….
>
> (4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a)the perception of B;
>
> (b)the other circumstances of the case;
>
> (c)whether it is reasonable for the conduct to have that effect.

136 Burden of proof

(1)This section applies to any proceedings relating to a contravention of this Act.

(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

151. The law in respect of unauthorized deductions from wages is found at s.13 of the Employment Rights Act 1996 as follows:

13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

23 Complaints to employment tribunals.

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2))…

(2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or…

(3)Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

152. The law in respect of working time is found in the Working Time Regulations 1998 at Reg 13(9) :-

Entitlement to Annual Leave

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but—

(a)it may only be taken in the leave year in respect of which it is due, and

(b)it may not be replaced by a payment in lieu except where the worker's employment is terminated.

Submissions

153. The Tribunal received written submissions from the Respondent which were shared in advance with the Claimant. It heard short oral submissions from the Respondent and lengthy oral submissions from the Claimant.

Applying the Law to the Facts

Liability

154. The Claimant had originally presented his claim against the First Respondent and also its French parent. He withdrew the against the French parent company as recorded in the Tribunal judgment of 26 August 2021.

155. At this hearing the First Respondent expressly accepted it was liable for any acts of its French parent, prior to its own incorporation. As a result of this concession the

Tribunal did not enquire further as to liability. All discrimination claims were made against both Respondents. The Employment Rights Act claims were against the first respondent only.

Direct race discrimination s.13 Equality Act 2010

156. In this case, the acts as found by the Tribunal relied upon by the claimant were not inherently discriminatory, therefore (as per James v Eastleigh Borough Council [1990] IRLR 572), the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact.

157. The tribunal reminded itself of the guidance in Nagarajan v London Regional Transport 1999 ICR 877, HL (a case under legacy race legislation but relevant to section 18) as follows,

> 'Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

158. It does not matter if the decision-maker was consciously or subconsciously motivated by a protected characteristic. The tribunal asks why they acted as they did.

159. The Tribunal also had regard to the comments of Lord Phillips, then President of the Supreme Court, in *R* (*E*) *v Governing Body* of *JFS* [2009] UKSC 15, also a case under legacy race discrimination. In deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent. This is simple shorthand for determining whether the proscribed factor operated on the alleged discriminator's mind. Whilst any discriminatory reason must be an effective cause of treatment, it does not have to be the only reason.

160. The Equalities and Human Rights Commissions Employment Code states that the protected characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

161. The House of Lords in *Najaragan* stated that for discrimination to be made out "racial grounds" (the material test at that time), it must have a significant influence on the decision. According to *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT* (a legacy sex discrimination case relating to pregnancy), the discriminatory reason does not have to be the main

reason, as long as it is an effective cause. See also the judgment of the *Employment Appeal Tribunal in Amnesty International v Ahmed* [2009] IRLR 884.

162. As to the burden of proof, the Tribunal directed itself in line with the guidance of the Court of Appeal in *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

163. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

164. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*: -

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

If the Claimant does not prove such facts, the claim will fail.

165. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

166. The Tribunal also directed itself in line with *Hewage v Grampian Health Board* [2012] UKSC 37 that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have

nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

167. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

> "No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."'

168. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) stated that tribunals,

> "…must avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

169. On these facts the tribunal was able to make positive findings on the evidence one way or the other. It was therefore not found necessary to work mechanistically through the provisions of the burden of proof case. To put it another way, the tribunal determined "the reason why" the respondent had acted as it had.

170. Essentially the Claimant's explanation as to why he believed that the reason for less favourable treatment was his race, was the simple unfairness of his treatment. And in particular Mr Harpe mentioning first and secondhand stories about the Claimant's making claims about this private and family life, for instance, his children playing for premier league clubs or an orchestra, or his knowing wealthy people. Mr Salah also made the allegations, calling him a fantasist.

171. The Tribunal found Mr Harpe's concern with this somewhat odd. Taking Mr Harpe's case at its highest, the Claimant had an outgoing and boastful personality, perhaps not an unusual personality trait in a successful salesperson.

172. The tribunal considered each alleged act of discrimination.

1.2 On 1 July 2019 members of the sales team were informed by Sanjay Jariwala that the Claimant was the Product Specialist Lead UK to the client, but he was not told about this and did not receive any pay increase or promotion.

173. In the view of the Tribunal this was not unfavourable treatment. The Claimant saw it as a positive at the time. In any event there was no evidence or indication that this was any racial motivation. It was job title inflation in front of an important client.

1.3 On 3 July 2019 the Claimant was promoted to Head of UK Sales by the Fourth Respondent, but he never received his pay increase and this was later revised to a 3 month secondment until someone else was recruited for the role (in November 2019). The Claimant alleges that Sanjay Jariwala/Mathew Harpe were responsible for this.
1.4 From 3 July 2019 the Claimant did not receive the pay rise and promotion which had been promised.

174. The Tribunal found that the Claimant and Mr Salah reached an agreement over the promotion. The only outstanding matter was benefits and commission, which was likely to be less than 20% - Mr Salah had said that he would not be particularly generous as to commission.

175. For the reasons set out below under the s.13 claim the Tribunal found this was an effective agreed variation of contract, which the Respondent subsequently breached.

176. The Respondent treated the Claimant very poorly. There was an agreement as to a very significant promotion including a doubling of salary. There was every reason at the time for the Claimant to expect the Respondents to deliver on this agreed variation of contract. The Claimant made eminently sensible attempts to get clarity on his new role, but he was ignored or obstructed.

177. The Respondent did not promptly tell the claimant it had changed its mind about his promotion. He was given a false impression by references to a pending role change and to presenting a business plan as an interview for the role. Unbeknownst to the Claimant, he fell victim to a secret and forceful rearguard action by Mr Harpe to stop the promotion.

178. The Tribunal considered Mr Harpe's motivation and the motivation of Mr Jariwala and Mr Salah in not opposing this.

179. Firstly, Mr Harpe. The tribunal reviewed the evidence. Mr Harpe relied on a gut feeling and made serious allegations about the claimant's integrity. Mr Harpe suggested

that he had lost trust in the Claimant, he stated that he "completely fooled" people. This was inconsistent with the account Mr Harpe gave in evidence – that the Claimant was a good salesperson but did not yet have the skill set for management, and that Mr Salah's approach to recruitment was inappropriate. Mr Harpe had other reasons for objecting to the promotion - organizational issues with the Claimant, dentists chasing poor contact, and adverse background information from former colleagues which was received as and when these were taken on. On the other hand, Mr Harpe gave the Claimant credit for hard work and getting on well with customers.

180. The Tribunal firstly considered Mr Drew as a comparator. Was Mr Drew either an actual or an evidential comparator? Mr Drew was appointed to the same role as the Claimant i.e. the UK Sales Manager and whilst the Claimants offer was withdrawn, Mr Drew's was not. However, the Tribunal found that there were material differences in the circumstances. Mr Salah of his own motion and without reference to his Senior Leadership Team and out with any formal recruitment process offered the position which did not exist yet, to the claimant. He was then effectively stopped by his direct report, Mr Harpe. The Claimant was in post and to some extent a known quantity. The situation with Mr Drew was entirely different - a formal recruitment involving HR and he was an external candidate.

181. The evidence indicated that this formal process produced a good quality appointment, Mr Drew who was later promoted. In the view of the tribunal, it cannot have helped the Claimants sense of injustice and of a hidden hand that, by the time of his dismissal in late 2021, Mr Drew was the person in post who dismissed him.

182. Mr Vanjole was new to the situation in early 2021 which he summed up well when saying the Claimant was still very upset as he felt he had been promoted and this had not happened. He came up with a sensible solution - include the Claimant in the recruitment process along with other candidates. In view of the Tribunal the failure to interview the Claimant was for the same reason that the original offer was withdrawn.

183. The Respondent provided the Tribunal with no statistics on its racial makeup. While the Tribunal accepted this might be restricted in France it was not the case in the UK. There was no evidence of any other black person at management level or looking to be promoted to management level. There was no sign of anything other than cursory discrimination or equality training. No witness referred to discrimination / equality training save Mr Harpe in answer to a direct Tribunal question. Mr Harpe referred to online tests of which the Tribunal saw no evidence. However, the Respondent had a good quality harassment policy, including racial harassment. The Tribunal took into account the Respondent was a new and small company at the material time, but there was no evidence that it had expanded discrimination training several years later.

184. However, this was a racially mixed workforce particularly at senior level - Mr Harpe was mixed race and Mr Jariwala was South Asian. We were not informed of Mr Salah's racial origin, but we understood that he was not white. The Respondent had a

number of other nonwhite employees and at least another one black employee in the London office.

185. Mr Harpe had employed the claimant twice, once in a previous role and had headhunted him for this role. He had not worked closely with the Claimant before in their previous roles. This was not inconsistent with his judging the claimant based on his performance with the respondent. The Claimant himself in his witness statement and before the Tribunal relied on a non-discriminatory explanation for Mr Harpe's conduct - essentially a turf war between Mr Harpe and Mr Jariwala for access to Mr Salah. The tribunal accepted that Mr Harpe would want to determine his own team, rather than Mr Salah doing so without his input. As the Claimant accepted, this was one of the reasons that Mr Harpe stepped in to stop the Claimant becoming UK Sales Manager. Mr Harpe made representations to Mr Salah that this was not a good way to recruit and Mr Salah accepted that Mr Harpe had a point. Mr Salah had in effect shot from the hip and later realized that this was not the best way to recruit.

186. Mr Harpe's views of the Claimant were volatile. Mr Harpe heard negative things from the Claimant's former colleagues, but later recruits were less negative, and he was not "the timebomb" they had feared. Once there was no risk of the Claimant being imposed on Mr Harpe as UK Sales Manager, Mr Harpe set to work to have the Claimant transferred another role. There was no sign he was trying to exit the Claimant out of the company. Whilst Mr Jariwala was unhappy with the Claimant in the DSO role by February, he had originally agreed to this. Further, there was no indication that he had intervened to stop the promotion to Sales Manager when he was present at the meeting. On the claimant's case, Mr Harpe objected to the claimant's promotion to undermine Mr Jariwala.

187. Mr Harpe's references to the Claimant's account of his personal life (to some extent echoed by Mr Salah) were not straight-forward racial stereotyping. It was hard to see Mr Harpe's doubt as to a black person playing top level football in London as racially stereotyped, although a reference to an orchestra might be potentially seen that way. The tribunal found that the references were insufficiently clear to draw an inference.

188. The tribunal saw evidence in the bundle that the Claimant had some issues with organisation and administration. For instance, Mr Harpe described the Claimant's spreadsheet as a "big mess" before promotion was an issue. The tribunal accepted that Mr Harpe did receive at least some criticism of the Claimant from customers and colleagues. Some criticism may not have been fair because of time zones and the Claimants inability to cover the entire country at the same time, but that did not stop Mr Harpe being influenced. There was evidence of London colleagues criticizing the claimant in the grievance process which suggested that Mr Harpe was not alone in his concerns over the claimant's suitability.

189. Viewing the evidence holistically, on the balance of probabilities, the reason for Mr Harpe's, Mr Jariwala's and Mr Salah's conduct was not race. Mr Harpe's motivation was his desire to have control of his own team. Having recruited the Claimant on two

previous occasions, what changed was not the Claimant's protected characteristic but the fact that Mr Harpe felt Mr Salah had undermined his ability to run his own team, the fact that there was a turf war and the fact that Mr Harpe had gained experience of working closely with the Claimant.

1.1 The Claimant was not paid commission that he was owed from June/July 2019.
1.5 From 19 July 2019 the Claimant was not paid commission he was owed and enquiries he made about this were not responded to in a timely manner.

190. The Tribunal as set out below found that the claimant was owed commission from the Mysmile accounts on the spreadsheet in page 1072. The failure to do so was unfair. The respondent did not treat the Mysmile matter with the care that it required.

191. The Tribunal sought to establish when a decision was made not to pay the Mysmile commission. The chronology showed that it must have been about the time the Claimant went off sick that is in June 2020 and this was revisited during the grievance investigation by Ms Vassay.

192. The Tribunal found that the failure to pay was not because of race for the following reasons.

193. Firstly, for the same reasons as set out at issue 1.3. The Respondent had paid the Claimant his commission before, although there had been issues or errors with the claims. Whilst the claimant took issue with Mr Harpe's failure to provide a pro forma spreadsheet, this was not aimed at the claimant – no one had access to a spreadsheet. What had changed was the Claimant was off sick and essentially was not around to fight his corner over this commission, for instance, the Tribunal could not see that the claimant told the respondent in terms that he had signed up the Mysmile accounts.

194. Secondly, there were many people involved - Mr Harpe, Mr Jariwala, Mr Vanjole and Ms Vassay. It is not impossible that all were motivated by race discrimination, but it made it less likely.

195. The Respondent thoroughly engaged with checking the Claimant's claims as to commission. The work was done by several people, who engaged with the Claimant's commission claims.

196. The Mysmile matter was being reviewed because the Claimant was bringing a grievance against many of the decision makers on other grounds. Many of the decision makers involved had been alienated by his behaviour in the mediation meeting – they saw him as being uninterested in finding a solution.

197. The tribunal found that the respondent simply failed to take the commission point sufficiently seriously and with enough care. The reason for this was that the claimant was not at work to fight his corner, and this was addressed within a grievance procedure.

1.6 Between July and October 2019 the Claimant recommended five candidates for roles who were not appointed by Mathew Harpe (1 … in July/August 2019; 2 – … in July 2019; 3 - … in July 2019; 4 - … in October 2019 and 5 … in July 2019).

198. This was accepted as being unfavourable treatment as the Claimant lost out on the finder's fees and his recommendations were not followed.

199. In determining Mr Harpe's motivation, the Tribunal took into account the same factors as at 1.3. In addition, Mr Harpe did invest considerable time and effort in at least three of the five candidates. Mr Harpe had plausible reasons for his failure to recruit in respect of the five candidates which were varied and particular to individuals. In respect of candidate one the Claimant himself was very critical of her following the interview. Another candidate did not attend the interview. Candidate Five was a near miss.

200. In addition, Mr Harpe had recruited one of the Claimant's referrals. The Respondent had recruited another referral.

201. The tribunal did not find that the reason was the claimant's race but the individual reasons which varied between the candidates. The claimant had cherry-picked the unsuccessful candidates he referred.

1.7 On 2 August 2019 the Claimant's performance review was delayed a month by Mathew Harpe and then never took place. It was accepted that this was not an issue.

1.8 From September 2019 the Claimant was required to cover two roles without sufficient support and/or remuneration, being required to work very long hours.

202. The Tribunal found that to some extent this had occurred and was related to Mr Salah not telling the Claimant straightforwardly that the promotion was not going to happen.

203. The Respondent to some extent took advantage of the Claimant who wanted the promotion. After the agreement, he took active steps to get the promotion for instance he wanted it on the agenda. In those circumstances it was easy to get the Claimant to carry out extra tasks above his product specialist role - to set up the office. This, not racial motivation was the reason why. Put simply, it was a convenient and easy way of Mr Salah and Mr Harpe getting some extra work done in the UK office at no extra cost.

1.9 On 4 (1) October 2019 the Claimant was described as Head of Sales by Matthew Harpe despite not being promoted into or paid for that role.

204. The claimant was not expressly referred to as Head of Sales on 1 October, the reference was "I think the team are already aware of your pending new role, I would like you to take the lead on the meeting from a UK sales perspective." The tribunal accepted this was consistent with the UK Sales Manager role and was understood as such by the claimant.

205. The tribunal found that the reason was the same as issue 1.3. The reason that the claimant was so described and was not promoted was that Mr Harpe was fighting a rearguard action against Mr Salah's decision and did not yet want to make this clear to the claimant. This misleading email was part of that process.

1.10 From 14 October 2019 the Claimant was supposed to present a business plan to the Fourth Respondent, Mr Jariwala and Mr Harpe ahead of a presentation in Paris; but meetings were cancelled and he was not provided with the necessary information.
1.11 On 29 October 2019 the Claimant Mr Harpe informed the Claimant that he did not support his promotion and had informed the Fourth Respondent of this.

206. Mr Harpe accepted that this was an active decision that the Claimant would not present the business plan as he was not going to be promoted.

207. This is part of the same process as issue 1.3. It was part of Mr Harpe's stopping the Claimant being UK Sales Manager and the motivation was not racial.

1.12 On 27 November 2019 Mr Jay was promoted to National Sales Manager in France.

208. It was accepted this was not a free-standing act of discrimination.

1.13 From November 2019 the Fourth Respondent stopped taking the Claimant's calls and did not return his messages.

209. Whilst Mr Salah had had some contact with the Claimant from this time, he was not as available h as he had been to the Claimant, particularly in respect of the promotion. However, the Tribunal could not find any indication that Mr Salah was racially motivated. Mr Salah was evidently not racially motivated against the Claimant when he agreed to promote the Claimant on the back of one meeting and the Claimant did not allege that Mr Salah was racially motivated in this regard. This was a significant demonstration of Mr Salah's positive opinion of the Claimant, and it did not fit well with Mr Salah having a racial motivation for his later conduct, including not returning his communications.

210. The tribunal found that Mr Salah's reason was that he had given into Mr Harpe about the promotion and was withdrawing from the situation. He was a busy man with numerous communications and calls on his time. His focus would not be on the UK when he was not in the UK. In particular, this was not an attractive thing for Mr Salah to engage with. He had made a promise which he broke and so there was a good reason for him not wanting to speak to the Claimant about this.

1.14 On 5 December 2019 Mr Jariwala offered the Claimant a 3 month secondment into the DSO Team but did not provide the details of this (salary, commission) in writing as requested.
1.15 On 7 January 2020 Mr Harpe announced to the Respondent that the Claimant had a 3 month secondment to the DSO Team as an Account Executive without him having agreed to the role change.

211. The Tribunal accepted that this had happened. The Claimant was offered the DSO role and he asked sensible questions which were not answered. In effect he was "bounced" into this role. This was unfavourable treatment.

212. The respondent handled this poorly and then handled the implementation of the transfer poorly. Mr Vanjole at the end of January still had no clarity about the secondment. The respondent had not managed to remove the claimant's former responsibilities to allow him to do the DSO role, at least in part because of a lack of head count.

213. The Claimant accepted in cross examination that there was nothing inherently disadvantageous in the role; his concern was being forced into the role in place of his promotion. In his grievance, he said he very much welcomed the move to the DSO. Mr Vanjole privately thought it had good long-term prospects.

214. Mr Harpe and Jariwala and Mr Salah discussed moving the Claimant to the DSO lead in November 2010, less than two weeks after Mr Harpe told the Claimant he would not be Sales Manager. Mr Harpe saw it expressly as a solution to the mess they had created over the UK Sales Manager promotion. Further context was Mr Harpe rowing back from his serious criticism of the Claimant. The move would allow the respondent to allocate resources to an immediate need – the DSO function - and take advantage of the Claimants agreed excellence in sales.

215. The correspondence showed a lack of clarity about what would happen at the end of the three months secondment. The Tribunal relied on Mr Vanjole's contemporaneous emails rather than his later different account. The Tribunal did not accept that this was a deliberate attempt to allow the Respondent to recruit a new Sales Manager, still less Mr Drew personally. The Respondent had got itself into a mess over the UK Sales Manager promotion and the DSO was a logical and convenient solution. The Claimant had a good track record with corporate clients.

216. The reason that the Claimant was "bounced into" the DSO was that the managers had bought into a solution which was convenient for them - and hopefully for the claimant. This was not surprising in a fast-growing office with - on the Claimant's case - serious problems with a turf war between senior managers.

1.16 In February 2020 on a Google Hangout call Mr Jariwala said that it was a risk to have someone like the Claimant as UK Sales Manager.

217. In the appeal outcome, the Respondent accepted that Mr Jariwala had said that he was taking a risk with the claimant. When the Claimant asked for clarification, he did not give it. The appeal had found that this fell short of acceptable managerial behaviour. In the view of the tribunal, it was self-evidently unreasonable of Mr Jariwala to refer to his own decision to take on the claimant as a risk. The Tribunal had accepted the Claimant's account of the conversation in his grievance as it was the most contemporary account.

218. The tribunal found that there was no reference by either Mr Jariwala or the Claimant to race during that conversation. The Tribunal did not accept any evidence by the Claimant to the contrary, which was in any event very weak. There was no reference in the grievance account, which was the nearest in time. The first reference was the witness statement in 2021. This statement incorrectly implied that it was Mr Jariwala who mentioned race. The claimant failed to answer a simple question as to whether or not he himself mentioned race.

219. The Claimants account of what Mr Jariwala said in his grievance, shorn of any racial reference, was consistent with the emails from Mr Jariwala. He wanted the Claimant in no uncertain terms to get with the programme or to get out of his team. He simply was not interested in the Claimant's complaint about the UK Sales Manager which was in the past. The reason in the view of the Tribunal for this comment was Mr Jariwala's exasperation which the Claimant records in his grievance account. Mr Jariwala wanted the Claimant to stop complaining and stop being inconvenient to Mr Jariwala.

1.17 In February 2020 Jacco Von Jole told the Claimant that he could not hire or support him to be the UK Sales Manager as he did not know the Claimant.

220. Mr Vanjole accepted he said this. The Tribunal accepted it was capable of being unfavourable treatment but did not find that it was because of race.

221. It was a realistic and fair comment and from Mr Vanjole's point of view. It was in his own interest not to get involved in this issue, and to take a neutral position. He saw that clearly something had gone wrong with the Sales Manager position. It appeared at least possible that promises were made and broken by the Senior Leadership Team. Mr Vanjole had a solution - which was to suggest a fair interview process.

1.18 In May 2020 the Claimant had to take sick leave, which impacted his finances.

222. The Claimant did not pursue this claim. However, the Tribunal, bearing in mind that the Claimant was unrepresented, considered whether Mr Sennhauser's suggesting the Claimant take leave and then paying him one month's salary only, amounted to an act of discrimination. In the view of the Tribunal this could not be a detriment. The Claimant received more than his contractual entitlement; he got one month's pay.

1.19 On 15 September 2020 the Claimant's grievance, which he alleges was not investigated adequately, was not upheld by Beatrice Vassy/Theo Naccache.

223. This issue expressly covered only to the grievance and not the appeal. The Claimant confirmed that he only relied on the failure to interview all their witnesses to the "risk" conversation.

224. The Tribunal applied *Nailard v Unite the Union* [2018] EWCA Civ 120 and reminded itself that for the claimant to succeed, the decision maker himself - Mr Naccache - must be racially motivated. The Tribunal had found there was no expressly racial element to the risk conversation.

225. Mr Naccache interviewed some but not all witnesses. The conversation was but one element of a very wide ranging seven-page long grievance, not including the subject access request. Further, the Claimant did not engage fully with the grievance although he did provide very full written materials. Mr Naccache and the Respondent allocated considerable resources to investigate the grievance including reassignment due to a concern about a conflict. Mr Naccache interviewed nine people, he wanted to interview ten people. This was not indicative of any shortchanging of the Claimant in the grievance and the Claimant had no concern for any other elements of the grievance. It was reasonable for him to take a proportionate approach. There was not any indication of racial motivation by him.

1.20 On 4 December 2020 the Claimant was invited to a disciplinary hearing.

226. The respondent's first letters chasing the sick note were sympathetic in tone. The Claimant then sent his sick note to the wrong address, and, however this arose, he was therefore absent without leave on long term sick. The Respondent invited him to a disciplinary hearing. It stated in terms in its invitation letter that it would cancel this disciplinary process if he provided the sick note. Once the sick note was in its hands the Respondent cancelled the disciplinary hearing. The tribunal found that this was unremarkable management of long-term sickness and not race discrimination.

1.21 On 13 March 2021 the Claimant was invited to a disciplinary hearing.

227. The correct date was agreed to be 31 March 2021. The Tribunal found that the Claimant did post the comments about Mr Salah for the following reasons. The Claimant's evidence in this regard was notably unsatisfactory. As his witness statement was written before 31 March, it did not cover this matter. He failed to comply with the tribunal orders to provide a statement going to the dismissal. Accordingly, his account only came out in cross examination. He failed to answer questions directly. He then stated that the LinkedIn post was entirely a fabrication. Further, the Tribunal saw evidence that he had posted inappropriate comments on Mr Salah's LinkedIn or other social media, despite having denied this before the Tribunal.

228. The post having come to the Respondents' attention, the Tribunal determined whether there was any racial motivation in the invitation. These were serious unparticularized allegations of discrimination against a CEO made in a public forum. The Tribunal accepted Mr Salah's evidence that he passed the matter on to lawyers with a simple instruction - make this stop. This was not seemingly a hasty or emotional reaction, it was a business focused reaction; the Claimant was a particular threat to the business, and this had to be dealt with.

229. There was no reason to believe that the Respondent would have not done the same to a person of a different race.

1.22 In April 2021 the Claimant had his use of the company car and mobile phone terminated.

230. There was no contractual entitlement to these benefits. The Claimant had received one month's discretionary sick leave and after this had expired the Respondent continued to provide the Claimant with these benefits for a year.

231. The Tribunal found that this was simply an oversight by HR. The Tribunal accepted HR evidence that the new and small company had never had someone on long term sick before and was unused to administering this. Further, there was a credible reason to stop these benefits, to save money. There was no evidence or indication that this was racially motivated.

Racial Harassment - s26 Equality Act 2010

232. The Tribunal having found that the conduct relied upon was not because of race, this claim could not succeed.

Unlawful deductions from wages - s.13 ERA 1996

233. As the respondent pointed out, for the tribunal to have jurisdiction, there must be a deduction, there has to be a sum that is properly payable to the claimant. According to *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*, there must be some legal — but not necessarily contractual — entitlement to the sum in question. See S.27(1) ERA 1996, which defines wages as 'any sums payable to the worker in connection with his employment… whether payable under his contract or otherwise'.

234. The burden of proof is upon the Claimant.

Holiday Pay

235. The claimant alleged a failure to pay him 87 days, being 19 days in 2019, 36 days in 2020 and 32 days in 2021.

236. The tribunal understood the Claimant to be claiming three elements of holiday pay: -

a. holiday pay accrued whilst working;
b. holiday pay accrued while on sick leave;
c. holiday pay, which would have accrued had he not been dismissed.

237. The Claimant was fundamentally confused about his holiday due when he was at work. The Tribunal spent considerable time discussing the holiday pay claim with the claimant and, in line with the over-riding objective, seeking to assist him in clarifying his claim. However, the tribunal was simply unable to identify the issues.

238. The claimant suggested in cross examination that he was claiming for unpaid lieu days and said expressly this was holiday pay, and also that it was not.

239. Upon further cross examination he said he was not claiming holiday pay but money for TOIL. The claimant had made no claim for or reference to TOIL in the pleadings or in the case management orders. Accordingly, the Tribunal could not find that there was any claim from the Claimant in respect of payment for TOIL. Further, there was no evidence going to TOIL.

240. As the claimant was unable to explain, even with considerable assistance from the tribunal, his claim for holiday pay whilst working, he was unable to discharge the burden upon him and the tribunal dismissed the claim for deductions for holiday pay accrued whilst the claimant was at work.

241. The next issue was holiday pay accrued whilst off sick. The tribunal sought to identify the period over which the claimant made his claim. On 20 June 2020 the Claimant was signed off sick. The claimant could not claim any holiday pay accrued later than the date the claim was presented on 19 February 2021. The tribunal considered if this position was altered by the case management order which expressly permitted a claim for commission up to May 2022. This Tribunal had granted the claimant's application to amend his salary claim to go up to that date. However, the claimant made no such application in respect of holiday pay. The tribunal did not accept that the amended claim (commission and salary) included holiday pay, which was qualitatively different.

242. Accordingly, the issue was whether there was any entitlement to holiday pay accrued whilst off sick from June 2020 to February 2021.

243. In the event, the tribunal adjourned this element of the judgement due to lack of time. It invited the parties to agree the point, or if not to make submissions. The parties were unable to agree, and the tribunal resumed to consider this point.

244. The tribunal considered if the claimant had a contractual right to the holiday pay. According to his contract of employment: -

9.2 You will not be allowed to carry over unused holiday entitlement into a following holiday year except in exceptional circumstances and with our express written agreement in advance. In cases of sickness absence, carry-over is limited to four weeks' holiday per year less any leave taken during the holiday year that has just ended. Any such carried over holiday which is not taken within eighteen months of the end of the relevant holiday year will be lost.

1.2 On termination of your employment, you will receive pay in lieu of any accrued but untaken holiday up to the date of termination…

245. It was not in dispute that there was no written advance agreement permitting the claimant to carry forward holiday pay outside of the contract. Accordingly, the claimant had to rely on clause 9.2. His holiday year ran from 1 January. Accordingly, any holiday pay accruing during sickness absence accrued during two holiday years.

246. Firstly, the year starting on 1 January 2020, that is holiday entitlement accruing from 25 June to 31 December 2020. The holiday entitlement not taken within 18 months, being middle 2022, and was therefore lost.

247. Secondly the year starting on 1 January 2021, that is holiday entitlement accruing from 1 January 2021 to 19 February 2021. The holiday entitlement not taken within 18 months, being middle 2023, and was therefore lost.

248. The tribunal considered if the right to any such carried over holiday had crystallized at the date of termination and therefore become due under clause 9.1.2 of the contract. However, the tribunal had no jurisdiction in respect of this clause as the claim was presented prior to termination, and the holiday pay claim was not extended beyond this date.

249. The tribunal accepted the respondent's submissions that to succeed the claimant had to point to a right to receive a sum. He had not and was not able to point to any such right outside of the contract. There is no right to receive holiday pay in lieu of untaken holiday whilst remaining an employee, see Reg 13(9) Working Time Regulations. This is consistent with the health and safety purpose of the provisions. The claimant, further, was not able to point to any other legal right to receive pay in respect of untaken holiday during employment.

250. Under cross examination the claimant confirmed that he was claiming for holiday accrued post-termination (as set out in his schedule of loss). This would not be recoverable under section 13 and the claim was accordingly dismissed.

Salary

251. The second element of the wages claim was for salary. The claimant's case was that he was due salary at the rate of £80,00 a year after Mr Salah had agreed he would

be promoted to UK Sales Manager. As the respondent had only paid him at the rate of £40,000, his original salary, it had made unauthorized deductions as to the difference.

252. Accordingly, the issue was whether or not the claimant's salary of £80,000 was properly payable, that is, was there an effective variation of contract? This required the Tribunal to construe the contract. The tribunal reminded itself that the burden in contract is upon the party that seeks to rely on it, here the claimant.

253. Any such contractual variation must have been with the French entity and the respondent expressly accepted it was the correct respondent. The Tribunal found that there was an agreement, both offer and acceptance. Mr Salah and the Claimant agreed that the Claimant would be the UK Sales Manager. Further, there was consideration going both in both directions. Mr Salah offered the salary and the Claimant agreed to work for it. Finally, there was an intention to create legal relations. This was an employment situation in which a promotion was being discussed. The three fundamentals of a contract were present.

254. The Tribunal went on to consider whether the contract was void for uncertainty over renumeration. The Tribunal had found that there was agreement as to £80,000, but not as to benefits, save that the parties accepted benefits were likely to be less than 20% on top, and would not be generous.

255. To summarize the law very briefly, there is no need for precision as to renumeration for a contract to be valid, see *Stack v Ajar-Tec Ltd 2015 IRLR 474, CA*. The tribunal found that because the proportion of uncertain renumeration was relatively small compared to the whole, there was sufficient certainty, and the contract was therefore not void.

256. Therefore, there was an agreed variation of the claimant's contract from July 2019. However, the Claimant signed another contract on 1 November 2019. Whatever the Claimant's motivation, he signed a written contract which on its face started on 1 November 2019 at a lower salary. As the respondent paid according to that contract from that date, there was no further breach of contract.

257. Therefore, time started to run on the deduction from wages claim in respect of salary on 1 November 2019. To comply with the statutory time limit, the claimant must have taken the first step in tribunal proceedings - starting ACAS early conciliation - by 31 January 2020. He did not contact ACAS until 11 December 2020, over ten months later. This was a significant delay, being over three times the original time limit. The Tribunal considered whether it was reasonably practicable to present the claim in time, and if not whether the claim was presented within such further time as was reasonable.

258. According to the Court of Appeal in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA*, 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'.

259. During the period of the statutory time limit the Claimant was working. There was no illness or infirmity preventing him from working, and there was nothing to indicate that there was anything preventing him from presenting his claim. There were no internal proceedings on which the claimant was waiting. The Claimant was not ignorant of any material fact. He knew what he believed his salary should be and he knew what the respondent was paying him.

260. Whether the Claimant knew about the time limit at the time was unclear. However, applying *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*, and *Porter v Bandridge Ltd 1978 ICR 943, CA*, this is not legal test. The question is whether the clamant ought to have known of the time limit. The claimant was an educated man performing a responsible job. He was used to information technology, which he used in his work. There was nothing to indicate that there was anything stopping him finding out about the time limit.

261. In these circumstances the Tribunal could not but find that it was reasonably feasible and reasonably practicable for the claimant to present his claim within the time limit. Accordingly, the tribunal had no jurisdiction over the wages claim in respect of his salary.

Commission/Incentives

262. According to the case management order, this claim ran from July 2019 to May 2022. In the view of the Tribunal this was probably a mistake and should have been May 2020. There could be no liability after May 2020 for commission or incentives as the Claimant was off sick. The claimant confirmed in any event that his claim was limited to the amounts set out in the spreadsheet at p1072.

263. The Tribunal firstly had to determine whether the claim had a legal right to be paid incentives for both the Mysmile and the non Mysmile accounts.

264. The Claimant's case in respect of the non Mysmile accounts was vague. The Respondent had admitted it had made an error as to the third dentist in the spreadsheet. It originally denied that he was entitled to this commission and later admitted that he was. Therefore, according to the claimant, it could well have made a mistake about other payments.

265. The Respondent had provided an explanation against each non Mysmile account on p1072 as to why the claimant was not owed commission. Each explanation was particular and not generic. It was consistent with the respondent having investigated these accounts. The fact that the respondent later admitted an error indicated that it had reviewed this matter and been prepared to admit to inaccuracies.

266. In these circumstances, the Tribunal could not find that the Claimant had discharged the burden upon him. His contention that simply because the respondent

had made a mistake on one account (which they had then corrected) they might have made another was not sufficient to discharge the burden of proof.

267. The Tribunal went on to consider the Mysmile incentives listed on p1072.

268. The tribunal firstly considered the promise by Mr Jariwala that the Claimant would receive some form of remuneration for Mysmile because he had reached the heads of agreement with Mysmile, but he did not follow through on this. The Tribunal could not find that this was a contractual variation – any such variation would have been void for uncertainty. Essentially it was a unparticularized promise from Mr Jariwala and nothing more. No legal liability resulted.

269. It was agreed that the Claimant was entitled to incentives on any Mysmile welcome packs he did sell. The issue was simple. If the claimant had sold the Mysmile accounts he contended at page 1072 in December 2019 and February 2020, he was entitled to the commission claimed. The Tribunal had found on the balance of probabilities that he did sell those packs and therefore was entitled to Mysmile payments set out at page 1072.

270. The accounts were invoiced on 31 March 2020. According to Ms Vassay, incentives were paid quarterly, the quarter after the invoice was presented. So, the payments were due to be paid by 31 June 2020.

271. To comply with the statutory time limit, the claimant needed to commence ACAS early conciliation by 30 September 2020. In fact, he did so on 11 December 2020. The claim was out of time.

272. In view of the Tribunal, there were no factors permitting it to come to a different conclusion on the time point about the Mysmile accounts than in respect of the salary. Although the claim was significantly less out of time than the salary claim, a little under two and a half months, it was still significantly out of time compared to the statutory three-month time limit. The claimant believed he was owed the Mysmile incentives at the date the time limit expired. Therefore, the claim must fail for want of jurisdiction.

273. For the sake of completeness, the Tribunal considered whether it was doing the unrepresented Claimant an injustice by failing to allow him to relabel his section 13 claim as a claim for breach of contract. However, the Tribunal could have no jurisdiction in respect of a breach of contract claim in February 2021 because the Claimant had not yet been terminated.

Employment Judge Nash
Dated: 26 April 2024

Sent to the parties on:

14 May 2024
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For the Tribunal Office