EMPLOYMENT TRIBUNALS

Claimants:	Mr A Oguntokun	**C1**
	Ms F Omar	**C2**
Respondents to C1's claims:	Stellantis & You UK Limited	**R2**
	Matthew Worsley	**R4**
	Tim Pickering	**R5**
Respondents to C2's claims:	Stellantis & You UK Limited	**R2**
	Matthew Worsley	**R4**

Heard at: Watford Employment Tribunal

On:	22 to 25 January 2024	(Days 1 to 4)
	9 to 11 April 2024	(Days 5 to 7)
	13 May 2024	(chambers)

Before: Employment Judge Quill; Mr D Wharton; Mr A Scott

Appearances

C1:	In person	
C2:	In person	(Days 1 to 4) &
	Mr N Smith, counsel	(Days 5 to 7)
For R2 and R5:	Mr E Beever, counsel	
For R4:	In Person	

RESERVED JUDGMENT

(1) All of the complaints, by each claimant, which we have upheld are in time. The Tribunal extends time on a just and equitable basis where necessary.

(2) R2 has not shown that it took all reasonable steps to prevent R4 doing the things (or any of them) which we have found to be contraventions of section 39 or section 40 of the Equality Act 2010 ("EQA").

(3) The acts of R4 and R5 which we have found to be contraventions of EQA were done in the course of their employment. Those things are therefore treated as also done by R2, in accordance with section 109(1) EQA. By concession, the section 109(4) defence does not apply to things done by R5. By unanimous decision of the Tribunal, it does not apply to things done by R4 either.

(4) All of C1's indirect discrimination complaints fail.

(5) C1's successful harassment complaints are as follows, using the numbering from the list of issues:
   (i) 32.6 ("banter"): Respondents R5 & R2

(6) C1's unsuccessful harassment complaints are as follows:
   (i) 32.1 ("hot box")
   (ii) 32.2 (move to sales)
   (iii) 32.3 (failure to send on training course, though it succeeds as direct discrimination)
   (iv) 32.4 ("slipper" / "flipper")
   (v) 32.5 (bias in grievance outcome, though it succeeds as direct discrimination)
   (vi) 32.7 ("issues raised by others and nothing done")

(7) C2's successful harassment complaints are as follows, using the numbering from the list of issues:
   (i) 32.8 ("Somali pirate"): Respondents R4 and R2
   (ii) 32.9 (air freshener and comments): Respondents R4 and R2
   (iii) 32.10, in part. ("your lot"): Respondents R4 and R2
   (iv) 32.11 ("foreigner"): Respondents R4 and R2
   (v) 32.12 ("jungle"): Respondents R4 and R2
   (vi) 32.13 ("sniff carpet"): Respondents R4 and R2
   (vii) 32.14, in part (comments about C2 and her colleague): Respondents R4 and R2

(8) In relation to C1's direct disability discrimination complaints, the following complaints are not well-founded and are dismissed:
   (i) 18.1 (move to sales)
   (ii) 18.2 (failure to provide training)
   (iii) 18.3 (threats of dismissal three times)
   (iv) 18.4 (redundancy bias)
   (v) 18.5 (appointment of Todor)
   (vi) 18.6 (grievance outcome)

(9) In relation to C1's direct race discrimination complaints, following numbering in the list of issues, the following complaints succeed

(i) 12.3 (training): Respondents R4 and R2
(ii) 12.4 ("black bastard"): Respondents R4 and R2
(iii) 12.5 ("your lot"): Respondents R4 and R2
(iv) 12.7 (redundancy bias): Respondents R4 and R2
(v) 12.9 (biased outcome of grievance): Respondents R5 and R2
(vi) 12.11 (dismissal threat not upheld) : Respondents R5 and R2

(10) In relation to C1's other direct race discrimination complaints, following numbering in the list of issues:
(i) 12.1 ("hot box") fails
(ii) 12.2 (move to sales) fails
(iii) 12.6 (threatened with dismissal 3 times) fails
(iv) 12.8 (appointment of Todor) fails
(v) 12.10 succeeded as harassment rather than discrimination

(11) In relation to C2's direct discrimination complaints, item 12.12 from the list of issues succeeded as harassment, and is not, therefore, a successful discrimination complaint, and:.
(i) 12.13 ("holiday leave") fails
(ii) 12.14 (abuse to colleagues) fails

(12) C1's victimisation complaints fails.

(13) C2 was dismissed within the definitions in section 95(1)(c) of the Employment Rights Act 1996. In other words, there was what is sometimes referred to as a "constructive dismissal".

(14) C2's dismissal was unfair.

REASONS

Introduction

1. Each of the Claimants are former employees of R2, having worked as Sales Advisers at its Staples Corner branch. They bring claims alleging contraventions of the Equality Act 2010 ("EQA") and, in C2's case, alleging unfair dismissal.

2. R4 was a manager at Staples Corner, and R5 was a more senior manager.

3. The allegations include, amongst other things, that specific words and phrases were used that amounted to harassment related to race, religion, sex and/or disability. In these reasons, we have not redacted the words allegedly used because it has been important to pay close attention to (amongst other things) the specific questions put to potential witnesses, the specific answers given by potential witnesses, and whatever quotes, if any, have been noted in contemporaneous documents.

The Claims

4. Claim Number 3312557/2020 was presented by C1 - Mr Oguntokun on 19 October 2020. [Bundle 16].

   4.1 It mentioned one ACAS early conciliation number only: R193999/20/06. That certificate showed early conciliation from 17 to 21 September 2020. That certificate named only R1. [Bundle 13].

   4.2 The claim form named both R1 and R2, but was accepted against R1 only.

   4.3 Although not mentioned in the claim form, the Claimant did have an ACAS certificate for R2 [Bundle 14]. That showed that early conciliation in connection with R2 had been 27 August to 21 September 2020.

   4.4 At Box 3, he mentioned C2 as someone who might have a claim arising from similar facts.

   4.5 R1 submitted a response which did not raise the statutory defence. [Bundle 48 to 62].

   4.6 In around March 2021, at R1's request, C1 supplied further information [Bundle 87 to 92].

5. Claim Number 3313242/2020 was presented by C2 - Ms Omar on 5 November 2020. [Bundle 29].

5.1 It mentioned one ACAS early conciliation number only: R198912/20/21. That certificate showed early conciliation from 29 September to 9 October 2020. That certificate named only R1. [Bundle 15].

5.2 At Box 3, she mentioned C1 as someone who might have a claim arising from similar facts.

5.3 R1 submitted a response, which did raise the statutory defence in relation to any acts of R4 that were found to have contravened EQA. [Bundle 63 to 76].

5.4 At R1's request, C2 - Ms Omar submitted further information on 8 March 2021. [Bundle 81 to 83].

6. Claim Number 3306466/2021 was presented by C2 - Ms Omar on 29 April 2021. [Bundle 93 to 108].

6.1 It mentioned one ACAS early conciliation number only: R17334/21/27. That certificate showed early conciliation from 1 to 9 March 2021. That certificate named only R1. [Bundle 84].

6.2 R1 submitted a response. [Bundle 117 to 131].

6.3 It noted that paragraph 4 of C2's Particulars of Complaint [Bundle 106] stated

> The Claimant maintains that the conduct of Matthew Worsley and the subsequent proceedings constituted a fundamental breach of the employer's implied duty of trust and confidence, but the Claimant chose to affirm the contract as she wished to retain her employment with the Respondent at that point.

6.4 It suggested that in relation to the events immediately prior to C2's email terminating her employment, she had acted too quickly and ought to have given (and had failed to give) the Respondent a chance to remedy any breach of contract, though any such breach was denied.

6.5 The statutory defence was not expressly mentioned, but a request to join the new claim to the earlier one was made. Our decision is that Claim Number 3306466/2021 was brought against the (perceived) employer only, and claimed only unfair dismissal (not breach of EQA). While breaches of EQA were mentioned, as per paragraph 2 of Particulars of Complaint, that was in the context of referring to the first claim, that was already before the Tribunal.

7. At preliminary hearings on 21 July 2021,

7.1 R2, R3, R4 and R5 were added as respondents to C1's claim, for the reasons stated by EJ Alliott. [Bundle 136 to 139].

7.2 R2, R3, and R4 were added as respondents to C2's first claim, for the reasons stated by EJ Alliott. [Bundle 140 to 143].

8. C1 submitted further information on 11 August 2021. [Bundle 144 to 148].

9. R2, R3 and R5 submitted a joint response to C1's claim. [Bundle 149 to 187]. Similarly, R2 and R3 submitted a joint response to C2's first claim [Bundle 188 to 213]. The contact details on the forms ET3 (for Holly Brennan) were the same as had been used by R1. All liability was denied. R2 and R3 (which were actually just different names for same company) denied being the relevant employer and (in any event) asserted the statutory defence. R2, R3 and R5 used the same legal representatives as R1.

10. R4 - Mr Worsley submitted a response to C1's claim and also to C2's first claim. [Bundle 243 to 256] and [Bundle 257 to 275] respectively.

11. It is not necessary to list all the later hearings and orders. Suffice to say that an application to set aside EJ Alliott's orders was refused, R4's responses were within the extended time limit that was granted, and a final hearing was listed, for all 3 claims combined, and each of R3 and (later) R1 were dismissed from the proceedings. The hearing was listed for liability only for the reasons stated at paragraph 8 of EJ McTigue's orders [Bundle 319.]

List of Issues

12. Further to EJ McTigue's orders, the parties produced an agreed the list of issues which was at [Bundle 311 to 316].

13. We note that C1 suggests that the list of issues draws the protected act too narrowly. We refer to what he said in his oral evidence about that in the findings of fact below.

14. We note that in closing submissions, Mr Smith suggested that we should make decisions based on the claim forms (and response forms) rather than the list of issues. We stated that we would be treating the list of issues as accurately describing the complaints which we had to decide unless any of the parties wanted to make an application that it was inaccurate and should be amended. There was no such request or application.

15. The list read as follows. We will address any (apparent) typographical errors in our analysis.

Jurisdiction - Time Limits

1. In relation to Mr Worsley (and the other Respondents added to the proceedings later), is the ET to consider limitation at the time that they were added as a party to these proceedings (being 21 July 2021)? Accordingly, are any and all claims which pre-date 22

April 2021 out of time as against Mr Worsley (and those other Respondents)? If this is not the correct date to consider, what is the correct date for limitation purposes in relation to Mr Worsley (and those other Respondents)?

2. [In relation to Mr Worsley, in the event that the Tribunal considers that the relevant date to consider for limitation purposes is the date of the ET1 being originally presented:] given the date the claim forms were presented and the effect of early conciliation, in relation to any complaint about something that happened before:

2.1 in the case of C1, 28 May 2020; and

2.2 in the case of C2's first claim, 30 June 2020,

the complaint may not have been brought in time

3. Was there a requirement for the claims against Mr Worsley to have gone through the ACAS Early Conciliation process pursuant to s18A Employment Tribunals Act 1996

4. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010?

5. If not, were the claims made within such further period as the Tribunal considers just and equitable?

Section 6 Disability (C1 only) and knowledge

6. Over what period, if any, did the C1 meet the definition of disability under s.6 Equality Act 2010 for anxiety and depression anxiety? Namely, at all material times:

6.1 Did C1 suffer from a mental impairment (namely, depression and anxiety)?

6.2 If so, did C's mental impairment have an adverse effect on his ability to carry out normal day-to-day activities?

6.3 If so, was that adverse effect substantial?

6.4 If so, was it long term in that it had lasted and/or was likely to last more than 12 months?

7. When, if at all, did R2, R4 and/or R5 know, or ought reasonably to have known, that the Claimant was disabled by reason depression and anxiety?

Constructive unfair dismissal (C2 only) (against R2 only]

8. Did the Respondent fundamentally breach the implied term of mutual trust and confidence thereby breaching the Claimant's contract of employment? The fundamental breach(es) relied upon by the Claimant are:

8.1 the conduct of R4 as referred to in C2's grievance dated 24 July 2020

9. Did the Claimant affirm the contract? If so, did the final straw revive her right to accept the repudiatory breaches and resign? The last straw(s) upon which the Claimant relies are:

9.1 on 27 July 2020, C2 went on a period of sick leave due to stress until her resignation on 5 February 2021;

9.2 C2 was not notified that R4's employment had ended in October 2020 but other staff had been;

9.3 during a period of sick leave, C2's new manager, Lewis Geoghegan started a WhatsApp group chat for communication with all employees but did not include C2 in the group. Other employees on sick leave were included;

9.4 C2 learned that Lewis Geoghegan had made comments to other members of staff regarding C2 returning such as "she had better not come back and think she is the boss" and "if she doesn't like it her, she knows where the door is" which increase C2's anxiety about returning;

9.5 C2 expected to receive communication from Lewis Geoghegan about a phased return to work commencing on 5 February 2020 but did not receive any communication about that until 3 February 2020, two days before she was due to return to work;

9.6 C2 requested a meeting with occupational health on 22 January 2020 but Lewis Geoghegan failed to action or respond to her request;

9.7 on 28 January 2020, C2 received a telephone call from Lewis Geoghegan and advised C2 that the business would be making potential redundancies and that C2 would receive a letter. C2 did not receive a letter until the evening of 30 January 2020 after chasing the letter and understands she was the last to receive a letter;

9.8 on 3 February 2020, Lewis Geoghegan contacted C2 to request that she provided 14 days of temperature readings in order to return to work. This was the first time that 02 had been advised of this requirement;

9.9 on 4 February 2020, C2 offered to provide copies of her diary which included temperature readings but these were not accepted. She was told she could not return to work until she had provided 14 days of temperature readings and on 5 February 2020, C2 was advised that she would not be paid for that period of absence and was not aware of any other colleagues subject to that ruling.

10. Did the Claimant resign in response to those breaches outlined in 9.1 to 9.9 above?

11. If the Claimant was dismissed, was she dismissed for a fair reason? If so, was the dismissal fair in all of the circumstances?

Direct discrimination (race)

12. Did the Respondents do the following alleged acts/omissions:

In respect of C1

12.1 in September 2019, R4/R2 said to C1 that he "should get back in [his] hot box" (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

12.2 in September 2019, R3/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R4 threatened C1 with redundancy if he did not take the position (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

12.3 between September-December 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (C1 compares himself to Yakub, dawn, Simon, Leon, Chris, Brennan);

12.4 in late February /early March 2020, R4/R2 called C1 a "black bastard" during an incident in the office where R3 tried to belittle C1 in front of colleagues by counting down to 3 for him. He was abused and called a "black bastard" in front of his colleagues upon leaving the office (C1 compares himself to Yakub, Todor, Simon, Dawn, Chris);

12.5 in September-December 2019 and February 2020, R4/R2 singled out C1 when black customers came to buy cars and referred to black customers as "your lot" (C1 compares himself to Yakub, Todor, Leon, Dawn, Chris);

12.6 in September 2019 (delivered by Steven Hearn), and on 27 February 2020 and in March 2020, R4/R2 threatened C1 with dismissal three times (C1 compares himself to Yakub, Todor, Dawn, Chris);

12.7 on 2 July 2020, R4/R2 was unfair and bias in respect of CTs redundancy (C1 compares himself to Paul, Leon Brennan, Fathia);

12.8 on 27 July 2020, R2 made C1 redundant and a driver called Todor was hired into CTs role (C1 compares himself to Yakub, Todor, Dawn, Chris);

12.9 on 29 July 2020, R5/R2 was bias in the treatment of CTs grievance outcome (C1 compares himself to Fatima, Simon, Leon);

12.10 on 29 July 2020, R5/R2 used belittling or patronising comment of "banter" to sum up the race discrimination faced by R3 (C1 compares himself to Fatima, Simon, Dawn, Leon);

12.11 on 29 July 2020, R5/R2 did not uphold CTs complaint that he had been threatened with dismissal by R4 (C1 compares himself to Simon, Leon).

In respect of C2

12.12 on 5 occasions between September 2019 and July 2020, R4 sprayed C2 with air freshener and made comments about a "Somali smell" or "bullshit smell" (C2 compares herself to other colleagues);

12.13 in October, November and December 2019, C2 requested holiday leave which was refused by R4. R4 threatened C2 with dismissal if she took sick leave during that time (02 compares herself to her white colleagues); and

12.14 R4 subjected non-white and non-British origin colleagues to abuse about their race or ethnic origins (C2 compares such colleagues to other employees who were white and of British origin).

13. If so, do the acts / omissions alleged amount to less favourable treatment?

14. If so, has the Claimant proven facts from which the Tribunal could decide the less favourable treatment was because of the respective C's race

15. Are the named comparators appropriate comparators and in circumstances where there is no material difference between the cases?

16. Was the alleged act/omission less favourable treatment than the respective comparators would have been treated?

17. If C has proven such facts, is there a non-discriminatory explanation for the alleged less favourable treatment?

Direct discrimination related to disability (C1 only)

18. Did the Respondents do the following alleged acts/omissions:

18.1 in September 2019, R4/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R3 threatened C1 with redundancy if he did not take the position (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

18.2 between September-November r 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (C1 compares himself to Yakub, dawn, Simon, Leon, Chris, Brennan);

18.3 in September 2019 (delivered by Steven Hearn), and on 27 February 2020 and in March 2020, R4/R2 threatened C1 with dismissal three times (C1 compares himself to Yakub, Todor, Dawn, Chris)

18.4 on 2 July 2020, R4/R2 was unfair and bias in respect of C1's redundancy (C1 compares himself to Paul, Leon Brennan, Fathia);

18.5 on 27 July 2020, R2 made C1 redundant and a driver called Todor was hired into CTs role (C1 compares himself to Yakub, Todor, Dawn, Chris); and

18.6 on 29 July 2020, R5/R2 was bias in the treatment of C1' s grievance outcome (C1 compares himself to Fatima, Simon, Leon).

19. If so, do the acts / omissions alleged amount to less favourable treatment?

20. If so, has the Claimant proven facts from which the Tribunal could decide that the less favourable treatment was because of Cs' disability?

21. Are the named comparators appropriate comparators and in circumstances where there is no material difference between the cases?

22. Was the alleged act/omission less favourable treatment than the respective comparators would have been treated?

23. If C has proven such facts, is there a non-discriminatory explanation for the alleged less favourable treatment?

Indirect discrimination (C1 only)

27. Did R2 apply a provision, criterion or practice ("PCP") to C1 and other employees? [C1 to clarify if this is intended to be the provision, criterion or practice relied upon] C1 relies on the PCP being an unfair bias and redundancy

28. Did R2 apply the PCP to employees who do not share his race and/or disability?

29. If so, did the PCP put, or would it put, persons with whom C1 shares the characteristic (race and/or disability) at a particular disadvantage when compared with persons with whom C1 does not share it?

30. If so, did the PCP put, or would it put, C1 to a particular disadvantage? C1 relies on the fact that he was made redundant.

31. If so, can R2 show that the PCP applied was a proportionate means of achieving a legitimate aim?

Harassment

32. Did the Respondents engage in unwanted conduct?: Cs rely upon the following alleged unwanted conduct: -

In respect of C1

32.1 in September 2019, R4/R2 said to C1 that he "should get back in [his] hot box" (in relation to C1's race);

32.2 in September 2019, R4/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R3 threatened C1 with redundancy if he did not take the position (in relation to CTs race and disability);

32.3 between September-December 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (in relation to CTs race and disability);

32.4 between September-December 2019 and February 2020, R4/R2 referred to C1 as "flipper" because he could not afford new shoes at the time (in relation to CTs race);

32.5 on 29 July 2020, R5/R2 was bias in the treatment of C1' s grievance outcome (in relation to CTs race and disability);

32.6 on 29 July 2020, R5/R2 used belittling or patronising comment of "banter" to sum up the race discrimination faced by R4 (in relation to C1's race); and

32.7 between September-November 2019 and February-March 2020 and July-August 2020, senior management of R2 created a hostile environment. Issues were raised to management by ex-employees on their exit statement and grievances with R2 but nothing was done about it (in relation to C1's race and disability).

In respect of C2

32.8 on at least 14 occasions between April 2019 and July 2020, R4 called C2 a "Somali Pirate" (in relation to C2's race);

32.9 on at least 5 occasions between September 2019 and July 2020, R4 sprayed air freshener at C2 and made comments about a "Somali smell" or "bullshit smell" (in relation to C2's race);

32.10 on at least 5 occasions between May 2019 and July 2020, R4 told C2 she should serve "Your lot" in reference to some black customers and was told to "keep it shut" when challenging R3. C2 was threatened that she would lose her job if she told anyone what was happening (in relation to C2's race);

32.11 on at least 2 occasions in November 2019 and February 2020, R4 called C2 a "Foreigner" (in relation to C2's race);

32.12 in January 2020, R4 referred to C2 and another black employee of African origins as "something out of the jungle" (in relation to C2's race);

32.13 in September 2019, R4 asked C2 if she was "going upstairs to sniff the carpet" (in relation to C2's religion); and

32.14 on at least 3 occasions between May and October 2019, R4 made untrue allegations about C2 having a relationship with a male employee called Kayum Ahmed. On occasions he did this in front of other employees whilst showing explicitly sexual videos (in relation to C2's sex).

33. If so, was the unwanted related to Cs' protected characteristic (as set out above next to each alleged act of unwanted conduct)?

34. Did that conduct described at 32.1-32.14 have the purpose or effect of violating the respective Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

35. If so, did R2 take all reasonable steps to prevent such unwanted conduct from occurring?

Victimisation (C1 only) [against R2 and Mr Pickering only]

36. Did C1 do, or was he perceived to have done, a protected act? C1 relies on the following protected act:

36.1 C1's grievance submitted to R2 on 6 July 2020.

37. Did R2/R5 subject C1 to a detriment because of that protected act? C1 relies on the following act(s) of detriment:

37.1 R5 treated C1 badly for coming forward by not taking his case seriously, carrying out a bad investigation and later upholding similar grievance claims but only for white colleagues, Simon and Leon, for example, being threatened with dismissal, race discrimination and bullying.

16. In fact, we did not have to resolve the matters identified at paragraph 6 the list of issues, because all the respondents conceded that C1 had a disability at all relevant times. (We still had to resolve the matters identified at paragraph 7.)

The Evidence

17. We had a bundle that was numbered up to page 963. We had it electronically and paper.

18. On Day 1, for the reasons we gave orally at the time, we admitted some additional documents [Bundle 964 to 979]. On Day 5, by consent, we admitted [Bundle 980 to 984].

19. [Bundle 964] was a late disclosure item from R4. C1 and C2 supported its admission (which was opposed by the other respondents) and, in part, the argument made was that R2 had made clear that it was seeking to rely on the statutory defence (and that this document was relevant to that issue).

20. Each of the claimants gave evidence and called no other witnesses. R4 and R5 gave evidence and R2 also called Holly Pauffley, Rob McKenzie and Jonas Kitto. Each of the witnesses had prepared a written statement. Ms Pauffley and R5 - Mr Pickering also prepared supplementary statements.

21. Each witness gave evidence in person. They swore to their statements, and answered questions from the other parties and from the panel.

The Hearing

22. Four days was not enough for the evidence, let alone submissions, deliberations and decision. We added three more days, which were listed for the earliest available dates.

23. We had intended that that would be sufficient to give our decision in the afternoon on Day 7. As we told the parties at 2pm on Day 7, we required more time to deliberate and so we reserved our decision.

The findings of fact

<u>The parties</u>

24. We will refer to Stellantis & You UK Limited as R2 - the Employer. This particular company has had its current name since March 2023 (so since long after the end of the employment of C1, C2, and R4 ended, and long after this litigation commenced). It has had a variety of previous names, including, Peugeot Citroen UK Ltd (at relevant times up to around February 2019) and PSA Retail UK Ltd. The former R3 was one of those earlier names for the same company, and so R3 was dismissed at an early stage. At some of the relevant times, the company traded using the name “Robins and Day”. So far as is relevant to this dispute, R2’s business includes car sales at a variety of sites, one of which is at Staples Corner.

25. We will be as brief as we can about the former R1, Go Motor Retailing Limited.

25.1 On 19 July 2021, so after responses to all 3 claims had been submitted, R1’s representative wrote to the Tribunal and the other parties to state that R1 had ceased trading and the plan was for it to be dissolved. Its staff and assets had transferred. It planned to take no further part in the proceedings, including not attending the preliminary hearing that was due to take place 2 days later.

25.2 There were several hearings prior to this final hearing. Following a preliminary hearing on 6 and 7 October 2022, EJ Emery issued a judgment with reasons (which was sent to parties on 1 December 2022) [Bundle 278 to 293].

25.3 The decision was that R2 was both claimants’ employer at the times of the respective terminations of employment. Paragraph 60 of the reasons states

that R2 became both claimants' employer in, or immediately after, January 2019.

25.4 There was, for a time, a dispute about whether a further judgment would be necessary to deal with whether/when R2 became the employer of R4 and R5. In due course, it was conceded that R2 was their employer at all relevant times, and, by consent, R1 was dismissed as a respondent. [Bundle 309] is EJ McTigue's judgment; [Bundle 324] is paragraphs 47 to 51 of the case management summary dealing with the concessions.

26. We will refer to the first claimant, Anthony Oguntokun, as C1 - Mr Oguntokun. His employment started 28 January 2019 and ended 31 July 2020. He was dismissed and the respondents all allege that the reason for the dismissal was redundancy.

27. We will refer to the second claimant, Fathia Omar, as C2 - Ms Omar. Her employment commenced 4 September 2017 and ended 5 February 2021. She alleges that she was constructively dismissed.

28. We will refer to Matthew Worsley at R4 - Mr Worsley. His employment commenced in May 2016. He moved to Staples Corner in 2018. He had the title General Sales Manager for a time, and around April 2019 became General Manager, responsible for both the Staples Corner branch and the Hayes branch. His employment ended in October 2020 following the expiry of his notice of resignation.

29. We will refer to Tim Pickering as R5 - Mr Pickering. His employment commenced around 2007. At the times relevant to this dispute, he was Operations Director. He was responsible for several sites (including Staples Corner) and several General Managers (including R4 - Mr Worsley) reported to him. At the time, he was responsible for 10 Vauxhall dealerships in London.

<u>The other witnesses</u>

30. Holly Pauffley ("Ms Pauffley") was known as Holly Brennan at work, at the relevant times, and that is how her name appears in various documents and her email address. At the relevant times, she was HR Business Partner covering the South Region. This region included Staples Corner. At the time, she had 3 direct reports, being HR Advisers, two of which were Miranda Durston and Deniz Gunduz.

31. Jonas Kitto was, at the relevant time, Divisional Operations Director for the South Inner M25 region. He was responsible for 11 Peugeot, Citroen, DS and Vauxhall sites across London, Surrey, Essex and Kent.

32. Rob McKenzie's employment started in 2002. He acted as cover General Manager at the Staples Corner dealership from 31 January 2021. He took over from Mustapha Lawson, who was the interim manager covering the site immediately

following R4's departure. Prior to 31 January 2021, Mr McKenzie had not worked at Staples Corner. During 2020, he was at the Edgware site.

The non-witnesses

33. We will generally refer to the Claimants' colleagues by first name only, even though we have the surnames in the bundle in most cases (for example, in interview notes). That is partly because they were generally referred to by first name in the evidence and partly because, where criticism of them is made, by one or more witnesses, or in any documents, they have not been questioned in this hearing and given their side of the story. Their full names are not relevant to our analysis of the issues which we have to address.

Brief overview and chronology

34. C1 - Mr Oguntokun started working for R1 at Staples Corner around 28 January 2019 in the service team. His line manager at the time was Steve Hearn, Service Manager.

35. When C1 joined, R4 - Mr Worsley was Sales Manager. That was a role of broadly similar seniority to Mr Hearn, and they both reported to the General Manager at Staples Corner.

36. In around April 2019, R4 became the General Manager.

37. C1 moved to the role of Sales Adviser in September 2019.

38. In March 2020, covid hit, and the Claimant was furloughed with effect from around 1 April 2020. He was never brought back off furlough. Redundancy consultation began in June 2020. Around 2 July 2020, C1 and another sales adviser, Simon R, were informed that they had been selected for redundancy and their employment would end with effect from 31 July 2020.

39. One objection which each of C1 and Simon R raised was that (according to them) immediately before furlough, one of their colleagues, Todor, had been in the role of "driver". However, while they remained furloughed, Todor was (a) moved to the role of driver and (b) brought back off furlough and (c) placed in the redundancy pool with them and (d) not dismissed, but retained as a sales adviser.

40. Shortly after being told about the redundancy dismissal, the Claimant asked questions to HR and then raised a grievance alleging discrimination (3 to 6 July 2020). The grievance stated: "*The person in question is Mr Matthew Worsley the branch manager*".

41. R4 - Mr Worsley's line manager, R5 - Mr Pickering, was appointed to deal with the grievance. He met the Claimant on 13 July 2020. He conducted some other interviews. He issued his outcome letter on 29 July.

42. C1 appealed against the outcome, and Jonas Kitto was appointed to deal with it. He spoke to the Claimant on 12 August 2020 and issued the appeal outcome on 17 August.

43. C2 - Ms Omar's employment started at a different branch. She moved to Staples Corner, as sales adviser, in around March 2019. R4 was briefly her line manager until his promotion.

44. In around September 2019, she raised a grievance regarding a colleague, Charles, which was investigated by R4. His outcome letter was 11 October. [Bundle 724]

45. C2 - Ms Omar was furloughed from around 1 April 2020, and returned to work in early June.

46. Around 17 July 2020, C2 was interviewed by R5 - Mr Pickering in connection with C1's grievance.

47. On 24 July 2020, C2 submitted a grievance. Starting on 27 July 2020, she commenced a period of sickness absence which lasted until the end of her employment.

48. R5 - Mr Pickering was appointed to deal with C2's grievance, and interviewed her on 24 July 2020. He also conducted other interviews. He provided an outcome letter on 19 August 2020.

49. C2 appealed on 21 August 2020. Mr Kitto was appointed to deal with the appeal and interviewed C2 on 9 September 2020. His outcome letter was 11 September.

50. Around 4 August 2020, R2 - the Employer suspended R4.

51. On 14 August 2020, R5 - Mr Pickering wrote to R4 to invite him to a disciplinary hearing. The letter was signed on Mr Pickering's behalf by Miranda Durston. [Bundle 894 to 896]. The disciplinary meeting was due to take place on 19 August and be conducted by Mr Kitto. R4 did not attend the disciplinary hearing prior to the end of his employment (or at all).

52. From around 14 August 2020, during his suspension, R4 commenced a period of sickness absence from which he did not return before the end of his employment.

53. On or around 14 August, R4 submitted a grievance. There is no copy of it in the bundle. Tom Ray, Operations Director, was appointed to deal with it. He held a meeting on 25 September 2020 which the Claimant did not attend. [Bundle 900 to 904]. He issued an outcome letter on 30 October 2020 [Bundle 905 to 914].

54. R4's employment ended on 31 October 2020 when his notice of resignation expired.

55. On around 20 November 2020, C2 - Ms Omar had a remote welfare meeting. It was conducted by her line manager, Lewis Geoghan, and Miranda Durston of HR. The Claimant was told that R4 no longer worked for R2 - the Employer (on R2's case, she had access to that information from no later than 3 November).

56. On 18 January 2021, there was an occupational health report for C2. It recommended that a phased return to work should commence from the expiry of her current fit note (so, from 5 February 2021).

57. On 3 February 2021, Mr Geoghan asked the Claimant for 14 days of temperature readings. On R2's case, she should have known that (for covid-related reasons), the policy was that she could not start work without a record. Following further discussions (in which the Respondent rejected the Claimant's purported readings, and told her she would be on 14 days unpaid leave), C2 submitted a resignation email on 5 February 2021.

General Comments on credibility

58. We have assessed the evidence as a whole, taking into account both the inherent plausibility of things asserted by witnesses, and how the witnesses' assertions compare to what was written in contemporaneous documents.

59. For each of C1 - Mr Oguntokun and C2 - Ms Omar and R4 - Mr Worsley we have found that there are reasons to approach their testimony with caution and to weigh matters up very carefully before accepting any fact, claimed by them in their witness evidence, that is not corroborated by other evidence.

60. We have taken into account, in our fact finding and analysis, that C1 - Mr Oguntokun gave an answer in oral evidence that is, in our judgment, plainly not correct.

60.1 Pages 6 to page 8 of his witness statement contain a section with paragraphs numbered from 1 to 27. It is (with the exceptions we will mention) identical to a section in C2's statement. Our assessment is that there is no possibility whatsoever that this is a coincidence. As a matter of logic, the possibilities are: they worked on this section jointly, and each put the jointly agreed version in their respective statements; one of them wrote it and let the other have a copy, and the latter copied and pasted it; a third person wrote it, and they each copied and pasted it.

60.2 C1 asserted that the passages were similar, but not exactly the same (which we do not agree with, but that is not the important point.) He said that the similarities were simply because they were each discussing similar topics and similar experiences.

60.3 Our conclusion is that we have to be very cautious about simply relying on C1's testimony about a particular event, where there is no corroboration. At best, he did not remember what actually happened during witness statement preparation, which would cast doubt on his ability to recollect events from further back in time (during his employment). However, on balance of probabilities, he gave a deliberately untruthful answer.

60.4 We are entirely convinced that C2 - Ms Omar wrote this section and that, after she had done so, she allowed C1 - Mr Oguntokun to have a copy, and he copied and pasted it. The version in his statement even has gaps (for example, part way through paragraph 8, 15 and 22) which correspond to the page breaks in C2's statement. C2 has formatted hers (including using red text in places). Our finding is that, when copy/pasting, C1 lost some of that formatting (while keeping the same words). Most tellingly, whereas C1 refers to himself in the first person in the remainder of the witness statement, in this section he uses the word "Anthony" when he means himself.

60.5 C1's unwillingness to acknowledge that he had copied part of C2's statement counts against him, as does his willingness to ask us to accept that it was just a coincidence.

60.6 However, we do not conclude that none of his evidence is truthful. Rather it is just one of the factors – albeit an important one – that we have taken into account.

61. We have taken into account, in our fact finding and analysis, that C2 - Ms Omar gave answers in oral evidence about her (alleged) diary/written record that is, in our judgment, plainly not correct.

61.1 We note C2's list of allegations [Bundle 43]. There are 41 allegations in chronological order. Each has a date, though the date is just the month and year rather than the exact date, with April 2019 being the earliest and July 2020 being the latest.

61.2 To take one example, "Somali Pirate" is alleged to have been said April 2019, May 2019 (x2), June 2019, July 2019 (x2), August 2019, September 2019, October 2019, December 2019, February 2020, March 2020, June 2020, July 2020 (x2). So that is 14 of the 41 numbered points.

61.3 Her evidence was the document was produced shortly before the litigation started. Upon being challenged on the basis that (in that case) it was not reliable contemporaneous evidence about what was said to her, and when, or how often, the Claimant asserted that she had transcribed this from notes that she had made contemporaneously.

61.4 These notes had not been provided to the Respondent in the course of the litigation. C2 claimed, however, that she thought that she might have sent them to her solicitor. She was ordered to try to find the documents, and to find any evidence that she personally had sent them to the Respondents, or that her solicitors had done so.

61.5 C2 was not able to locate the document, and it is clear that no such notes had been sent to the Respondents during the litigation. Such notes were not referred to by C2 during the grievance process, or mentioned prior to the questions put to her about [Bundle 43].

61.6 We are satisfied that C2 did not keep a contemporaneous record of specific occasions when R4 made specific comments to her. We do accept that she drew up the list on [Bundle 43] shortly before her claim was issued (and after the grievance outcome) to provide information to her solicitor about the allegations. Our finding is that the list was created on or around 5 November 2020, and was done from memory, rather than drawn from any earlier notes.

61.7 Our finding, therefore, is that the Claimant has given inaccurate evidence to the Tribunal when she has claimed that she had made contemporaneous notes. We find that she must have known that it was not true to claim that she had recorded these events in a diary (or similar) when she (falsely, in our judgment) claimed that she had done so.

61.8 We have taken that finding into account throughout our findings of fact and our analysis. For the avoidance of doubt, it applies to all 41 items on the Claimant's list, not just the "Somali Pirate" comments.

61.9 However, having carefully considered all of the oral testimony, and those documents which we consider relevant, our finding is that C2 has not invented the assertion that she was called (for example) "Somali Pirate" by R4, or the assertion that R4 referred to Somalian customers in such terms. As discussed below, our finding based on the evidence as a whole, is that the comment was made several times, and C2 did not believe that there was anyone to whom she could complain about it.

61.10 We reject her evidence that she made written notes at the time (either with a view to making a later written complaint, or at all).

61.11 She did not decide that she would try to complain until after she had been interviewed in connection with C1's grievance, and after she became aware of Leon's grievance. By then, she was not in a position to state specific dates and times of specific incidents.

61.12 Any person, including C2, who attempts to mislead the employment tribunal deserves severe criticism. However, that does not change the fact that our

decision is that (as discussed below), some of the remarks were actually made, and C2 did actually hear them. The exact number of times, and the exact dates of each, cannot be reliably determined. But C2's dishonest assertion that she made contemporaneous notes does not prevent us – based on the totality of the evidence – concluding that she does actually remember hearing the comments.

62. R4 has made several denials, both in the internal processes, and in the tribunal litigation, about making certain specific comments. In some cases, we accept his denials and/or there is nothing to contradict them. In other cases, we have decided that he was not telling the truth when he denied making particular comments. That is, rather than it simply being a case of not recalling, our finding is that he must have remembered the remarks, but denied them anyway. It does not follow that we disregard the rest of his evidence in its entirety, but, we treat it with caution, especially where he denies making a particular comment that other people have claimed he made.

Appraisals

63. The Respondents (a) assert that C1 had had an appraisal and (b) deny it was influenced by R4. C1 denies having had any appraisal. We take Ms Pauffley at her word, given on oath to the Tribunal, that, after C1 challenged his redundancy dismissal, she saw in around July or August 2020, that the Claimant did have an appraisal score on the system, and that it matched the score allocated to him in the redundancy matrix.

The employer's policies and the enforcement

64. The bundle contains extracts from the Robins & Day Employee Handbook for 2019 [Bundle 327], including introductory comments from James Weston, chief executive. The bundle includes:

64.1 Disciplinary and Appeals Procedure [Bundle 336]

64.2 Grievance Procedure [Bundle 342]

64.3 Absence Management Policy [Bundle 344]

64.4 Code of Conduct [Bundle 353] including "Treat each other with respect and courtesy and in accordance with the Company's Equality Policy."

64.5 Code of Ethics [Bundle 358], including Rule 7 "Prohibition Of Discrimination, Harassment and Disrespectful Behaviour …" [Bundle 360]

64.6 Equality Policy [Bundle 362]

65. The Equality policy includes:

> As part of the Group's Code of Ethics, the Company adopts a zero tolerance approach to harassment and bullying.
>
> Bullying is offensive, intimidating, malicious, threatening or insulting behaviour, or an abuse or misuse of power which undermines, humiliates or injures another person.
>
> Harassment is any unwanted conduct related to a protected characteristic, which has either the purpose of, or could reasonably be considered to have the effect of, violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person, even if that effect was not intended by the person responsible for the conduct.
>
> Behaviour which may be considered to be "common-place", which was intended as a joke, or was not intended to be offensive, may still amount to harassment or bullying. This is because everyone finds different levels of behaviour acceptable and has the right to decide for themselves what behaviour they find acceptable to them. Harassment may be deliberate or unconscious, open or covert, an isolated incident or a series of repeated actions; it may also include, in certain circumstances, off-duty conduct.
>
> Behaviour which a reasonable person would realise is likely to offend will always constitute harassment without the need for the employee having to make it clear that such behaviour is unacceptable, e.g. physical violence. With other forms of behaviour, it may not always be clear in advance that it will offend a particular employee, e.g. office banter and jokes. In these cases, the behaviour will constitute harassment if the conduct continues after the employee has made it clear, by words or conduct, that such behaviour is unacceptable to them. A single incident can amount to harassment if it is sufficiently serious

66. This was followed by a list of examples, [Bundle 366-367], and the comment:

> Every employee is required to assist the Company in meeting its commitment to provide equal opportunities in employment and avoiding unlawful discrimination. All employees, whatever their position within the Company have a part to play in implementing this policy and are responsible for their own behaviour.

67. It included a section on "*What to do if you witness or experience a form of harassment / victimisation / bullying*" and the instruction not to ignore, and various options about what action to take. This was followed by:

> Remedial Action
>
> Any reported incident of discrimination or harassment may result in the Company invoking the Disciplinary and Appeals Procedure. If it has been determined that an employee has assisted, participated in or carried out an act of discrimination, harassment, bullying or victimisation it will be deemed to have contravened this policy and may result in the Company taking disciplinary action, up to and including summary dismissal.
>
> Persistent harassment or discrimination, or a single act of gross harassment or discrimination, is likely to be considered an act of gross misconduct and may lead to summary dismissal, in accordance with the Disciplinary and Appeals Procedure.

> Employees found to have committed an act of unlawful discrimination or harassment can be held personally liable and serious acts of harassment may be referred to the police.
>
> In the event that the complainant is found to have brought a malicious claim, or to have contributed to the harassment, they themselves would be liable to disciplinary action, which may include summary dismissal.

68. [Bundle 369] (page 70 within the handbook) listed the action the employer said it would take to monitor the effectiveness of the policy.

69. On 6 April 2019, Amy Fox, Head of HR, emailed staff, including R4 and R5 with the subject line “Equality and Diversity” [Bundle 375]. The introductory paragraph was as follows:

> Despite previous communications and training, unfortunately we have had some recent instances of "banter" and extremely inappropriate behaviour in our workplace that has led to grievances and subsequent disciplinary action. I would like to take this opportunity to remind you that the Company takes such behaviour exceptionally seriously and Robins & Day follow a strict code of ethics and are committed to ensuring that all individuals are treated equally, with dignity and respect, at all times.

And the email concluded:

> I would also like to remind you of the Equality and Diversity Training which exists and is available by clicking here. If you or your teams haven't already completed this module, please do so by 30th September 2019, this is a **mandatory** requirement.
>
> **We need to be extremely vigilant in ensuring this behaviour is not tolerated**.

70. An almost identical piece of correspondence was sent to all staff on 3 July 2020 [Bundle 443]. In that case, the date for the training to be done by was 31 August 2020.

71. For the latter email, we accept Ms Pauffley’s evidence was that it was the result of an incident which she described (in her statement paragraph 24 and Bundle 952-955) which led to an employee being dismissed. We also note the oral correction to her written statement in that this incident was the one at a dealership in Wales. Her statement, paragraph 27, misidentified the incident in Wales as being (i) from September 2019 and (ii) the cause of the April 2019 email from Ms Fox. Ms Pauffley cannot comment specifically on what Ms Fox was referring to in the opening of the April 2019 message.

72. Other than the (circa) July 2020 dismissal mentioned in the previous paragraph, Ms Pauffley referred to two other dismissals (paragraphs 22 and 23 of her statement): one of which, she had no documentation for; the other has a redacted dismissal letter on [Bundle 955]. We accept that each of these dismissals occurred, but we have little information about the dates, the corroborating

evidence, or the seniority of the staff involved. We also have not been provided with information about the number of times an employee made an allegation of race discrimination and (i) it was not upheld or (ii) it was found to have occurred, but R2's actions was something other than taking disciplinary action.

Managers' Training

73. On 11 December 2018 [Bundle 441] and again on 23 October 2019 [Bundle 376], R4, along with other managers, attended "HR Masterclass", which was an internal training session provided by R2's HR department; it was run by Ms Pauffley on each of those occasions.

74. The slides from that training are [Bundle 377 to 440].

75. The training included training about absence procedures. [Bundle 394] is the slide about reasons for withholding sick pay. Referral to OH is mentioned in the case of long term absence. The training included training about disciplinaries, grievances and whistleblowing.

76. [Bundle 427] is the start of the slides about "Bullying, harassment and discrimination vicarious liability".

77. The EQA definition of "harassment" is given on the slide at [Bundle 428] followed by:

> Banter - There are many grey areas around Banter
>
> What may be fun to one person may not to someone else.
>
> Offense is not always clear
>
> Can constitute harassment is conduct continues
>
> If incident is sufficiently serious it can be considered as Harassment.
>
> **TREAT OTHERS AS YOU WANT SOMEONE YOU CARE ABOUT TO BE TREATED**

78. While Mr Smith's observation that the case study on "vicarious liability" is a personal injury case (about a physical assault), rather than an Equality Act / Employment Tribunal claim, we are satisfied that the surrounding text on the slides made clear that vicarious liability could apply to the latter as well. For example:

> **What can we do to avoid vicarious liability for the actions of our employees?**
>
> Take reasonable steps to prevent such acts or omissions from occurring. For example, maintaining an up-to-date equal opportunities policy and providing anti-discrimination training to staff serve to demonstrate an active commitment on the part of the employer towards combating discriminatory practices in the workplace. This would then reduce the likelihood of an employer being held vicariously liable for any discriminatory acts committed by its employees

79. In any event, it seems that the case study was intended to demonstrate that there could be vicarious liability for incidents away from the workplace, not to demonstrate that liability was limited to incidents similar to those in the case study.

C1's disability

80. On 11 June 2021, R1 conceded the Claimant's disability at all relevant times (that is, from the earliest alleged act of discrimination in September 2019). The other respondents confirmed that they also made this concession. Knowledge, at relevant times, is not conceded.

81. Prior to working for R1, C1 had worked in car sales for most of his working life. From December 2017 to March 2018, he had a period of absence which his GP certified as "anxiety with depression", "depression" and "stress related problem" for different periods. [Bundle 970].

82. He started working for R1 in January 2019.

82.1 He had sickness absence in 2019 from 31 August to 3 September 2019.

82.2 The first time he had certified absence from his GP was in December. The fit note is not in the bundle, but is in the GP records [Bundle 969], and was for "Anxiety with Depression" for 6 December to 15 December. The Claimant believes that he supplied the note to R2 at the time and, on balance of probabilities, he did so.

82.3 He returned to work, but then had further absence 3 January to 3 February. He supplied fit notes, including [Bundle 929 to 930] and referenced on [Bundle 968]. These were also for anxiety with depression.

83. During the absence, he was referred to Occupational Health and had a telephone consultation. The report dated 17 January 2020 was sent to Miranda Durston of HR. [Bundle 931]. It stated that he would be fit to resume work and recommended a phased return.

84. Under "current situation" it included:

> Anthony tells me he was diagnosed with anxiety and depression in 2016 and openly discussed the cause and triggers of his symptoms during today's consultation. For the purpose of this report Anthony's requested this information is not shared and in my opinion this information is not relevant to this report.

85. The conclusion included:

> He would meet the criteria of the Equality Act in my opinion however ultimately this is a legal decision not a medical one.

86. Based on the contents of the report (and the absence, and the fit notes), we are satisfied that R2 had actual knowledge of C1's disability from no later than 17 January 2020. We will discuss in the analysis whether it had knowledge from any earlier date.

C1's move from Service to Sales – September 2019

87. We are satisfied that C1's account, as related to R5 on 13 July 2020, is essentially correct in the important details. He was first approached by the then Sales Manager [Simon H, who is not the same Simon who was made redundant at the same time as C1; the latter is Simon R] and who said that the Sales team had a shortage of staff, and that, since C1 had done the work previously, he wanted him to move to Sales. C1 said "no". He said "no" again when his line manager, Steve Hearn, discussed it with him.

88. C1 and Steve Hearn had previously discussed C1's mental health, and Mr Hearn was aware that C1 had made a deliberate and specific decision that, because of his mental health, he no longer wished to do sales.

89. There are some differences between C1's version of events, and that given by Mr Hearn to R5 [Bundle 527]. However, Mr Hearn does confirm that he had a discussion with R4 and that, after that discussion, he and C1 had discussions about C1 moving to Sales, and that he, Mr Hearn, thought that such a move by C1 would mean that there was no need for redundancies in Service.

90. Our finding of fact is that R2 did pressurise C1 to move from Service to Sales, and it did so knowing that C1 had moved away from sales (at the previous employer) because of mental health issues.

91. It is true that there were discussions about the financial consequences of a move to Sales. However, it is not true that C1 instigated the move (either for financial reasons, or at all) and it is not true that C1 was easily persuaded to agree to the move (either for financial reasons, or at all).

92. It is true that C1 told colleagues that he was determined to do a good job in Sales. However, that was after he had already come to the realisation that R2 was not willing to take "no" for an answer, and that he had to move.

Not sending C1 on the residential training course (September 2019 onwards)

93. The Respondent provided a one week residential training course at head office for sales advisers. It ran once per month. The general rule was that every sales adviser would be sent on this course. C1 was not sent on it.

94. R2 and R4 have not provided any evidence that there were any attempts to book the Claimant on the course.

94.1 The assertion that he could not attend the course in September 2019 because of sickness/holiday absence that month is plausible.

94.2 The assertion that the course was full in October, November, December 2019 is unsupported by any evidence. It is not self-evident that the course was full, given that the reason for insisting that the Claimant move to Sales was a shortage of sales advisers. We do, of course, take into account that a shortage of staff in London does not make it impossible that the course was full because of recruits from elsewhere around the country. However, no documentary evidence showing an attempt to book the Claimant on the course, or a reply stating the course was full, has been produced. Furthermore, normal practice would be that, if someone tried to book on a course, and the next month (or two months) was full, there would be a reply which said a place had been reserved for the next available date.

94.3 The Claimant asserts that colleagues who joined the Sales team later than he did were sent on the training, and we find that to be the case.

95. The Claimant had some sickness absence in December 2019 (as discussed in more detail above). That started on 6 December 2019. However, R2 and R4 would not have known in November or October or September that C1 would be sick in December. So that sickness absence would only explain the fact that he did not do the training in December if either:

95.1 R2 had booked C1 on the training for December, but had to cancel his booking because of C1's illness, or

95.2 Training bookings were ad hoc, and last minute, and so it was already known that C1 was off sick before the time arrived at which R2 or R4 would otherwise have made the booking for December.

95.3 There is no evidence that the first of those happened, and the Respondents do not seek to assert that it did.

95.4 Our decision is that an arrangement such that training was always booked last minute would be inconsistent with the Respondents' claim that the course was in high demand and that (part of) the Respondents' reasons for not sending C1 on the course was that it was always full. In any event, there is no evidence of any attempted booking in any month, last minute or otherwise.

96. We do accept that, once C1 returned to work in the new year, on a phased return, there was no time to get the Claimant on the course before Covid hit. We accept the Respondents' argument that it would not have been appropriate for the employer to send C1 on this full-time residential course while he was on a phased return, and that that was why he did not attend it in February or March 2020.

Parking Ticket Issue / Alleged threat of dismissal

97. While the Claimant was on sick leave, his company car had received some parking tickets which had not been paid. R4 and C1 discussed this on C1's return to work. In accordance with R2 - the Employer's policies, C1 was obliged to reimburse the cost of these.

98. The discussions led to a letter of 20 February 2020 from R4 to C1, which said:

> **Letter of Concern**
>
> Further to our recent discussion, I am writing to confirm that no further action will be taken. However I would like to confirm in writing our concerns regarding your parking tickets.
>
> Upon speaking to you regarding your build-up of parking fines it came to my attention that you were expecting a further fine to come through from a ticket that had been left on your car which you failed to acknowledge or pay and threw away. You confessed that you were struggling financially and thought it was best to ignore it. As per the company hand book and I quote "You are responsible for the cost of any parking fines or tickets incurred while you are driving" if you have any concerns around paying these then you must speak with your line manager or myself immediately.
>
> I will be monitoring this and expect that this will not arise again. However, should this continue to be a problem, I will have no alternative but to take further action in accordance with the Company disciplinary procedure.

99. All of the deductions were taken out of C1's next salary, leaving him with very little to live on for the month. We accept that this was not based on R4's instructions. We accept that, as per paragraph 19 of R4 - Mr Worsley's witness statement, there was an error by payroll, and that he took steps to seek to resolve it.

100. C1 became very distressed about the situation. He contemplated suicide. He discussed his distress with R4 the following day. Although R4 denies it, our finding is that R4's response was to say that if C1 was not fit for work then R4 would get in touch with HR and that this would potentially lead to dismissal.

Start of Covid, Furlough, Testing Requirements

101. C1 was furloughed from around 1 April 2020, and never came off furlough prior to the termination of his employment.

102. C2 was also furloughed around the same date. Her furlough ended in early June.

103. There is a disputed document at [Bundle 935]. The Respondent claims it is a letter sent to C2. R2 says it gave employees' names and addresses to an external contractor for them to send the letter to all employees. The letter is dated 8 April. The Claimant's name and address is shown in red ink on [Bundle 935] but her name in "Dear Fathia" is shown in black. If red ink is supposedly highlighting the

mail merged data, with the rest as standard, there is no obvious reason why the Claimant's name in "Dear Fathia" would not also be in red ink. Either way, Ms Pauffley is confident that R2 correctly instructed the contractor to send the letter, and that it did so (based on her examination of the records, including the location from which she obtained [Bundle 935]) whereas C2 is confident that she did not get this letter.

104. The letter commenced:

> I would like to take this opportunity to send to you and your family my best wishes at this difficult time, and ask that you continue to follow all of the Company and Government advice to protect your health and wellbeing.
>
> Even though there is currently no firm date set for returning to normal operations, we are working to prepare ourselves for a re-start to our activities.
>
> In preparation for this, it is important that you follow the following requirements:
>
> 1. Start taking your temperature at home every day from now until you return to the workplace. You should do this twice per day, in the morning and evening. Make a note of the date, time and temperature using the enclosed form. You will then need to bring this with you when you return to site. **You will not be able to access any site without this information, and will be sent home on unpaid leave until we have the previous 14 consecutive days recorded, so please ensure you comply with this direction for the safety of your colleagues**.

105. It attached self-monitoring protocol [Bundle 937-939].

106. A further letter dated 21 April 2020 is at [Bundle 940]. Again, C2 does not recollect receiving it. It commenced:

> Firstly, following the recent discussion with your line manager and subsequent letter in which you were identified as a "furloughed worker" under the Coronavirus Job Retention Scheme ("the Scheme"), I would like to thank you for your agreement and acceptance of these changes in order to protect the future of our company.
>
> As referenced in the recent Safety Protocol letter issued, we are working in the background to prepare ourselves for a re-start to our on-site activities. We are in the process of implementing a number of new safety protocols as requested by Groupe, some of which require action by yourselves.
>
> You will find further details of the expanded safety protocols below:
>
> • You should start to take your temperature at home every day from now until you return to the workplace. You should do this twice per day, in the morning and evening. Make a note of the date, and temperature using the attached form. You will be required to sign a health disclaimer on return to confirm you have adhered to this directive, which is pivotal to our restart plans. Please ensure you comply with this for the safety of your colleagues.

107. It concluded:

> We appreciate that there are a number of stringent measures that we need to put in place for our restart, however our key priority is to safeguard you and your colleagues' health and wellbeing. We will continue to monitor the situation and relax these measures as and when we are able to. In the meantime, we will keep you updated and provide you with further updates as necessary.

108. C2's recollection, which we accept is genuine, is that when she returned to work from furlough, she did not have to supply 14 days' worth of temperature readings.

109. Whether she did, in fact, supply such readings or not (and the Respondents have not produced them) and whether or not she did, in fact, receive the two April letters, we find that, even on the face of the letters themselves:

109.1 The 21 April letter superseded the 8 April letter

109.2 The 21 April letter did not state that employees would have to keep temperature readings after they had returned off furlough. Once off furlough, there was a requirement to allow daily temperature readings taken by the employer on arrival at site, not a requirement to keep one's own readings.

109.3 The 21 April letter did not state that an employee could not resume work (that is, come off furlough) unless they supplied management with a copy of their temperature readings. It stated that they had to sign a disclaimer which confirmed they had monitored their readings.

109.4 Even the 8 April letter (which did say the record of temperature readings had to be brought on return to site) did not state that it was necessary to carry on with the record of temperature readings following the return to site.

110. We accept that [Bundle 945 to 947] are genuine letters issued to employees (though none are for employees at Staples Corner).

110.1 Two are letters issued stating that the employee could not come back to work (from furlough, for the first time, we infer) and would be placed on unpaid leave instead because of lack of temperature readings.

110.2 The other is dated 30 September 2020, and stated that an employee "currently off work with flu like symptoms" would be placed on unpaid leave until they had 14 days of temperature checks.

111. C2 was not aware of these incidents. She was not aware that colleagues (at other branches) had been placed on unpaid leave in those circumstances, and she was not told that, following her return to work after furlough, if she had a future break from work, she would need to provide 14 days worth of temperature readings prior to being allowed to resume working, or that R2 - the Employer would refuse to pay her in such circumstances.

112. Of particular relevance is the letter dated 27 August 2020 [Bundle 833]. This was sent to C2 after she had been off sick for about a month. It alleged that she had not followed the proper absence reporting procedures. Although it commented on procedures in some detail, it made no mention of C2 needing to have 14 days worth of temperature readings (so as to return to work, or otherwise).

113. Even more relevant is the letter of 9 November 2020 [Bundle 851] which is worded almost identically, and is presumably a standard letter. This was sent by Miranda Durston of HR who had been involved in liaison with C2 about C2's absence. The fact that Ms Durston saw no reason to say anything about temperature readings is significant.

114. We are not persuaded, by the evidence which the employer has supplied, that it actually did have a policy of insisting that employees who had already returned from furlough had to keep on with their own temperature recordings (either during a subsequent absence or otherwise). However, even if it did have such a policy, it did not inform C2 about it (any earlier than around 3 February 2021).

Todor's move to Sales Executive

115. R2 - the Employer has provided no documentary evidence of the date on which Todor was moved from being a driver to being a sales executive. On R2's case, this was 1 April 2020, and so, even on that basis, it had not happened prior to the business temporarily being closed, with all sales staff being placed on furlough, which was 1 April 2020.

116. R5 - Mr Pickering's evidence is that he conducted no investigation or checks into when Todor was moved, or why. He claimed to have known that there had always been a long term plan for Todor to move to sales; he also claimed to have had no direct involvement. We found R5's evidence on this point to be vague and unpersuasive. Todor's employment with R2 started in August 2017, so 18 months before C1's. R4 - Mr Worsley's evidence was that it was a shortage of Sales Executives in September 2019 that caused C1's move from Service to Sales. So it seems implausible that there had "always" been a plan for Todor to move to Sales, and no explanation for why he would not have moved in (say) September 2019 if (a) there was a shortage of Sales staff and (b) a pre-existing plan for Todor to become Sales staff.

117. Further R5 - Mr Pickering's evidence was that 1 April 2020 was prior to R2 - the Employer being aware of the possibility that there might need to be redundancies. We find that to be false, and to be inconsistent with the evidence of other witnesses, and with basic common sense. In any event, since R5 did not investigate who took the decision to make Todor sales adviser, or when, R5 did not know whether, at the time that person took the decision, that person already knew that there would be redundancies amongst sales advisers.

118. Our finding is that it is unlikely that the decision to make Todor a sales adviser was made on exactly 1 April 2020 (coinciding with the start of furlough). If the decision had been made earlier in 2020, and was due to be implemented on 1 April 2020, then the Respondent would have some documentary evidence of that, in the form of an email, or letter, or contract sent to Todor to tell him about a future move to Sales due to commence with effect from 1 April 2020. On balance of probabilities, the decision to bring Todor back from furlough, and to bring him back in the capacity of Sales Adviser, was made after the start of furlough, and shortly before some sales advisers (but not C1 or Simon R) were brought back from furlough.

Redundancy Consultation

119. By June, some sales advisers, including C2, had returned to work. C1 was still on furlough. Potential redundancies were announced on 22 June 2020. [Bundle 468]. At Staples Corner, the number of sales executives would potentially be reduced by 2. The announcement set out the consultation timetable.

120. In accordance with that timetable, C1 met R4 and Miranda Durston of HR on 24 June. [Bundle 470]. It was stated that the reason for the proposals was financial, and, in particular, the effect of Covid. Details were supplied. The consultation process and how to seek alternative work within R2 was explained. In relation to redundancy matrix, it was stated:

> R4: If the proposal goes ahead, do you understand the selection matrix that will be applied? Do you have any questions regarding the matrix?
>
> C1: Yeah. I know what factors will be considered but don't quite understand how they will get to the end factor.
>
> MD: All of the different factors will contribute to a final score which would determine the individuals at risk

121. C1 confirmed the notes were accurate. [Bundle 476]

122. The same day, another sales adviser, Simon R, who, like C1, was still on furlough, had a very similar meeting with R4 - Mr Worsley and Miranda Durston. [Bundle 473]. He had also received the blank redundancy matrix (that is, details of what the factors would be, but without any scores) and we are satisfied that he received the same blank document that C1 received. There was a lengthier discussion about the matrix (because of the number of comments/queries made by Simon R at the end of the meeting), but Simon R was not given information that was not given to C1. R4 stated:

> MW: Unfortunately the matrix has to been decided with the facts and information that we hold. Its not on hearsay or previous experience.

123. On 29 June, R2 announced that, following the initial consultation, it was still proceeding with its proposals to make a reduction of 2 sales advisers at Staples

Corner and that it would now use the matrix to determine which 2 would potentially have further consultation about potential dismissal. [Bundle 479].

Redundancy Matrix

124. R2 - the Employer has supplied very few documents about this and relies heavily on oral evidence.

125. [Bundle 957] sets out the scoring system which R2's witnesses state on oath is always used for all redundancy exercises (for sales advisers) at all branches. They swear that R4 had no role in devising the matrix or scoring system for the redundancy exercise which led to C1's dismissal.

126. It is very surprising that there are no supporting documents to demonstrate the truth of this assertion. However, there is no evidence to the contrary, and the witnesses have given evidence on oath under penalty of perjury, and so we accept the assertion is true.

127. There are 5 categories, and we will call them A to E as a short hand, but that is our labelling, not what is used in the document. So they are:

C	Individual Knowledge
D	Appraisal Rating
A	Length of Service
B	Annualised Sales Volume
E	Disciplinary Record

128. Category C requires employees to be allocated one of four ratings, and this leads to a score. The Respondents accept that R4 would have had input to this category (though only this category, they assert)

Basic	1
Autonomy - majority of job function	2
Mastery – all aspects of role	3
Reference – all role and supports others	4

129. Category D is based on appraisal ratings. The Respondents and Ms Pauffley assert that these are taken from the HR records, and are based on what had been entered at the time for the most recent previous appraisal cycle. They deny that they were done specifically for the redundancy exercise, and deny that R4 had any influence (at the time of the redundancy exercise) for this category.

Below expectations	1
Meets some expectations	2
Meets all expectations	3
Exceeds expectations	4

130. Category A is based purely on continuity of employment (so including time with other group companies) regardless of role. That is, it is irrelevant how long the person has been a sales adviser, and only relevant when they became an employee. There are just two possible scores. Two or more years of employment gives a 5, and less than that gives a 0.

131. Category B is something that cannot be influenced by R4, according to the respondents, because it is based entirely on records/ratings that are maintained for a different purpose. Sales advisers are rated Gold, Silver or Bronze based on sales performance (which is noted in the official records) and the ratings are used for pay purposes and (therefore) held centrally, and are transparent. Employees would know their rating in this category at all times, regardless of whether there was a redundancy exercise or not.

Gold	15
Silver	10
Bronze	5

The document on [Bundle 957] also shows 0 as a possible score.

132. Category E is, according to the Respondents, based on pre-existing disciplinary warnings (formal and informal) and is not based on managerial discretion exercised at the time of the redundancy exercise. In other words, on the Respondents' case, the only influence R4 would have is a matter of common sense. If he was the manager who made a decision to issue a warning (and decided if it was formal or informal) or to refrain from doing so, he would have that influence. Whereas other managers' historic decisions would also play a part.

Clean Record	5
Letter of Concern	1
Probation Concerns / Extension	1
Formal Warning	0

133. At [Bundle 704] is a version of the matrix that was used for Staples Corner in June and July 2020. We accept that this is a document that was printed some months

later, and that (because of that) the right hand column "scoring" on [Bundle 704] inaccurately displays what the "scoring" column would have shown in July 2020. However, other than that, we accept that it is an accurate document, and that it can be used, by applying the scoring system set out on [Bundle 957] to show what the 8 sales executives at Staples Corner were scored at the time. The correct scores should have been:

	A	B	C	D	E	Total
Ilesh	5	5	3	2	5	20
C2	5	5	3	2	5	20
C1	0	5	1	1	0	7
Simon R	0	5	1	1	5	12
Branagh	0	5	2	1	5	13
Sayed	0	5	2	1	5	13
Todor	5	5	2	1	5	18
Hiva	0	5	3	3	5	16

134. The scores in the table that we have created above (extrapolating from the ratings given on [Bundle 704] and applying the scoring system on [Bundle 957]) matches the "scoring" column on [Bundle 704] save that [Bundle 704] shows a "7" for the Claimant.

135. We have accepted Ms Pauffley's explanation that [Bundle 704] was printed from the spreadsheet later than 28 January 2021, and that (therefore) the spreadsheet gave C1 the "5" for column A (length of service) that he would have been entitled to had the redundancy exercise been done after he had reached 2 years' service. It must, therefore, have been printed earlier than 20 February 2021 (because, if it was later than that Hiva would have had "21" in the "scoring" column, because of going up from 0 to 5 for column A too).

136. Given that we have accepted the evidence on oath that this scoring system was always used, across the group, it follows that the scoring system was not manipulated by R4 in order to achieve a desired outcome of C1 being dismissed, or at all.

137. Further, our finding is that R4 had no influence over either of Categories A or B.

138. For Category D, appraisal rating, the evidence provided by R2 is very weak, and again is based entirely on oral testimony. C1's position is that he never had an appraisal and (therefore) cannot have been given a score. R2 is not able to say who carried out the appraisal which it alleges occurred. It is said to be for 2019, but R2 cannot say whether it was done by Steve Hearn (C1's manager for January to September 2019 in Service) or by the Sales Manager, Simon H. Ms Pauffley's evidence is that:

138.1 She checked the scores at the time, including when she attended C1's grievance appeal meeting in August 2020.

138.2 She was satisfied at the time that the HR records showed (i) that the appraisal had been done and correctly entered onto the system and (ii) was "below expectations".

138.3 R2 no longer has access to the appraisal records, they having been destroyed in the normal course of events for data protection reasons

138.4 Had C1 dome more to query this at the time, it would have been possible, at the time, to supply him with more specific information (and printouts) about the appraisal.

139. Against this, C1 disputes that he would have received such a low rating from Steve. He says that they got on well, and that Steve was sorry to see him go from Service. In Steve's interview during the grievance, he does make some positive comments about C1, but also refers to him as "weak link". In relation to the possibility of the Sales Manager giving him such a low rating, it is notable that one of R4's arguments for C1 not requiring training was that his commission records showed that he did well immediately upon moving into Sales; thus, if true, that would make it odd that C1 was given such a low appraisal rating. However, C1 did not agree with the points R4 put to him on that when R4 was cross-examining him; he accepted that he had some commission in his first few weeks, but thought that it demonstrated only low sales volume in that period.

140. On balance, there is nothing to contradict Ms Pauffley's evidence on oath that she saw that an appraisal score had been entered onto the system. We find that it was not R4 who entered that score. It was one of C1's direct line managers for 2019, either the Service Manager or the Sales Manager. The appraisal rating is not one of the Claimant's specific complaints of race or disability discrimination. While R2 has not called either the Service Manager or the Sales Manager to justify the rating, or specified which of them it was, or produced any documentary evidence about it, the rating is not contradicted by any other evidence showing it ought to have been higher, and there are no facts from which we could conclude that either the Service Manager or the Sales Manager (as the case may be) was motivated by race when they gave that rating to C1 - Mr Oguntokun.

141. For Category E:

141.1 The bundle does not include the "formal warning" which was said to justify the score of zero in C1's case. C1 did accept, in cross-examination, that he had received a 12 month warning for attendance from Steve Hearn, in or around September 2019. C1 argues that it should not be counted because it was absence caused by being bullied by R4, but did not deny receipt, and does not allege that Steve Hearn was racially motivated when he issued the warning.

141.2 C1 also had a "letter of concern" issued by R4 on 20 February 2020 [Bundle 934]. This was in connection with the parking ticket issue. It included:

> I am writing to confirm that no further action will be taken. However I would like to confirm in writing our concerns regarding your parking tickets …

and

> … should this continue to be a problem, I will have no alternative but to take further action in accordance with the Company disciplinary procedure

141.3 If the (alleged) formal warning was not counted, but the "letter of concern" was, then C1 would have received a "1" for Category E, and an overall matrix score of 8. He would still have been the bottom scorer.

141.4 On the assumption that it was correct to treat the September 2019 warning (which R2 has not produced during this litigation) as a "formal warning" then C1's Category E score was correctly 0, and the letter of concern was irrelevant. His score would have been no different without the letter of concern.

142. R2 accepts that R4 did have a say in the Category C score (referred to as "technical role mastery" on [Bundle 704]).

142.1 It is noteworthy that C1 gets "Basic" (so 1 point) and so does Todor. This was the lowest score and so Todor could not have got any lower than "basic". 5 out of 8 sales executives are given the "basic" rating. From the evidence we heard, more than one of those given "basic" were white employees.

142.2 If C1 had been given a rating which matched that given to C2 and to Ilesh, then it would only have increased his overall score from a 7 to 8.

142.3 Had C1 been given the highest possible rating for this category then it would have taken his score from a 7 to 10, and he would still have been the lowest scorer overall.

143. On the basis of this matrix, the fact that Todor was included in the selection pool made no difference to C1. The employer wanted to have 6 Sales Executives. Including Todor meant that it needed to go from 8 to 6, whereas if Todor had not been made a Sales Adviser, then the employer would have needed to go from 7

to 6. However, C1 was bottom of the matrix either way and so - according to the matrix – would have been selected for redundancy either way.

144. It is, therefore, our finding, that neither R4, nor anyone else, converted Todor to sales executive (and/or included him in the pool) with the intention of manipulating the situation to bring about C1's dismissal.

C1's dismissal

145. On 30 June, C1 was invited to a "final consultation meeting". That took place on 2 July 2020. Again, the attendees were C1 - Mr Oguntokun, R4 - Mr Worsley and Ms Durston from HR. [Bundle 480]. Following some discussion and an adjournment, R4 told C1 that C1 was dismissed by reason of redundancy with effect from 31 July.

146. A letter confirming the decision was sent [Bundle 482]. R4 - Mr Worsley referred to the decision (the details of which were repeated in the letter, and were consistent with what had been said in the meetings and previous correspondence) as "my" decision.

147. In the meeting, C1 had been told that he could contact R4 or Ms Durston with any queries. He was also told about the right to appeal, which was to contact Ms Pauffley: "Holly Brennan" as she was then known at work.

148. Simon R was also dismissed and received a similar letter/information.

C1 lodges grievance

149. In the meetings with R4 and Ms Durston, C1 had made no allegations of bias or discrimination.

150. On Friday 3 July 2020, he wrote to Ms Durston [Bundle 485]. The subject line was "racial discrimination and bullying" and the body of the email included.

> I was wondering how it worked if I wanted to make a formal complaint about bullying and racial discrimination? Before I consider legal action. As I don't want anyone else going though what I did

151. She replied the same day:

> Formal complaints should be made through the company's grievance policy, which is within the company handbook. I have attached a copy for you to this email

152. The following Monday, 6 July, at 14:18, C1 wrote again to Ms Durston, in the same email trail (and therefore with the same subject line) [Bundle 484]:

> As per our last conversation last week I have decided to make a complaint for bulling and discrimination. The person in question is Mr Matthew Worsley so who would be

> the best person to share the details of my complaint to and could I have there email addresses please ?
>
> Also do we have a working union at robinsandday

153. He wrote to her again, later the same day, at 16:11. That email [Bundle 486] had subject line "Complaint regarding Racial Discrimination, Bullying" and stated:

> To whome it may concern,
>
> My name is Anthony Oguntokun I'm a sales adviser at Robins and Day. This letter is a formal complaint for bullying, discrimination and a bias redundancy dismissal.
>
> The person in question is Mr Matthew Worsley the branch manager.
>
> Key points:
>
> I was indirectly bullied and blackmailed into sales by Mr Matthew Worsley through my manager at the time Mr Steve Hearn after I turned down the position for sales advisor due to my mental health.
>
> Since starting sales even after asking on numerous occasions I have not been on any sales training course like my work colleagues have which is discrimination by law.
>
> Also I believe the decison to make me redundant was unfair and bias which again falls under discrimination.
>
> The info above is just a brief outline of the bullying and discrimination I have faced. I'm hoping by me telling you my story we can hopefully stop this from happening to anyone else at Robins and Day.
>
> I look forward to hearing from you soon

154. The same day, at 20:08, C1 sent the same message again to Ms Durston, but this time also sending to R5 - Mr Pickering and to R2's chief executive.

155. On Tuesday 7 July, Ms Durston acknowledged receipt and said she would be in touch shortly "to arrange a grievance hearing". The same day, C1 wrote back to say (amongst other things) [Bundle 488]:

> Thanks for confirmation on receipt of my email however can you please confirm when I will get appointment date for the grievance I have rasied over racial discrimination, bullying and blackmail? For example end of play today in the next few days? Just so I know as this is very stressful situation for me and has triggered my anxiety so I think clarity would help please tell me if you think my request is unreasonable ?

156. On 7 July, Ms Durston wrote to C1 with details of a meeting for 13 July 2020. It was to be conducted by R5 - Mr Pickering, and, because of Covid, was to be by phone. That meeting went ahead, and Ms Durston was the note taker. [Bundle 492]. After the meeting with C1, R5 - Mr Pickering carried out further interviews. These were: C2 - Ms Omar [Bundle 511]; Todor [Bundle 514]; Jakub [Bundle 517]; Dawn [Bundle 520]; Sayed [Bundle 524]; Steve Hearne [Bundle 526]; Nishma

[Bundle 531]; Mohammed [Bundle 533]; R4 - Mr Worsley [Bundle 535; Christopher [Bundle 543]; Branagh [Bundle 546]; Suliman [Bundle 551].

Grievance Outcome

157. On 29 July 2020, R5 - Mr Pickering sent grievance outcome letter to C1 [Bundle 553]. The 10 issues which R5 identified as requiring decision were:

> 1. You felt that you were indirectly bullied and blackmailed into sales by Mr Matthew Worsley through your manager at the time, Mr Steve Hearne after you turned down the position for sales advisor due to mental health.
>
> 2. Since starting within the sales team even after asking on numerous occasions you have not been on any sales training course like your work colleagues have which you feel is discrimination by law.
>
> 3. You believe the decision to make you redundant was unfair and bias which you believe to fall under discrimination.
>
> 4. Being referred to as Flipper.
>
> 5. Being told to "Get back into your hotbox"
>
> 6. Upon expressing feelings of suicide you were responded with "You are not fit to work, I am going to have to call HR and terminate your employment"
>
> 7. The placing of a driver, Todor …, into your redundant role.
>
> 8. Singling you out when food orders are placed.
>
> 9. Humiliating everyone, specifically body shaming Dawn ….
>
> 10. Saying "Your lot are outside you might want to see to them"

158. The first 8 were each “not upheld”.

159. For item 2, the explanation was:

> Due to your high levels of absence, holidays, staffing shortages and management changes, it was not feasible for the business at that time to place you onto training. When this was feasible in the New Year, you had over a month of sickness and returned on a phased return to work making it inappropriate to book you onto training. We do not believe this to be discriminatory or in any way racially motivated.

160. Our finding is that the first sentence of this conclusion was not based on any evidence other than R4’s assertions of the reasons.

161. For item 5, the explanation was:

> Unfortunately, I cannot find any evidence to corroborate your statement, nor have you submitted any evidence. Therefore I cannot uphold this element of your grievance.

162. No-one other than R4 had been asked about this. C1 had submitted some information by email to Ms Durston after seeing the notes of 13 July, and had not

been asked for more evidence or information. There was no finding about whether R4 had said "get back in your box" and C1 had misheard or misunderstood.

163. For item 6, R5 did ask some questions to R4 about this. He accepted R4's denials.

164. For item 8, the explanation was:

> I am unable to give you specific dates of employees employment as this is confidential to the individual, in line with the General Data Protection Regulations. I can, however, confirm that Todor was moved over to the sales team before the redundancy program took place. There has always been an intention to move Todor over to the sales team and his headcount has always sat within the sales department. By moving him earlier this meant that he was also placed at risk and pooled as part of the redundancy programme.

165. R5 was unable to explain to the Tribunal what specific investigations he had made, or documents he had seen, to enable him to reach the conclusion that "there had always been an intention to move Todor to sales team", or about why it happened during furlough. His evidence to the Tribunal was that there would have been no reason to suspect that there might be redundancies amongst sales advisers when Todor was moved. No documents about the exact date that it was done have been provided to the Tribunal, or were seen by R5 at the time, but our finding is that, at the time that a decision was made to bring Todor off furlough, as a sales adviser (while leaving other people, including sales advisers C1 and Simon R, on furlough) it was apparent to R2 and senior staff that there was the possibility of redundancies amongst sales staff in the not to distant future.

166. Item 9 was not an allegation of something said to the Claimant. R5's decision was that there was "a case to answer" and that action would be taken in accordance with the disciplinary policy, which would be confidential.

167. For Item 10, the response was:

> Decision: Upheld
>
> After carrying out thorough investigations we have reasonable belief that the comment was made. Although it is my reasonable belief that the comment was not intended to be racially offensive, I acknowledge that it is how the individual interpreted the wording and that this is not acceptable.
>
> Taking into account the information presented in the meeting and my following discussions, I have reviewed the matter and have decided that based on the information presented, that there is a need for the judgement of "banter" to be addressed. Any further action we deem appropriate will be taken privately and confidentially.

168. There was then a summary.

> In conclusion, from the investigations I believe that there are improvements required to Matthew's management style and judgement of "banter" any further action we deem appropriate will be taken privately and confidentially. I do not, however, believe that Matthew's management style is in any way motivated due to race or personal dislike, nor do I believe that there has been any unfair bias in your redundancy process

169. In his witness statement, R5 - Mr Pickering says this about Item 10:

> … Matt had made comments along the lines of “your lot are outside you might want to see to them”. I believe that Matt’s comment was a crude attempt at banter, not intending to cause offence, but wholly inappropriate. It needed to be addressed accordingly and that’s why I upheld this element of the grievance

170. Whereas, in relation to item 9, he stated that he regarded R4’s actions as “inappropriate” (rather then “wholly inappropriate”).

171. The witness statement is not an accurate characterisation of the outcome letter. Our finding is that, in the outcome letter, the comments about Dawn were not (specifically) described as “banter”; it was specified that those allegations would be addressed in accordance with the disciplinary procedure. For item 10, the comments were described as “banter” and the comments about action that was to be taken did not specify whether it would be formal or informal.

C1’s Grievance Appeal

172. C1 - Mr Oguntokun appealed on 31 July 2020 [Bundle 598]. The letter also stated “*I want a grievance raised over Mr Tim Pickering bias handling of investigation*”.

173. Amongst other things, he stated:

> Tim stated there was no evidence to back up the "hotbox" statement made but he acknowledged that Mr Matthew Worsley had humiliated everyone called my shoes slippers and made racial discriminative comment like "your lot outside you might want to see them" Which Tim believes to be banter so no judgement is needed and hes conclusion is Mr Matthew Worsley was not intentionally trying to be racist or discriminate it was just banter.
>
> However Mr Tim Pickering did not consider that racist comments like "go serve your lot" being made on a regular basis to me when he see customers that are black is singling me out because of the colour of my skin which by defenition is racial discrimination.
>
> Which is why I believe Mr Tim Pickering is part of the problem, again even after he uphold the racist comments made by Mr Matthew Worsley. Tim made no apology and justified Matts racist comments as banter which is unacceptable.

174. He also wrote:

> … indirectly by my making comments about my colour behind my back to hes management team and my colleges who will confirm this

175. Our finding is that the words "making comments about my colour behind my back" refer to the allegation that R4 had referred to C1 as "black bastard", and that C1 did not allege, in the grievance process, that he had heard R4 make such comments. Furthermore, taking account of the extracts from the appeal letter mentioned above, as well as the grievance process as a whole, if C1 had remembered, in July 2020, that R4 had made a comment which directly referred to C1's skin colour (such as "black bastard") then C1 would have written that – at the latest – in this appeal outcome letter. As the extracts just mentioned do make clear, it was C1's interpretation that the expression "your lot" when telling C1 to serve black customers was a reference to race/colour. We are satisfied that he does remember "your lot" being said; we are also satisfied that, at the time of the grievance, he did not recall "black bastard" being said within his earshot.

176. Jonas Kitto, the then Divisional Operations Director for the South Inner M25 region, was appointed to deal with the appeal. Ms Pauffley wrote to invite C1 to a hearing. It was to deal with the appeal, and what C1 had said about a grievance against R5 - Mr Pickering.

177. The meeting went ahead, remotely, as scheduled on 12 August [Bundle 668].

177.1 In the meeting, Ms Pauffley ("HB" in the minutes) and Mr Kitto asserted that the redundancy matrix was the same for all branches, and that R4 could not influence the scoring.

177.2 It was stated that "your Appraisal rating for 2019 is below expectations" and C1 did not query that remark at that point of the meeting.

177.3 The warning was mentioned and C1 asserted that but for R4's treatment of him, he would not have been sick.

177.4 In relation to "flipper", C1 stated:

> I never said he called me flipper I said he called my shoes slippers, I understand you have to set standards on uniform but what is not ok is every day picking at me and commenting on my appearance, every time he saw that he commented on the way I looked it was bullying

177.5 In relation to "hot box":

> JK: Looking through all the statements there is no evidence to support that the statement was made ok.
>
> C1: That was made in the service department quite a while ago I know I am asking them to look into deep into my memory, I remember everyone was waiting for me to react and I didn't

JK: That statement for me would be completely unacceptable, why did you wait over a year to bring it to our attention and now we are trying to ask people to remember an incident that happened over a year ago to deal with it accordingly

It is difficult for me to comprehend why you waited so long, that should have been reported immediately

AO - At the point Matt was GM, he was the ceiling, I just thought there was no where to go

JK: You have previously stated you have gone to your managers with issues (Mo or Steve), you said you had a good relationship so I don't understand why you didn't raise it

C1: We dealt with that there and then I wanted to use as an example of his history of how Matt was I wanted them to understand the reason behind that

177.6 In relation to Todor:

JK: we wouldn't move someone into a job when people were at risk

HB: Yes and also this meant he was pooled and put at risk also

JK: When we launched redundancy, all recruitment and offers are immediately put on hold, he would have been in the role prior to the redundancy programme being launched.

Holly was he already in situ prior to it being launched.

HB: yes

C1: He hasn't got sales experience though so how did he score higher

JK: As a current employee he would have an appraisal rating

C1: What appraisal rating, I never had one of those

178. Unfortunately, there was no response to the Claimant's last question/comment. Ms Pauffley's assertion during oral evidence that C1 had not disputed the fact that he had had an appraisal is factually incorrect. He did dispute it, and the Respondent failed to give him details of who conducted the appraisal, on which date, and failed to give him a copy of any supporting documentation.

179. At the end of the meeting, C1 was told that there would be further investigation regarding the "slipper/flipper" and R5's use of word "banter" in the outcome letter.

180. The grievance appeal outcome letter was sent 17 August 2020 [Bundle 700].

181. The allegation that R5 - Mr Pickering had been biased was rejected.

182. For not sending C1 on training, the decision was:

Decision: Partially Upheld

> I have partially upheld this element of your appeal, as whilst I believe it is fundamentally important that all employees are sent on training. I can see how due to your absence this did not happen. However, I can find no evidence to support that the oversight to not send you on training racially motivated in any way

183. For use of the word "banter" by R5 in the outcome letter, the appeal outcome was:

> Decision: Upheld
>
> Whilst I don't believe the word banter was intended in any way to undermine your concerns, I can see how you may have interpreted it. I would like to make it clear that the Company views any allegation of racial discrimination very seriously. As discussed in your meeting, where it is felt there is a case to answer for, those individuals will be held accountable in line with the Company disciplinary procedure, but as explained that has to remain private and confidential.

184. The comment about disciplinary procedure is accurate. On 14 August 2020, R5, on behalf of the employer, had sent a letter to R4 which informed R4 that there would be a disciplinary hearing; one of the allegations listed was C1's allegation that R4 used the phrase "*Your lot are outside you might want to see to them*"

185. The decision re "slipper" was as follows:

> **The comments on your appearance by Mr Matt Worsley not being addressed in your outcome letter**
>
> **Decision: Upheld**
>
> Having reviewed the notes and through further investigation, I do agree there is a case to answer for here. Any action deemed appropriate will be taken in line with the Company disciplinary, and details of that action will remain private and confidential.

186. The appeal letter also dealt with other issues that were not upheld.

<u>Further findings of fact re C1's Allegations against R4 as per the list of issues</u>

187. We have to make determinations about whether, on balance of probabilities, the following incidents occurred, and, if so, when, and in what circumstances.

To C1: "get back in your hot box" (September 2019)

188. In the meeting on 13 July 2020, with R5, the Claimant reported a discussion in which R4 had allegedly said that he, R4, was not a "people person", but was good at pretending to be, and C1 had allegedly said "you can't say that". The remarks to R5 continued:

> C1: … he told me to get back into my hotbox. I understand my history which he may have thought I didn't but I do and I know what that means. Do you?
>
> R5: No I don't

> C1: When you work on a plant they would put black people slaves into this hotbox if they were not working hard enough and they would fry them. I understand my history, all these little sly comments. His intention was to get rid of me but it was impossible within the service department but in the sales department you can manage people out but then I was doing everything by the book. He then thought you know what I am going to make this guys life hell. I now Look back and see he was trying to push me out. …

189. C1's comments then continued, and he moved on to other matters. R5 did not return to the alleged "hot box" comment. He did not seek any information about date or witnesses.

190. The day after the meeting, at 10.30am in the morning, C1 - Mr Oguntokun wrote to Ms Durston chasing up the meeting notes and supplying a list of witnesses. He did not state which witness witnessed which alleged incident. [Bundle 502].

191. His email stated:

> As per our last conversation on the phone after the grievance hearing. I highlighted how unhappy I was with the way Mr Tim Pickering handled the hearing. Where I felt he wasn't listening to me at all and was just trying to make me out as a liar, its this feeling as I stated before is one of the reasons it took me so long to come forward and is why no one comes forward.
>
> However you did reassure me that robins and days take these kinda of matters seriously which I appreciate as you was the only person on the call that sounded like they was interested in resolving the case so thank you again for that Miranda.

192. Ms Durston has not been called as a witness, but her reply at 10.50am does not dispute that C1 had said to her, at the time, that he was unhappy with how the meeting had been handled. She sent him the notes, and C1 replied stating that he disagreed with some aspects, including:

> Also the explaintion you have on the hot box comment made by Mr Matthew Worsley and my explaintion on what it means is not clear in the statement. When I was clear on what that ment to people of colour.

193. After Ms Durston's further reply, C1 wrote back, on 14 July 2020, stating, amongst other things [Bundle 499]:

> As per our conversation to clarify the hot box comment I explain the hot box was were they would put black people who wanted to escape slavery or didnt work hard enough on the plantation. It's was made of metal which got really hot under the sun it's was so hot that most time when they would be dead by the time the sun had gone down like that were fried or cooked alive a horrible fate for anyone that suffered it as you can imagine

194. In R5's interviews, while he asked interviewees whether they had seen racism, and about their perception of R4's treatment of C1, he did not ask anyone other than R4 about the alleged "hot box" comment.

> R5: Upon investigating there have been some specific elements of banter mentioned which I will go through.
>
> The first one is that you were having a conversation with Anthony and you told him to go and get back into his hotbox?
>
> R4: I would never say that.
>
> R5: Do you know what that is?
>
> R4: No. I know the term get back in your box but not hotbox

195. Thus, in introducing the question, R5 used the word "banter". There was no other question about this alleged remark. In particular, R4 was not asked if he had said "get back in your box" to C1, even though he was denying "hot box".

196. We have not been satisfied, on the balance of probabilities, that this comment was made. C1's witness statement does not do more than cite from the list of issues, and does not give any surrounding information about the (alleged) incident. He cites the allegation from the list of issues twice, and on one of those occasions refers to R5 (rather than R4) as the maker of the comment. Plainly that is just a typo (and we take into account that C1 is a litigant in person, and that he has dyslexia) but the fact remains that we consider there to be insufficient evidence to satisfy us that it is more likely than not that C1 has accurately recalled an incident in which R4 used these particular words.

Threatened with dismissal 3 times

197. The three occasions on which the Claimant says he was threatened with dismissal were, according to his answers in cross-examination:

197.1 The threat of being made redundant from Service, in September 2019, if he would not agree to move to Sales

197.2 In February 2020, on telling R4 how upset and distressed he was because of the parking ticket issue, being told that if he was not fit for work, R4 would contact HR and this could potentially lead to dismissal

197.3 The June/July 2020 redundancy exercise.

198. We have dealt with each of these three allegations elsewhere.

"Flipper" (&/or "slipper") comments (September 2019 onwards)

199. C1 alleged, in the meeting on 13 July 2020, that

> He used to take the mick out of me about my shoes and call me flipper. He said I can pay you £20 for a new pair of shoes. I thought it was a good will gesture, once I knew him I knew it was not. And if I had excepted it that would have been it.

And, on being asked why the £20 had been offered:

> I don't know, he felt sorry for me I guess and wanted to give me some charity. He said if you don't change your shoes, every time I see you I am going to take the mick out of you

And, on being asked if he did change his shoes:

> Yeah I did. I was just the way he was comments like, he just used to belittle everyone. I try to look back at a specific time, it was all the time. To everyone. Actually no some people were Ok, Jakub and Chris everyone who was white. I don't call people mate but he thought I called him it. I said Matt, he thought I said mate and said don't call me your mate, I am not your mate. I told him that I did not say that and he said oh sorry I thought you did. He used to let Jakub and Chris call him mate though.
>
> The only different between us all is that me and Tayan are of ethnic background but I did not take it like that at the time, it's on reflection. It's all the little things …

200. Our finding is that R4 did use the word "slipper" (not "flipper") to refer to C1's footwear. He did not refer to C1 himself as "slipper" or "flipper".

C1 being called "black bastard" by R4 "in late February / early March 2020"

201. Our finding is that C1 would have specifically made reference to it during the grievance and/or appeal had he recalled, in July and August 2020, that a few months earlier that particular remark had been made (either in the context alleged in paragraph 12.4 of the list of issues, or at all).

202. In July and August 2020, C1 did not have a recollection of this comment being made to him. Our finding is that the reason that he did not have a recollection of this comment nearer the time is that it had not been said within his earshot. Having seen the evidence disclosed during this litigation, including noting what Leon has said about these words being used, C1 has come to have an honest recollection that he personally heard the words being used. However, our finding is that C1 is mistaken about that.

"Your lot"

203. There is very strong evidence that R4 used words similar to "go and serve your lot" to both C1 and C2. Indeed, R4 accepted, in the tribunal hearing, that he did so.

<u>C2's grievance</u>

204. As mentioned above, C2 was interviewed by R5 as part of the investigation into C1's grievance on 17 July 2020, and the notes are [Bundle 511]. Her initial

interview stated at 10.30am and (judging from the notes) would have finished before 11am. Later in the day, having observed R4, R5 and Ms Durston in discussions, she asked to make a further comment. The only additional comment recorded (at about 4.10pm) was her opinion that a potentially redundant employee in Hayes might have been treated more favourably than C1 - Mr Oguntokun.

205. Contrary to C2's oral evidence, it is not the case that she asked (at 4.10pm) R5 and Ms Durston to make sure that the notes did not say that she thought R4 was "nice". She had not seen the notes by that stage.

206. We accept that the notes of the 17 July meeting are reasonably accurate and that, in that meeting, C2 did not make the specific allegations about R4's alleged words and conduct that she has made subsequently. As well as stating that she believed the redundancy process was unfair, her comments about R4 included:

> C2: … Matt as he can come across like he is belittling you. He can be quite patronising sometimes. …
>
> R5: Have you seen anyone do anything you would deem to be discrimination or bullying?
>
> C2: Yes, bullying from the General Manager. Not just to me, to Dawn, he makes comments to all of us. For most people here we would not say much but yeah he does as that's the only behaviour I see. For example he made a comment ... [to Dawn] … and she took that offensively. There are a few examples. The other day a member of staff was not wearing their mask correctly and he said I could fire you for that and he was a man of colour. It is hard to talk with the mask on and he didn't say that to a man who was not of colour. Yanik said you cannot speak to me like that and then Matt back tracked.
>
> R5: You mentioned colour. Have you ever witnessed racism at Staples Corner?
>
> C2: Yeah towards a man called Kayum. Matt used to say to him are you going to go upstairs and sniff the carpet. I am Muslim and I would take offense to that and in the position that Matt holds. Nobody here don't say anything as we feel that nobody would listen. Everyone in this department is intimidated by him, that's why a lot of people left and thats why they have not spoken up. If you called all of them and asked why they left they would say it's because of Matt. I think the role brings out certain sides of him which are not nice.

207. Three days after that interview, on Monday 20 July 2020, C2 - Ms Omar raised a grievance [Bundle 728]. The heading was: "*Formal complaint for bullying, sexual innuendos, racism and discrimination by Matthew Worsley*"

208. Amongst other things, she wrote:

> In the first instance of my complaint I will address the racism and discrimination I have been subjected to. On a number of occasions Mr Worsley would spray an air freshener around me and I quote his words "the Somali smell" and "bullshit" which was witnessed by many of my colleagues and would leave me feeling humiliated and

embarrassed. On numerous occasions I was often referred to as a “Somali pirate” and “foreigner” again witnessed not only by my managers but also other colleagues.

He further to illustrate his racism towards people of colour he would often refer any Somali customers to as “your lot” to me so that I may only deal with them.

In number of occasions he would also call me and another colleague of colour “something out of a jungle” which is outrageous and straight out racist

This level of racism and abuse has left me paralysed and has impacted both my emotional well-being but also my physical health.

209. R5 - Mr Pickering was appointed to deal with the grievance.

209.1 He carried out the following interviews, on 27 July 2020, accompanied by Deniz Gunduz from HR: Sayed [Bundle 731]; Hearn [Bundle 734]; Mohammed [Bundle 737]; Komal [Bundle 739]; Jakub [Bundle 741]; Lewis Geoghegan [Bundle 745]; Todor [Bundle 747]; Dawn [Bundle 750].

209.2 On 4 August, R5 - Mr Pickering interviewed Sayed accompanied by Ms Durston. [Bundle 760]. Sayed was asked about issues raised by C2 and by Leon and said he had not heard such matters, and would have reported it to HR if he had heard such things.

210. Later on 4 August, at 5pm, R5 - Mr Pickering interviewed R4 - Mr Worsley. The introduction was:

So as you are aware we have had some grievances raised against you which we have had to investigate in detail which has taken some time. We now in total have 5 grievances raised. It has taken a while to investigate as they did not all come at once, we have had to go back and talk to everyone again. We had one with Anthony which we discussed, Fathia which we haven't been able to investigate due to her sickness. Another from Leon, Simon … and Dawn. The theme for these falls under the following: Racism, bullying, intimidated, humiliation, discrimination and an unfair bias redundancy. We won't discuss Anthony or Fathia today but we will discuss the others.

211. The comments included:

TP: What about the other terms, Black bastard and Indian Twat?

MW: No

TP: The next point is around you referring to different groups of minorities as "Your lot".

MW: With that I do say "This is one for you" which is not specific to race or any specific elements. I will say this is one for you as in a customer for you.

TP: We have had people cited who say that you have referred to specific groups as your lot but no offense was taken and it was as a joke. People who also say it's in a racially discriminating way. You have referred to an ethnic group of customers as your lot.

MW: In the nicest way possible, you don't know what race people are just from seeing them. So that would be a highly inappropriate thing to say.

TP: How would you explain the numerous statements confirming this?

MW: I sometimes do swear and that is something I am working on with myself

Nobody can say I have used specific wording. I think there are people who have been speaking with each other.

TP: We asked for the specific terms but were advised that the terms Norwegian had been heard but could not confirm specifics.

MW: I may swear. As I said.

TP: It does not say swearing, it refers to racial discrimination.

MW: I may swear. I do not use racism though and have not said mountain monkey. The only comment I have ever used in relation to a monkey. Is, I would say you could teach a monkey to do that. It is just a saying that I have used it has no racial context.

And

TP: What about the referring to carpets when praying, this has come up in numerous investigations, carpet lifting, carpet sniffing and the referring to shoes being stolen. Referring to Kayum sniffing carpets.

MW: I have said I cannot remember specifically.

TP: Have you said anything in relation to prayer?

MW: I cannot remember.

TP: Would you have said that?

MW: It does not sound like something I would say. I allow everyone to go every Friday to pray. I even learnt that when they fast, Muslims can break there fast of an evening and you would use dates. So I did my research and if I am working late with them at the time I will bring dates in.

TP: Have you or haven't you ever said sniffing the carpet?

MW: No. I cannot remember so I have to say no

And

TP: [Leon] also says: Me and Fathia had a pretty rocky relationship as she does have a problem with being managed but I watched her go through comments like "Your lot is here" anytime a Somalian customer would come in. He would say are you going to sniff carpets along with Mo and Fathia to Kayum.

MW: Fathia never goes to pray so why would I say that and by December /January Kayum had left. Also he was allowed to by unfranchised cars if you will remember but we stopped him as he bought a £20,000 electric BMW

TP: Yes I remember.

And

TP: (quoting Dawn) “I overheard him saying to Fathia, something had happened with the cars and Fathia was trying to explain to him what had happened. Matt didn't like that and he said these are for listening with (ears) bat this (mouth) is to be shat and with me he wouldn’t have got away with saying that. But he got away with saying that to Fathia and maybe some are tired and worried of losing their job. It doesn't sit right with me, I don't want to be downing Matt.

MW: I actually say you have two ears for listening when people will talk over me, Fathia interrupts so I politely say you have to ears for listening. That's Dawn not actually hearing it correctly. As for Fathia, that conversation was had the day before you came to Staples when she blatantly lied to a customer twice. I said I had enough of what she was doing. I had a witness in my office and the doors open when I was talking to her. I have been through a grievance process with Fathia before with Charles so I have been very careful thereafter. Anytime I speak to Fathia I make sure it is with a witness and with the doors open. We actually left the room joking after. Fathia will lie continually even when others are present, even if there is blatant lie, she did it the other day with myself and Lewis.

TP: Why haven't you managed her?

MW: Fathia is hard to manage. I have been her biggest supporter. I asked for her when I was a GSM, she was in service and I knew she was good at selling. She caused shit, but once you accept that its fine, she delivers a high level of cars and she will sell cars that others cannot but she continually lies to customers and to staff.

TP: But don't you think that should have been managed?

MW: She sells loads of cars. She has ever had a PSS issue.

TP: But other people in the team must notice that she gets away with things.

MW: They all notice. If I was to manage her she would create problems. Charles attempted to manage her it turned out he wasn't doing it in the correct why though. Simon [H] has tried, Leon has and they have all had problems with her. The only person who has not is Jakub as she doesn't see him as a manager.

I have been Fathia's biggest supporter. Leon shouted at Fathia and I had to pick up the pieces, once you accepted that Fathia came with problems it was ok. We all have Sales Advisors who don't follow the correct processes but sell loads of cars.

TP: You have to be consistent throughout the dealerships with managing performance.

MW: I am. I am strict and tough with everyone. That is how I work with them. That is why I am the same with everyone. I am the only person who can talk to Fathia. She tried to lie about Lewis right in front of him, she said Lewis told her it was ok and Lewis said no I didn't. I know Lewis didn't agree that with her. Even in front of another manager, she blatantly lies to me about him. She does not care. She has no fear at all.

212. In relation to allegations made by Simon R, R4 replied: “*Just so your aware all these people are talking to each other. I am aware*”. Later, he added:

TP: Why do you think they are doing this then?

> MW: Anthony has been made redundant the only claim he has is through racial discrimination. Simon didn't have any issue with me until he went into a redundancy process and the only problem he had was in his last meeting which is within his notes. I have had a customer complaint as he did not do a deal correctly. Fathia I am not the first person she has done this too. Dawn I don't know. Leon I am not surprised as we have terminated his employment. Fathia was known for throwing shit at the wall and seeing how many stuck. Paul had the same with her. Steve had plenty of issues with managing her to. She can sell and sometimes you need that person. She is hungry.
>
> Dawn I am actually upset about. I tend not to bother Dawn too much. I tend to help Dawn. With time off, sickness. I have always helped her.
>
> Leon I am not surprised. I have terminated him. He didn't like that I was in the office with him towards the end and he didn't like that. He will also know that Lewis is here as he is talking to others.
>
> The job I was given was to manage him. When he went onto furlough and then I found all the issues that he had created

213. R5 quoted several allegations made by Simon R, one of which was that R4 had said “black idiot” another was that he had made C2 cry with comments about her hijab. R4 denied all the alleged comments and stated that “*Simon was a habitual liar*”. [Bundle 771]. The same list of allegations was repeated later in the interview, again without being put one by one, and therefore, in R4’s answer that he did not remember “saying that”, it is unclear what “that” refers to.

214. In the meeting, R4 invited R5 to speak to Hiva and to Ilesh who would, he suggested, confirm that he was telling the truth when he denied make certain remarks to them.

215. The meeting finished about 18:45, after which R4 - Mr Worsley was suspended. [Bundle 758].

216. On 6 August, R5 - Mr Pickering interviewed Ilesh. At first, Ilesh stated he had never personally heard R4 use the phrase “Indian twat” to him or about him, but he had been told – in approximately January 2020, he estimated – by other people that R4 called him that. Upon being pushed for details of who told him, he stated that, in fact, he had accidentally overheard R4 use that phrase when R4 was speaking to Leon, and he was unsure whether it was a reference to him, Ilesh, or to someone else.

217. Ilesh referred to a time when R4 had refused him permission to take time off when he had wanted to attend a family funeral. This led to R5 offering an apology on behalf of the company, and inviting Ilesh to contact him, R5 - Mr Pickering, if necessary in the future. Ilesh replied: “*You being so high up, one feels also a little awkward to say I am going to be speaking to Mr Pickering*”

218. R5 spoke to Hiva on 7 August. [Bundle 784] and again on 13 August [Bundle 797]. This included:

> TP: He would say that. Was there ever any racism?
>
> HM: Yes a number of times and if was going to pray or going to the mosque he would make jokes.
>
> TP: What did he say?
>
> HM: Just take it as a joke and laugh at it. …. I think he was saying something, when he was going upstarts to prey. He said he was upstairs sniffing the carpet. So many times he makes racist comments about us as most of us are not from England. If he was discussing something with someone else English he would say you lot would not know what we mean and laugh it off. Act as if we are stupid.

219. On 12 August, he interviewed C2 by phone. [Bundle 788]. C2 made her comments on the notes on 14 August [Bundle 801].

220. Branagh was interviewed on 14 August [Bundle 802].

221. On 14 August 2020, R5 spoke to R4 by phone, with notes taken by Deniz Gunduz. [Bundle 806]. R5 made the follow up enquiries about C1's footwear, as directed by Mr Kitto. He then put points to R4 from C2's interview.

<u>Grievance outcome for C2 and the appeal</u>

222. R5's grievance outcome letter was dated 19 August 2020 [Bundle 827]. R5 listed 13 allegations.

> 1. Mr Worsley would spray air freshener and refer to the 'Somali smell' and the 'bullshit' smell
>
> 2. You would often be referred to as a 'Somali Pirate'
>
> 3. You would be referred to as a 'Foreigner'
>
> 4. Mr Worsley would refer to Somali customers as 'your lot' so that you may only deal with them
>
> 5. Mr Worsley would refer to you and another member of staff of colour 'something out of a jungle'
>
> 6. Mr Worsley has told you 'not to think' and 'I do not pay you to think'
>
> 7. Mr Worsley would say 'where did you go wrong Fathia? Oh you used your brain'
>
> 8. Has told you to 'Please shut it and don't help Todor'
>
> 9. In relation to your holiday Mr Worsley has told you if he wants he will not let you have it
>
> 10. Threatening you with the 'Sack' if you call in sick
>
> 11. If you don't wear your glasses (PPE) you will be on formal disciplinary and singling you out

> 12. Mr Worsley would make comments in relation to your intimate life and your relationship with Kayem, specifically saying 'you're going red in your face, what have you and Kayem done upstairs' and asking you 'how do you like it'.
>
> 13. Mr Worsley would display sexual images on his phone about what he believes your sex life [is] like

223. Items 5, 8 and 12 were "not upheld".

224. Items 11 and 13 were "partially upheld"

225. The other eight items were "upheld". Although some of the wording varied for what the next steps would be for each of those, the summary stated:

> Taking into account the information presented in your Grievance and my following
>
> discussions, I have reviewed the matter and have decided that based on the information presented, I believe there is a case to answer for. Any action deemed appropriate will be taken in line with the Company disciplinary procedure, and details of that action will remain private and confidential.
>
> Robins & Day take matters of this nature extremely seriously and I would therefore like to apologise on behalf of the company on how this has made you feel.

226. C2 appealed on 21 August 2020 [Bundle 943]. Her appeal related (following the numbering in R5's outcome letter) items 5, 8, 12, 11, 13.

227. Mr Kitto was appointed deal with the appeal, and the appeal meeting was conducted by phone. Ms Pauffley accompanied Mr Kitto. [Bundle 836].

228. C2 was told that R4 was "not in the business" and that confidential procedures were being followed and that she would be updated in due course. She was told by Ms Pauffley, in relation to the matters which were not upheld: "*This isn't about saying Fathia has fabricated this is it just to say we don't have the evidence to support that allegation. But we are taking this really seriously*".

229. C2 was given the opportunity to make any comments that she wished in support of the appeal. The discussion included, amongst other things:

> Mr Kitto: It will be good for you to come back to work. You will walk into a different place
>
> C2: Yes I spoke to Dawn she is loving it
>
> Ms Pauffley: That's good, it is all well and good us saying it is better but nice to hear it from one of your colleagues
>
> C2: Yes. And I have nothing bad to say about the company
>
> Mr Kitto: we want you back at work doing what you are good at
>
> C2: Hopefully I will be able to come back next week

230. The appeal outcome was sent 11 September 2020 [Bundle 839]. Mr Kitto's decision was that R5's outcome decisions should stand. The letter included:

> … As discussed as a result of this, Tim has felt there is a case to answer for and will progress those allegations in line with the Company disciplinary procedure.
>
> The remaining allegations were not upheld, which, as you explained is why you have appealed. As you felt this is now a suggestion you are lying. As discussed in the meeting, this is in no way a suggestion that we believe you have fabricated these allegations. Having reviewed all of the evidence, I agree that is was the correct decision not to uphold these elements as there was not enough evidence or corroboration to support the allegation and progress it further. As stated, this was not a suggestion you fabricated the allegation.
>
> You also raised concerns that you don't feel ready to come back to work as you have not been made aware of the conclusion of the further action against Matt Worsely. As stated, we cannot disclose the action being taken due to our obligations under the General Data Protection Regulations. In addition, we cannot share anything before the process has fully concluded, which at this stage it hasn't.
>
> I would like to reassure you that we are taking this extremely seriously and that the individuals concerned will be held accountable for their actions in line with the Company disciplinary procedure. I would also like to reiterate that Robins & Day prides itself on the diverse nature of its workforce and we are committed to ensuring all employees are treated with dignity and respect and any behaviour to the contrary of this will not be condoned

<u>R4's grievance and departure</u>

231. On 14 August 2020, R2 - the Employer wrote to R4 - Mr Worsley to state that he was required to attend a disciplinary hearing on 19 August 2020. [Bundle 894]. The signatory of the letter was R5 - Mr Pickering (pp'ed by Ms Durston) and he attached the various interviews that he had conducted.

232. The letter stated that Mr Kitto would be the disciplinary hearing officer. We accept that this letter is genuine, and also accept that Mr Kitto has no recollection of having been asked to conduct the disciplinary hearing. He is copied in on the email sent to R4 [Bundle 893], but we accept that he did not study the attachments at the time. The disciplinary hearing did not take place.

233. The letter included the investigation summary [Bundle 824 to 826]. Our finding is that that document is a reasonably accurate summary of what particular witnesses had said about particular allegations. (In fact, there is a 4 page version at [Bundle 705 to 708], and it may well be that the 4 page version was sent to R4, and there is just a mistake in the bundle; however, our decision is that nothing turns on this.)

234. The letter stated:

> The purpose of the hearing is to consider the following allegations which has been raised in relation to your conduct:
>
> • Racism, bullying, intimidation, humiliation and discrimination, please see specific allegations listed individually in the investigation summary.

235. From 14 August 2020 onwards, R4, who was already suspended, was on sickness absence, which continued to the end of his employment. An Occupational Health report dated 19 August 2020 is [Bundle 898]. R2 had requested advice about whether R4 was fit to attend a hearing. The report suggested that he would not be fit to do so for at least 2 weeks, but possibly after that with adjustments. It stated his GP had "*referred him to a psychologist*".

236. R4 raised a grievance around 14 August. We do not have a copy of the actual document, but extracts are quoted in the notes of the meeting of 25 September 2020. Thomas Ray, Operations Director, was appointed to hear the grievance. He had a hearing in R4's absence on 25 September 2020 [Bundle 900], based on HR advice which was:

> To review, the grievance hearing has been scheduled 4 times, on receipt of his grievance and following advice from his OH report, Matt was invited to attend on Thursday 3rd September, Matt felt unfit to attend rescheduled to week after Thursday 10th September, Matt again felt unable to attend due to personal matters, Matt requested date Friday 18th September, the evening before Matt then asked if the disciplinary hearing could be held before grievance, advised this is not our normal process, agreed to grievance being heard first, invited for today, Friday 25th September. Matt is not in attendance as he feels unable to attend in person but has provided written representation via email this morning which has been forwarded to you

237. R4's grievance made allegations against C1. These were of "physical intimidation" by C1 and making false claims of discrimination. The grievance asserted that he, R4, had been acting on instructions in connection with "*move [C1] from Service into Sales as if not his position was to be made redundant*."

238. He alleged C2 was "*a serial liar*".

239. He also criticised the other people who had brought grievances, making various suggestions of collaboration.

240. R4 - Mr Worsley also criticised Ms Durston and R5 - Mr Pickering. He reported that, on 17 July, R5 - Mr Pickering and Ms Durston had told him there was nothing to worry about. We infer this was during the same conversation that C2 witnessed. C2 did not hear what was said, but thought that the three of them appeared to be light-hearted. R5 - Mr Pickering admits he probably said something along the lines of "enjoy your holiday" but denies saying there was nothing to worry about.

241. R4's grievance alleged that R5 - Mr Pickering did not necessarily follow due process, and referred to some specific alleged historic examples.

242. According to the meeting notes, the grievance and/or R4's written submissions for the meeting had included the following:

> Tim P set up a WhatsApp group for Senior Vauxhall Managers where there have been racial images sent and he has allowed it. Screen shots can be provided if you require.

243. So both "racial images" and "screen shots" were plural. R4 has produced one item [Bundle 964] and says it is the only item that he has. R5 - Mr Pickering and R2 - the Employer deny that they have anything else which would match the description contained in R4's grievance. We accept that, as stated in the grievance outcome letter, Mr Ray gave R4 the opportunity to provide evidence at the time (by asking around 9 October) and no response was received.

244. The grievance and written submissions expressed a desire/willingness for R4's employment to end (or, at least, to have discussions about it).

245. The grievance outcome was dated 30 October 2020 [Bundle 905]. In relation to the allegations about the conduct of C1 and C2 (etc), it was pointed out (reasonably, in this tribunal's opinion) that R4 was the general manager, and so, if he had had the alleged concerns about their conduct, as specified by him in his grievance, he was responsible for instigating appropriate procedures.

246. The letter included:

> With regards to collusion with Hiva, you state that she continually went into Dawn office having private conversations when she was working. Hiva has been on maternity leave since 1st November 2019, just over 9 months prior to the submission of the first grievance. Based on the substantial amount of time that has passed we find it difficult to believe that collusion was taking place at that time. Furthermore, this substantiates that it was normal behaviour for colleagues to have conversations in Dawn's office, prior to the submission and investigation of any grievances. On review of the investigation summary, that was provided to you as part of the disciplinary documents, there were 22 allegations. Of those allegations, 20 were corroborated by at least 1 of the 4 people named, however there were no allegations there were corroborated by all 4 parties, and 13 of those 20 were corroborated by other colleagues. I would uphold that there were general conversations regarding the grievance and investigatory process, however our investigation could not find any evidence of collusion and I would therefore not uphold this element of your grievance.

247. In relation to R4's allegations about a WhatsApp group, the letter stated:

> Our investigation could not find any evidence to corroborate your statement, nor have you submitted any evidence. I would therefore not uphold this element of your grievance.

248. It denied that what R4 had stated about previous disciplinary proceedings showed that R5 did not act properly.

249. The letter said that the investigation had confirmed that moving C1 to Sales (to avoid redundancies) had been the subject of a discussion between R4, more senior managers and HR.

250. R4 submitted a resignation around 29 September 2020. We do not have a copy. Following discussions between him and R2, it was clarified that he was resigning with notice and his last day of employment was confirmed as 31 October 2020.

C2's absence

251. C2 - Ms Omar commenced sickness absence on 27 July 2020 [Bundle 754]. She did not resume work prior to the end of her employment. The Occupational Health report dated 3 August 2020 [Bundle 755] stated there were no significant previous mental health issues, and noted that C2 had stated that she was receiving treatment from her GP for stress-related symptoms.

252. C2 remained absent and a further Occupational Health report dated 20 October was provided [Bundle 845]. It reported that C2 had stated that she was concerned about not knowing the results of the procedures in relation to R4.

253. On 3 November 2020, Ms Durston wrote to C2 forwarding an announcement which Amy Fox had made to all staff. [Bundle 848, 849]. Amy Fox's announcement included *"Matthew Worsely, General Manager Staples Corner & Hayes, left Robins & Day on 31st October 2020*" and discussed his replacements. Ms Durston's comments in her email to C2 included:

> As confirmed within your grievance and appeal outcome we cannot disclose the specific action that has been taken towards Mr Worsley due to our obligations under the General Data Protection Regulations. Any action deemed appropriate will have been taken in line with the Company's disciplinary procedure, and details of that action will remain private and confidential.
>
> Following on from your Occupational Health report I trust that this announcement will give you some reassurance in returning to work.
>
> We would like to invite you to attend an audio call with myself and Lewis to iron out any further concerns you may have before you return

"Lewis" was a reference to Lewis Geoghan who was the Sales Manager, following Leon's departure.

254. Ms Durston wrote to C2 again on 12 and 19 November, referring back to her 3 November communication. Following an email exchange, Ms Durston, C2 and Mr Geoghegan had a discussion on 20 November.

255. C2 stated that she had not noticed the sentence in Amy Fox's announcement which referred to Staples Corner / R4, and she had interpreted the covering email from Ms Durston as meaning that there was no update. Regardless of whether it is true that she did not properly read the contents of Ms Fox's announcement, we are satisfied that that R2 had attempted to inform her, on 3 November, that R4 had gone a few days earlier. In any event, on 20 November, C2 was told unequivocally that R4 had left and would not be returning.

256. On balance of probabilities, the staff actually in work at Staples Corner in late October 2020 were told sooner than Tuesday 3 November 2020 that R4 would not be returning to work. However, we are satisfied that there was no deliberate decision to withhold the information from C2, or to delay providing it to her. There is no evidence that there were other people on sickness absence who were informed prior to C2.

257. In the November 2020 meeting, there was a discussion about C2's return to work. Mr Geoghegan said he realised that the following Monday might be too early, but there was discussion about the possibility of 4 December. There was no mention of needing temperature readings.

258. The Claimant provided Fit Notes and remained absent. A further Occupational Health report dated 18 January 2021 was obtained [Bundle 864]. As well as commenting on C2's health and treatment, it included:

> A stress risk assessment would guide you further regarding the areas of concern, potential control measures and an agreed action plan. In my opinion, Miss Omar would benefit from a phased return to work in line with your usual policies. I would suggest that she starts with 50% of her working hours and building up over a four week period in line with her coping. If feasible, you may wish to offer her any flexibility. She would benefit from close my management support on her return and additional breaks should she become overwhelmed during her initial return.

259. C2 requested a further Occupational Health referral on 22 January [Bundle 869]. This was by text exchange with Mr Geoghegan. C2 chased on 26 January, at 16:48. At 17:14, Ms Durston emailed HR to request the appointment. On 28 January, Occupational Health requested further information before a booking would be made. [Bundle 866]. Our finding is that it was Occupational Health rather than Ms Durston or Mr Geoghegan who caused the delay after 28 January. In saying this, no criticism of the external Occupational Health provider is intended; we are simply stating that it was their decision, not the employer's.

260. Following some further text and email exchanges, on Tuesday 2 February, C2 messaged Mr Geoghegan at around 2pm, asking about the phased return and point out her fit note ran out on Thursday 4 February. He replied at 10.23am the next day, stating:

> Hi I am just awaiting on how to do it from hr . Also do you have 14 days of temperatures

261. This was the first time that C2 had been asked for this. She replied to say that she did not have, and did not know what he meant. His reply was:

> We have to always have 14 days of temperature for covid
>
> To make sure you don't have the high temperature

262. C2 asked what would happen, and Mr Geoghegan said he would find out.

263. There was no further reply from him prior to C2's text the following day, just after 4pm. Her reply briefly mentioned an assertion that she has subsequently explained in more detail. C2 asserts that she had been told by her GP to keep temperature readings, in connection with the medication which had been prescribed to her, and that, therefore, she had now realised that she had temperature readings after all. She claimed that it had not initially occurred to her that the readings that she had been keeping for her GP could, in fact, simply be supplied to R2 - the Employer, to satisfy Mr Geoghegan's request.

264. Mr Geoghegan replied at 19:50 to say that he had forgotten to call the Claimant back. He said that R2 would not accept the readings she had described in her text. He said that he had discussed it with R4's interim replacement. Mr Geoghegan has not given evidence. However, the interim manager, Rob McKenzie has done so, and confirms that Mr Geoghegan's message was sent on his instructions. He states:

> Neither of us believed Fathia's explanation. Lewis communicated that Fathia did not know that she was required to keep a 14 day record of her temperatures. Once this was communicated to Fathia her response was that she did not know about it. We were then provided with temperature readings for the previous 14 days within 24 hours. Myself and Lewis had a discussion regarding this quick response and in the interest of employee and customer welfare, I asked Lewis to inform Fathia that she would not be able to return until we had 14 days temperature readings and advised that she should start today (4 February 2021) and return in 14 days time.

265. On 4 February, C2 asked Mr Geoghegan to check again and he said (at 8pm) that he would do so.

266. On 5 February, at 8.22am, she asked if she would be paid. She sent reminders at 8.44am and 9.10am. At 9.22am, Mr Geoghegan texted back:

> Hi sorry I was in a meeting you will not get paid.

267. At 10.17am, C2 wrote (to Mr Geoghegan, copying in Ms Durston and Ms Pauffley) [Bundle 880]:

> I am writing to inform you that I am resigning from my position of sales advisor with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experience.
>
> I feel that I have been let down by the company even though I have worked over 3 and a half years. I am resigning in response to a breach of contract and feel that the way I have been treated during my sick leave was unacceptable.

268. Ms Pauffley wrote, the following Monday, 8 February 2021, [Bundle 881] commencing the letter:

> Further to recent discussions and your letter of resignation with immediate effect, I can confirm that your employment with Go Motor Retailing Ltd will terminate on the grounds of resignation on 5th February 2021.
>
> We have noted your comments and should you wish to have these formally addressed please refer to the Robins & Day Grievance Procedure.

<u>Further findings about C2's Allegations against R4</u>

"Somali Pirate"

269. The following people said that they had not heard this said: Sayed [Bundle 732]; Steve Hearn [Bundle 734]; Mohammed [Bundle 737]; Komal [Bundle 739]; Jakub [Bundle 741]; Lewis Geoghan [Bundle 745]; Dawn [Bundle 750];

270. Apart from C2 herself, and from Leon, two others claimed to have heard it:

271. Hiva [Bundle 797]

> R5 - Have you heard references made to a Somali Smell?
>
> Hiva - Yes
>
> R5 - Could you tell us a little more, when and in what context?
>
> Hiva - I am trying to think, I definitely heard it, it was something to do with where we had customers and there was a smell in the showroom. There were some Somalians around I cant remember but I remember him reference it.
>
> R5 - Who was saying it?
>
> Hiva - It was Matt that was saying it
>
> R5 - Ok, have you seen anyone spraying an air freshener around people and talking about a 'bullshit' smell and the Somali smell?
>
> Hiva - I have seen the spray but not heard anything about Somalian smell or bullshit.
>
> R5- Who was spraying around?
>
> Hiva - Matt
>
> R5- In what context was he spraying it? Was it just to freshen the room?

Hiva - He always does it, makes it out we are foreign, might be smell of our food. Number of times I have my own food and says to me it smells funny. It's something that happens all the time. When he was doing it he was saying to someone yes its smell of your people 'your lot' but I cannot 100% remember the word bullshit when he was spraying it.

R5 - Ok.

R5 - Referring to Somali Pirate - have you heard this before?

Hiva - Yes

R5 - By who?

Hiva - Matt.

R5 - In what way would he use that term?

Hiva - I'm being honest I don't know because I didn't understand what it meant. I never realised what it means. I've heard him say it many times and laughing

R5 - In what context was it in general discussion about pirates?

Hiva - No he was saying it to someone

R5 - Who?

Hiva - Fathia

272. Branagh [Bundle 803]

R5: - Have you ever heard him referring to others as something out of a jungle?

Branagh - No I have not

R5: - Foreigners?

Branagh - He has mentioned foreigners but not jungle.

R5: - Has he said anything to you that you consider to be racist?

Branagh - Personally not to me but to Muslim background yes

R5: - What has he said?

Branagh - Again about the smell, Somalian pirates

R5: - Can you give more details on the foreigner comments

Branagh - More towards when black people come I would deal with it, Somalian customers, more of you're lot. 'Your people are here'. Same country or same colour then that's when he comments

And [Bundle 805]

R5 - Have you heard him use the term Somalian pirates?

Branagh - Yes

R5 - In what context.

Branagh - When Somalian customers walk in to building he notices them and Fathia at her desk. He would mention it.

R5 - Would he mention it to Fathia

Branagh - What I seen never been to her face but I wouldn't put it past him

R5 - What would he say customer walks in

Branagh - Fathias people or cousins here.

R5 - But not Somalian Pirate?

Branagh - I heard him say it once in the office when group come in. Fathias people and then comments about Somalian pirates.

R5 - Ok nothing more from me, anything to add?

Branagh - No

273. At the 4 August 2020 meeting with R5, R4 denied ever making the "Somali pirate" remark. (Notes start [Bundle 610] with the denial being [Bundle 623]). He also denied it at the 14 August meeting [Bundle 682] where he described the allegation as "complete rubbish" and stated that he had "never referred to anyone as Somali Pirate".

274. Our finding is that the remark was made. C2 genuinely recalls it and her recollection is supported by Leon, Hiva and Branagh. We take account of the fact that they have not appeared as witnesses, but our finding is that the four of them were not part of a conspiracy to make false allegations about R4 to R4's employer.

275. R5 - Mr Pickering's evidence to the Tribunal was that he remembered thinking it was significant that Hiva corroborated C2's version of events, because (a) R4 - Mr Worsley asked him to speak to Hiva because R4 was confident she would support him and (b) Hiva had been away from work for several months beforehand, and so it was less plausible that she would have been approached (by C2, or by Leon, etc) to form part of a conspiracy to tell lies about R4. We agree with that assessment.

276. On the balance of probability, it is not the case that R4 had referred to C2 as "Somali Pirate" and had forgotten about by August 2020. We think it more likely that, in August 2020, he did remember the comment, but chose to deny it to R5.

277. We note C2's list of allegations [Bundle 43], and that "Somali Pirate" is alleged to have been said April 2019, May 2019 (x2), June 2019, July 2019 (x2), August 2019, September 2019, October 2019, December 2019, February 2020, March 2020, June 2020, July 2020 (x2).

278. C2 did not keep a contemporaneous record of specific occasions. We are not satisfied that there is reliable evidence that R4 said it (a) 14 times exactly or (b) in those specific and exact months. We are, however, entirely satisfied that he said

it several times in C2's presence after she moved to Staples Corner, and that included after he became General Manager. On balance of probabilities, the occasions on which he said it included one or more occasions after C2 had come back off furlough, so in June and/or July 2020. His reason for use of the phrase "Somali pirates" was both his perception of the customers' race, and his perception of C2's race.

Air freshener & "Somali Smell" & "Bullshit smell"

279. R4's comments to R5 on 14 August were as follows [Bundle 682-683] in response to R5's question which referred to spraying air freshener, "Somali smell", "Somali pirate", "your lot" amongst other things:

R4 - Do you want me to answer that?

R5 - Yes

R4 - Complete rubbish.

R5 - None of that is true?

R4 - Never referred to anyone as Somali Piriate. We have had the conversation so I don't think I need to reiterate the 'your lot' comment because I feel that is being generated through the whole lot. With regards to the spray. Yes I always have an air freshener in the office I work in. Yes it does get sprayed and not meant in an offensive way to anybody.

R5 - How is it used?

R4 - It is used if there is a smell in the office, unfortunately people do tend to smell when they work hard. On a number of occasions it will be sprayed near me when someone is clearly lying.

R5 - Can you explain how you use it?

R4 - When someone is lying I will, as with several people, the term bullshit is used. I know we have used the term before with ourselves when we are talking. Yes it will be a smell of bullshit but its not at her, not near her and actually its not meant in an offensive way. It is because of her continual lying which can be proved on multiple occasions.

R5 - You don't deny when you think she lying you spray air freshener around the room accusing her of bullshit

R4 - Accusing her of lying yes.

R5 - The specific term is bullshit

R4 - Which is why I'm saying lying

And

R5 - In our investigations and people we have spoken to we got more than one person saying they have seen you use the 'Somali smell' and use the spray in relation to Fathia particularly.

R4 - As I said, Fathia is predominantly someone who is 90% of the time continually lying and not following processes or management requests. I have not used word Somali pirate at Fathia at all

280. Sayed [Bundle 731], Steve Hearn [Bundle 734], Mohammed [Bundle 737], Jakub [Bundle 741], Lewis Geoghan [Bundle 745], Todor [Bundle 747] each said to R5 that they had not heard “Somali smell” accompanied by spraying (of, for example, air freshener).

281. Dawn’s comments [Bundle 750] were:

R5 - Have you heard Matt use the term 'Somali Smell' ?

Dawn - He has a bullshit smell/spray. If he thinks somebody is bullshitting that's his 'Bullshit spray' and spray It near you. I haven't heard him say the 'Somali smell'. I know Fathia has been upset about it I haven't heard it but have heard the bullshit quote.

R5 - Ok second, have you seen anyone spraying air freshener around the staff and saying 'Somali smell'?

Dawn - I have not witnessed that

282. Hiva’s comments [Bundle 797] on this allegation were quoted above.

283. Branagh’s comments were [Bundle 801-802]

R5 - Have you heard any references to a 'Somalian Smell'?

BRANAGH - Yes I heard Matt say that in morning meetings. Also when Fathia has customers, she deals with Somalian and Muslim people and things like that as language barrier. Matt always says Fathia it's 'your lot' and has mentioned about the way Muslim people smell and things like that. I Have heard him say that.

R5 - When does he use these terms?

BRANAGH - Anytime, morning meetings.

R5 - So he uses this in meetings, in what context?

BRANAGH - He would say Fathia, your people are here and mention something about how they smell

R5 - Does he make reference to a bullshit smell?

BRANAGH - Yes bullshit spray, air freshener in managers office, I think he used on Fathia a lot

R5 - What does he do?

BRANAGH - If a customer was an issue, you will hear customers side and ours, Matt will spray and say 'oh its the bullshit spray'

R5 - Directed at Fathia or everybody?

BRANAGH - Everybody but I feel like he mainly targets Fathia. Picks on her more than everybody else

R5 - When used, in relation to Somali smell or just bullshit

BRANAGH - He has sprayed it when she's walked away

R5 - Has he made comments on anything when spraying?

BRANAGH - He just sprays it

"Your lot"

284. As mentioned with the findings about C1, it is clear that R4 did make comments along the lines of "go and serve your lot". In C2's case, he did it in reference to customers whom he perceived to be Somalian.

"keep it shut"

285. We are satisfied that R4 did use these words to C2. We are not satisfied that he ever said it in response to her suggesting that she would complain about him.

threatened that she would lose her job if she told anyone what was happening

286. We are not satisfied that C2 ever said to R4 that she was proposing to tell anyone about his (allegedly racist) comments. Therefore, it follows that he did not respond by telling her that she would lose her job.

"Foreigner"

287. We accept C2's evidence on oath that there were two occasions (in or around, November 2019 and February 2020) when R4 called her a "foreigner".

Referring to C2 and C1 as "something out of the jungle"

288. On 17 July 2020, when C2 - Ms Omar was interviewed by R5 - Mr Pickering as part of the grievance investigation into the issues raised by C1 - Mr Oguntokun [Bundle 511], C2 commented briefly on her working relationship with C1. She said that her perception was that C1 did not get on with R4. She did not state that she recalled any incident in which R4 had used the phrase "something out of the jungle" to her and/or to C1.

289. However, on balance of probabilities, we accept that R4 did make this remark to C2. We are satisfied that C2 is not making up this allegation and that she has not misremembered or misheard the comment.

"going upstairs to sniff the carpet"

290. R4 made comments along these lines to and about followers of Islam when they were about to go and pray.

291. He made these comments in C2's presence, and in other people's presence.

Comments about Kayum Ahmed

292. On more than one occasion, R4 made suggestive comments about C2's friendship with a work colleague, Kayum Ahmed. He implied that they were in a sexual or romantic relationship, which was not true, and which C2 found offensive.

Discussing C2 while showing sexually explicit images

293. Hiva and Branagh informed R5 that they were aware of R4 showing such images to colleagues. Neither stated that he did so while specifically talking about C2.

Refusal of Holiday requests Threatening C2 with dismissal if she had sick leave

294. We are not sure that either R4 or C2 have a particularly clear recollection of C2's holiday requests towards the end of 2019. It is common ground that she had a lot of annual leave left, and that this was (in part, at least) because R2 had encouraged her not to use her annual leave to help cover staff shortages.

295. There is an inconsistency in some of C2's evidence in relation to whether she asked for a long period of leave and was refused (accompanied by an assurance that she could carry over the unused leave), or whether she was content with just an assurance that she could carry over.

296. We do not have clear enough evidence about what C2's exact words were which preceded R4's comments about the possibility of someone being disciplined if they asked for leave had it refused, and then went off sick for that same period. Similarly, the evidence is not clear about whether he specifically told C2 that she would be disciplined if she called in sick around this time (late 2019).

297. However, based on the totality of the evidence, we are satisfied that even if R4 did threaten C2 with disciplinary action, he would have made such a comment to any employee if he believed (whether rightly, or wrongly) that there was a reason to suspect that the employee might phone in sick when they were not really sick.

<u>Grievance by, and interview with, Leon (General Sales Manager)</u>

298. An employee named Leon, who was the General Sales Manager at Staples Corner, was made redundant at around the same time as C1. Leon raised a grievance on 21 July 2020 [Bundle 890]. The written grievance included, among other things, the allegation:

> I have also witnessed other of my team being called "Black Bastard, Indian Twat, YOU LOT referring to muslims along with derogatory comments such as "carpet lifters" when they go to prey". I find this behaviour shocking and it tells me Mr. Worseley is has racial bias …

299. R5 - Mr Pickering, accompanied by Ms Durston, met Leon on 29 July 2020 to discuss Leon's grievance. In other words, R5 met Leon on the same day that the outcome letter was sent to C1.

300. Part of Leon's grievance was about the termination of his employment. Like C1 and the other dismissed sales adviser, Simon R, Leon had not been brought back off furlough. His grievance alleged that that he was the only Sales Manager in the whole group who had not been brought off furlough, and alleged a lack of genuine consultation, and that R4 had appointed a friend of his to the sales team, the previous March, and was now replacing Leon with that friend.

301. The next part of his grievance was:

> … as to Mr Worsteys motives, and that is I feel have been since I started with the company been a victim of psychological terror, humiliation, bullying and racial prejudice by Mr Worseley. The work environment is highly racially charged Mr Worseley uses frequently racial "Banter" and "Stereotypes" very often and this has been extremely uncomfortable to work in. Personally, I been called "A Norwegian TWAT, A Norwegian Mountain Monkey, Bloody Immigrant etc." to mention but a few. I have also witnesses other of my team being called " Black Bastar, Indian Twat, YOU LOT reffering to muslims [along] with derogatory comments such as "carpet lifters" when they go to prey". I find this behaviour shocking and it tells me Mr Worseley is has racial bias, and one must consider the fact this racial bias as I am not English, could be the real ground of my dismissal, which I believe I can prove they are.
>
> Mr Worseley has deliberately created a hostile work environment where it has been next to impossible to thrive, I have never been allowed to implement any of the ideas I was hired to do, If I try to mention subjects that goes against Mr Worsleys already set processes even if I believed them to be more efficient, I was always intimidated or made fun of in front of the team or others, as as to discourage further attempts by me to do my job the way I felt most conducive for the company. I felt on many occasions bullied and humiliated and lost lot of self-confidence. I even emailed Mr Worseley telling him how I felt but his strong reply scared me so I apologised, but its not correct that I should be bullied into silence, nor having to be victim as well as bystander of Racial abuse and prejudice.

302. His allegations included.

> Leon: When I asked Matt for your number to contact you, he said if you go above my head that will be the last thing you do.
>
> R5: Why did you not speak to me?
>
> Leon: I wanted to but I was scared for my job.
>
> R5: When was this that he said it?
>
> Leon: From January. Anytime I would say about having your contact details or discussing anything with yourself, he says if you go above my head that's the last thing you will do

303. Later he added:

> Leon: … I was worried to go above Matt. It's so difficult
>
> R5: You could have emailed me.
>
> Leon: I felt that Matt could just terminate my job, I was worried. …

And, later:

> R5: When you were so offended by Matts comments why did you not raise this?
>
> Leon: Do you think it's easy to stand up to a bully? Someone who can fire you at any point. I have been bullied so much that I lost all self-confidence of myself.
>
> R5: Did you not think if it was raised at the time we could have done something about it?
>
> Leon: No I didn't see any point as Matt had control ….

304. About C2, Leon said (implying it was a regular thing on Fridays):

> Me and Fathia had a pretty rocky relationship as she does have a problem with being managed but I watched her go through comments like your lot is hear anytime a Samarian customer would come in. He would say are you going to sniff carpets along with Mo and Fathia to Kayum.

305. Later, having referred to a comment that had allegedly been made to him, Leon, he added:

> Leon: It's always you are Samarian, you are this or that, he doesn't refer to people as individuals.
>
> R5: When he called you that who was present?
>
> Leon: Fathia for sure and I think Jakub was there. I remember Fathia was shocked, she gasped. Apart from that everyone knows that Matt thinks this racial element is funny but it's not. How he talks about Muslims is shocking.

306. Later, Leon's allegations included:

> Yes apparently in Matts mind all Somarlian's are criminals so if a finance gets rejected he will say "Oh it's the Somarlian pirates again" Fathia deals with a lot of the Somarlian customers as she can speak the langue but he will say to her your lot are here when they attend site.

307. About C1, Leon said:

> R5: Has he spoke to you racially on more than one occasion?
>
> Leon: Several occasions. The working environment at Staples Corner is so horrible. He is there standing over everyone and if you put a foot wrong he will call you up. It's all the innuendos, racial slurs it is shocking. Everyone is terrified of him and that's not the trait of a good General Manager.

> R5: You reference black bastard who did he say that to?
>
> Leon: Anthony, he is quite energetic and Matt would say calm down you black bastard. It was said in front of the whole team.
>
> R5: He called him a black bastard?
>
> Leon: Yes and then Anthony went outside to calm down.
>
> R5: When was this?
>
> Leon: It difficult for me to say

308. Upon being asked about whom he alleged had been called “Indian twat”:

> Leon: Ilesh I believe, Ilesh brushes it off. As he is not good with computers he has to reset his password a lot and Matt will say "Oh you Indian Twat"
>
> R5: So in a jovial way but potentially racist?
>
> Leon: If Ilesh is happy with that I don't know but you shouldn't brand people like that.

309. The above-mentioned quotes are all from R2 - the Employer’s notes (produced by Ms Durston) which are [Bundle 557-563].

310. Without R5 - Mr Pickering’s or R2 - the Employer’s knowledge or consent, Leon made an audio recording, and the purported transcript is [Bundle 564-590]. The actual recording has never been provided to the Respondents, and nor has a witness statement from Leon to confirm the (alleged) accuracy of the transcript. In those circumstances, we have given little weight to the alleged transcript, and have relied instead on R2’s notes.

311. Based on R2’s notes, Leon made several assertions as to why he had not reported matters earlier. He specifically commented on the phrase “your lot” being used to several people (though not to C1 specifically) and said why he believed (or claimed to believe) that it had been used in a way that was connected to race (and/or religion). His only specific comment about C1 was as quoted above, but he did assert, more generally, that there was race discrimination by R4.

312. It is unclear whether R5’s meeting with Leon was before or after C1’s grievance outcome letter was emailed to C1.

313. Later, after C1 had appealed against the grievance outcome, R5 was asked questions by Jonas Kitto in relation to C1’s appeal. R5 did not tell Mr Kitto about Leon’s allegations as they related to C1.

314. In paragraph 42 of his witness statement, R4 states:

> Leon and Fathia were very close colleagues and I strongly suspect that they had colluded with raising their grievances as the contents were very similar.

315. In paragraph 47, R4 states:

> I also understand that they have the support of their close previous colleagues and friends, Leon … and Dawn …. I consider that a significant driver behind this was Leon, who after I had left the business sent me a WhatsApp message stating that he was behind the coordination of the Claimants' claims and that would teach me for terminating his employment previously. Unfortunately, on leaving employment with the Company, I deleted all WhatsApp messages and text messages relating to the Company from my phone and so I no longer have access to this message.

316. We take into account that there must be a certain level of contact and co-operation between Leon and the claimants, because they were able to provide the (alleged) transcript of the covertly recorded 29 July meeting.

317. Our finding is that Leon did not send a message to R4 which matched the description in paragraph 47 of R4's witness statement.

317.1 It is inherently implausible that someone who (on this hypothesis) went to the trouble of co-ordinating a group of people to tell lies, so as to damage R4, would undermine all that work by admitting to it in writing.

317.2 It is also inherently implausible that someone on the receiving end of such a campaign, whose stance has been throughout that lies were being told about him (and co-ordinated lies; a "collaboration" as he has termed it) would delete a message which confirmed his stance. We do not ignore that the implication is that it was part of a mass deletion exercise, rather than as a conscious decision to delete that individual message, but we still find it to be implausible. R4 went to the trouble to print a particular image from a WhatsApp group which he believes assists him (because he believes it shows the type of image which R5 was willing to condone) and so we are sure that if he had a message from Leon which made these claims, then he would have printed it.

317.3 We take into account that there was a long delay until R4 knew that there was an employment tribunal claim against him, but he took the trouble to preserve some evidence which (he alleges) is relevant to R5's and/or R2's attitude to issues connected to race. The claim that he would receive a message such as that described and do nothing with it (not, for example, send it to R5 or Mr Ray or Ms Pauffley or Ms Durston or anyone else) other than allow it to be deleted it so implausible that we are sure that it is not true. Furthermore, the comment in paragraph 42 that R4 "suspects" collusion makes little sense if, in fact, he had received express confirmation from Leon that there was collusion.

317.4 His assertion is false in circumstances in which he must know that he is making a false assertion.

The Law

Equality Act 2010 ("EQA")

318. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (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.

319. It is a two stage approach.

319.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

319.2 If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

320. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

321. The burden of proof does not shift simply because, for example, the claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unwanted conduct and/or that there was a protected act. Those things only indicate the possibility of discrimination or harassment or victimisation. They are not sufficient in themselves to shift the burden of proof; something more is needed.

322. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness. In SRA v Mitchell UKEAT/0497/12/MC, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation of the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services.

323. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

324. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

325. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different

individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

326. A crucial distinction is between – on the one hand – an invariable rule which will inevitably result in a discriminatory outcome each time and – on the other hand – a discretionary decision made under a policy, in which the discretionary decision may sometimes result in an employee getting the desired outcome, and sometimes not. In the latter case, the discretionary decision causes the time to run (for a complaint based on that decision), regardless of arguments about whether the policy itself is discriminatory.

327. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

328. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

329. The factors that may helpfully be considered include, but are not limited to:

329.1 the length of, and the reasons for, the delay on the part of the claimant;

329.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

329.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

330. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) “whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)”: Abertawe Bro Morgannwg University Local Health Board v Morgan Neutral Citation Number: [2018] EWCA Civ 640.

Definition of Direct Discrimination – section 13 EQA

331. Direct discrimination is defined in s.13 EQA.

> (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.

332. There are two questions: whether the respondent has treated the claimant less favourably than it treated others ("the less favourable treatment question") and whether the respondent has done so because of the protected characteristic ("the reason why question").

333. For the less favourable treatment question, the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined. Sometimes an approach can be taken where the Tribunal deals with the reason why question first. If the Tribunal decides that the protected characteristic was not the reason, even if part, for the treatment complained of then it will necessarily follow that person whose circumstances are not materially different would have been treated the same and that might mean that in those circumstances there is no need to construct the hypothetical comparator.

334. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the respondent's various acts, omissions and decisions.

335. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

336. If we find that the reason for particular treatment of the claimant was - for example - the claimant's absence from work, then the relevant comparator (for the direct discrimination allegations) would have to be someone who was also absent from work for a similar amount of time, and so on.

Harassment – section 26 EQA

337. Harassment is defined in s.26 of the Act.

> (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.

338. It needs to be established on the balance of probabilities that the claimant has been subjected to unwanted conduct which had the prohibited purpose or effect. However, to succeed in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it had the purpose or effect described in s.26(1)(b). The conduct also has to be related to the particular characteristic.

339. Section 136 EQA applies and so the claimant does not necessarily need to prove on the balance of probabilities that the conduct was related to the protected characteristic. If the tribunal finds facts from which it could conclude that the conduct was related to the protected characteristic then the burden of proof shifts.

340. The use of the word “or” in s26(b) (twice) is important.

341. “Purpose” and “effect” are two different things, and must be considered separately. Where it was the wrongdoer’s “purpose” to do the things listed in s26(b), then the complaint can succeed even if the conduct did not successfully have that effect. Correspondingly, where the conduct does have the effect described in s26(b), then the complaint can succeed even if the Respondent (or the person whose conduct it was) did not have the intention of causing that effect.

342. In Land Registry v Grant Neutral citation [2011] EWCA Civ 769, the Court of Appeal said that when considering the effect of the unwanted conduct, and when analysing s.26(4), it is important not to cheapen the words used in s.26(1).

> Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the claimant to a “humiliating environment” when he heard of it some months later is a distortion of language which brings discrimination law into disrepute.

343. When assessing the effects of any one incident of several alleged acts of harassment then it is not sufficient to only consider each incident in isolation. We obviously must consider each incident by itself, but, in addition, we must stand back and look at the impact of the conduct as a whole.

Victimisation

344. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

345. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

346. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

347. A person subjected to a detriment if they are placed at a disadvantage and there is no need for either claimant to prove that their treatment was less favourable than a comparator's treatment.

348. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because she did a protected act or because the employer believed that she had done or might do a protected act.

349. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

350. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

351. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

352. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Indirect Discrimination

353. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

354. Race and Disability are relevant protected characteristics listed in section 19(3).

355. The definition of the phrase “disability discrimination” includes “discrimination within section 19 where the relevant protected characteristic is disability”. The definition of the phrase “race discrimination” includes “discrimination within section 19 where the relevant protected characteristic is race”. [Section 25 EQA.]

356. The phrase “provision, criterion or practice” is commonly abbreviated to “PCP”. It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

357. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if related to a procedure, should be applicable to others as well as the complainant.

358. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protected characteristic, would not fall within the definition of PCP because it would necessarily not be applied to individuals who were not so vulnerable. Further, in James v Eastleigh BC [1990] HL/PO/JU/18/250, the policy was, at first sight, neutral between the sexes, but, on proper analysis the

qualification criteria was so closely linked to sex that it amounted to direct, rather than indirect, discrimination.

359. The PCP does not have to be a complete barrier preventing the claimant from performing their job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not "forced" to do so (ie even if they were not disciplined for failing to do so).

360. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

360.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it.

360.2 that the claimant must personally be placed at that disadvantage.

361. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice. A person might be able to show a particular disadvantage even if they have reluctantly complied with the PCP in order, for example, to avoid losing their job.

362. In some cases, where a "group disadvantage" is sufficiently notorious, judicial notice may be taken of it. The relevant principles about when judicial notice may be taken, and the need for caution, were discussed by the EAT in Dobson v North Cumbria Integrated Care NHS Foundation, UKEAT/0220/19/LA.

363. However, unless the group disadvantage is proven by judicial notice, then it must be proven by evidence, as with any other allegation of fact.

364. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant himself, at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

365. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration.

366. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

367. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

368. In Homer v Chief Constable of West Yorkshire [2012] UKSC 15; at paras 22 - 23 of Baroness Hale's judgment:

> Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question: thus, for example, the aim of rewarding experience is not achieved by age related pay scales which apply irrespective of experience (Hennigs v Eisenbahn-Bundesamt (Joined Cases C-297/10 and C-298/10) [2012] 1 CMLR 484); the aim of making it easier to recruit young people is not achieved by a measure which applies long after the employees have ceased to be young (Kücükdeveci v Swedex GmbH & Co KG (Case C-555/07) [2011] 2 CMLR 703)....
>
> 23 A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

369. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer. The tribunal must make an objective determination and not (for example) apply a "range of reasonable responses" test to the respondent's decision to apply the PCP.

370. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

371. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

Contraventions of EQA and liability for them

372. Section 40 EQA makes it a contravention of EQA if (amongst other things) an employer harasses an employee.

373. Section 39 makes it a contravention of the act if (amongst other things) an employer discriminates against an employee or victimises an employee.

374. Dismissal is expressly covered under section 39 and section 39(7) reads, as far as is relevant:

> (7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

375. Section 109 EQA addresses which acts/omissions are treated as done by an employer for the purpose of (amongst other things) sections 39 and 40 EQA. Section 110 deals with the personal liability of employees for their acts/omissions.

> 109 Liability of employers and principals
>
> (1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
>
> ….
>
> (3) It does not matter whether that thing is done with the employer's … knowledge or approval.
>
> (4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A-
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.
>
> 110 Liability of employees and agents
>
> (1) A person (A) contravenes this section if-
>
> (a) A is an employee …,
>
> (b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer …, and
>
> (c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

376. Often, and as in this case, when a claimant brings a claim against their employer or former employer, the employer is a legal person, a company, rather than a natural person, an individual human being.

377. The decisions, however, are made by individuals. That includes matters which are very clearly and explicitly done in the name of the employer (a dismissal, for example, or a decision to suspend an employee, change their pay arrangements, etc), as well as situations in which the individual might appear to be expressing their own views, rather than those of the corporate body.

378. For many alleged detriments, or acts of dismissal, there will be no difficulty in identifying the decision maker or makers. For example, a particular person might have communicated the employer's decision to the claimant, and there might be no dispute, from the claimant (and no suggestion from the respondent) that the decision-maker was anybody else.

379. There can also be circumstances in which people other than the ostensible decision maker are involved in the decision making process. That could be people providing neutral advice (such as an HR expert) and/or it could include people providing (allegedly) factual information about the claimant. In such cases, it might be necessary to carefully analyse who did what and why as part of the process leading to the detriment/dismissal.

380. Referring to the decision of the Court of Appeal in Reynolds v CLFIS (UK) Ltd [2015] ICR 1010, in Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 the EAT commented:

> The ratio of CLFIS is simple: where the case is not one of inherently discriminatory treatment or of joint decision making by more than one person acting with discriminatory motivation, only a participant in the decision acting with discriminatory motivation is liable; an innocent agent acting without discriminatory motivation is not. Thus, where the innocent agent acts on 'tainted information' (per Underhill LJ at paragraph 34), i.e. 'information supplied, or views expressed, by another employee whose motivation is, or is said to have been, discriminatory', the discrimination is the supplying of the tainted information, not the acting upon it by its innocent recipient

381. Once the decision-maker, or decision-makers, have been identified, for the employer to be liable for their conduct, three things must be established:

381.1 that there was at the relevant time, an employment relationship between the employer and the alleged discriminator(s);

381.2 that the conduct occurred "'in the course' of employment", and

381.3 that the employer failed to take all reasonable steps to prevent the conduct in question.

382. The phrase "course of employment" should be given a wide meaning, in accordance with the fact that the purpose of EQA and its predecessors is to seek to eradicate discrimination against employees, and to ensure that there is redress available when it does occur: Jones v Tower Boot Co Ltd 1997 ICR 254.

383. The "reasonable steps" defence (section 109(4) EQA, often colloquially referred to as the "statutory defence") is limited to steps taken before the act(s) of discrimination / harassment / victimisation occurred. Section 109(4) requires the employer to prove what it had done in the past: Mahood v Irish Centre Housing Ltd EAT 0228/10. If the employer can show that it promptly remedied the situation after it occurred, then, although that might be relevant to remedy, it does not assist the employer to establish the defence. Correspondingly, a slow or inadequate response to a particular allegation of particular discrimination will not cause the employer to lose the defence (for that particular discrimination) if it can show that it had taken all reasonable steps prior to the discrimination.

384. Whether the defence will succeed will depend on what "steps" the employer can prove it took and on an analysis of all the circumstances, including the actual details of the discriminatory conduct, and the likelihood of the steps being effective in preventing such discrimination. The cost and practicability of taking additional steps will also be relevant. The defence might be unlikely to succeed if the employer cannot even show that it took fairly obvious and basic steps such as having policies which made clear what was forbidden, and that there might be disciplinary action for certain types of conduct, and taking action to ensure these policies were drawn to employees' attention. The EHRC Employment Code suggests some steps that employers could/should take.

385. As per Canniffe v East Riding of Yorkshire Council 2000 IRLR 555, EAT, tribunals should decide:

385.1 whether there were any preventative steps taken by the employer, and

385.2 whether there were any further preventative steps that the employer could have taken that were reasonably practicable.

386. Training provided long ago, and not repeated, is less likely to help to establish the defence than training which is recent and/or which is updated/refreshed. An anti-discrimination policy which is not actually enforced in practice is less likely to help to establish the defence than if the employer can show that it sought to remove obstacles to complaints, and was willing to investigate complaints properly, and take disciplinary action where appropriate.

Apportionment

387. Where the employer is liable (for contravention of section 39 or 40 EQA, as a result of the operation of section 109) and where the individual employee is also a respondent, then, for each such act/omission, the Tribunal is likely to decide that the damage caused to the claimant by the statutory tort is "indivisible" and that, therefore, there should be a joint and several award against the individual respondent and against the employer.

388. Where the employer establishes the statutory defence, then the whole award (for the particular act in question) would be against the individual respondent only.

389. Where there are a series of connected discriminatory acts then (even though alleged financial loss would be analysed separately for each), it might be sensible and convenient to make a single overarching award for injury to feelings.

390. There will, however, be some cases, where it is necessary to separately identify each item of damage (including injury to feelings) and potentially to make different awards against different respondents. This might apply, for example, where some

individual respondents were responsible for one or more contraventions of EQA, but not for all of those which have been upheld.

Constructive Dismissal

391. For the unfair dismissal claim, the second claimant relies on section 95(1)(c) of the Employment Rights Act 1996 ("ERA") to establish that she was dismissed. It reads:

> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

392. Section 95(1)(c) ERA (and section 39(7)(b) EQA) refer to something colloquially known as "constructive dismissal". In order to prove constructive dismissal the employee must prove

392.1 that the employer has committed a serious breach of contract and

392.2 that the employee resigned because of that breach (or at least partly because of that breach; it does not necessarily have to be the only reason) and

392.3 that the employee must also prove they has not waived the breach by affirming the contract.

393. In London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493, the court, at paragraph 14, stated that:

> The following basic propositions of law can be derived from the authorities:
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761*
>
> 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA [1998] AC 20* , 34H–35D (Lord Nicholls) and 45C–46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".
>
> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666* , 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship (emphasis added).
>
> 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense

that, looked at objectively , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph [480] of Harvey on Industrial Relations and Employment Law:

> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

394. The last straw might be relatively insignificant, but it must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw even if the employee genuinely but mistakenly interprets the act as hurtful.

395. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal clarified the analysis in Omilaju and added to it. It reiterated that the last straw doctrine is only relevant to cases where the repudiation relied on by the employee takes the form of a cumulative breach and that the last straw doctrine does not have any application to a case where the alleged repudiation consists of a one-off serious breach of contract.

396. In Kaur, the Court of Appeal made clear that in a last straw case the fact that the employee might have affirmed a contract after some of the earlier conduct does not mean that it is not possible for the claimant to rely on that earlier conduct as part of a cumulative breach argument and in paragraph 55 of its decision it summarised the correct approach.

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation ...)

(5) Did the employee resign in response (or partly in response) to that breach?

397. Where the answer at point (4) is "no" (for example the act that triggered the resignation was entirely innocuous), it is necessary to go back and see whether there was any earlier breach of contract that has not been affirmed, and which was

a cause of the resignation. See Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19.

398. In considering whether a contract has been affirmed after a breach, it is necessary to have regard to the entirety of the circumstances. A gap in time between the act relied on and the resignation is a significant factor but it is by no means the only factor; in other words, a delay is not necessarily fatal to the employee's argument for constructive dismissal. The reasons for the delay would be relevant as would consideration of what had happened in the intervening period, such as was the employee working and receiving pay amongst other things.

Unfair Dismissal

399. Where an employee alleges constructive dismissal, and succeeds in that argument, then the dismissal "reason" for the purposes of the Employment Rights Act is the employer's reason for the conduct which caused the employee to treat themselves as dismissed.

400. It is open to an employer to argue that the dismissal was for a potentially fair reason and was, in all the circumstances, a fair dismissal.

401. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness.

> **98.— General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

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

402. So, in a constructive dismissal case, the employer must also satisfy us that the dismissal reason falls within one of the definitions in either section 98(2) or section 98(1)(b). If so, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent's size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating capability as a sufficient reason for dismissal.

Dismissal contravening Equality Act vs Unfair Dismissal

403. In considering unfair dismissal arguments, we must take care not to conflate tests for whether a dismissal was a breach of the Equality Act with tests for whether the dismissal was unfair contrary to the Employment Rights Act.

404. In particular, for unfair dismissal, we must identify the (sole or) principal reason for the dismissal. Whereas, under EQA, if there is conduct which is discriminatory (or which harassed or victimised the employee) then it is not necessary for us to be satisfied that that conduct was the principal reason for the constructive dismissal, so long as it played more than a trivial or insignificant part.

Fact Finding

405. We have set out above the burden of proof which applies (for the EQA claims) once we have made our decisions about the facts.

406. Where there is a disputed fact, the onus is on the party relying on that fact to prove it. However, the expectation is that courts and tribunals must not too readily fall back on this burden of proof position as a means of resolving the factual dispute. For example, if a claimant alleges that Fact A is true, whenever possible, the analysis should go further than "claimant has failed to prove Fact A". We should, instead, try to come to a decision, based on the evidence, either that "it is more likely that A is true, than not true" or else "it is more likely that A is false, than true", and only rely on the burden of proof where absolutely necessary.

407. The fact that it might be difficult to come to decision about whether "A = True" or "A = False" is more likely does not mean that we should avoid making a decision. This is subject, of course, to two points:

407.1 Just because the parties think a factual dispute is important, and have put time and effort into arguing about it, does not mean that we have to resolve it if we can decide all the complaints without resolving that particular matter.

407.2 If there is a claim which is potentially out of time, then difficulties about coming to a decision on a particular factual dispute (especially where passage of time has caused or contributed to the difficulties) might be a very important factor which weighs in the balance against a just and equitable extension.

408. In Gestmin v Credit Suisse [2013] EWHC 3560 (Comm), at paragraphs 15 to 23, the High Court made some very insightful and useful comments about the fallibility of human memory, the difficulties that a witness can have about distinguishing between a genuine "original" memory, and one which has been altered by intervening events, and the need for courts and tribunals to proceed with care: either before assuming too readily that a witness who seems sure and clear must be remembering well, or before assuming that a witness whose evidence is seemingly inconsistent with "better" evidence must be lying.

409. In Hovis Limited v Louton EA-2020-000973-LA, the EAT gave a reminder that, while it is generally important and sensible for a party to call witness evidence to prove a fact that they are seeking to establish (especially where they appreciate that another party is likely to be calling a witness to testify that they have direct knowledge that the fact is untrue), there is no rule of law that (in an employment tribunal) oral testimony of a witness has to be preferred to hearsay evidence. The fact that a hearsay statement has not been given under oath, or tested in that way at trial, are considerations that will be relevant to the Tribunal's assessment of reliability and credibility of the statement, and of what weight to attach to it, but are not necessarily the only considerations that will affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth. Similarly, the credibility and reliability of the (opposing) oral evidence will also be subject to evaluation, and, in a given case, might be outweighed by a hearsay account, which, in all the circumstances, the Tribunal finds more reliable or compelling.

Analysis and conclusions

410. In terms of paragraph 3 of the list of issues, we pointed out to the parties on Day 1 that our decision would take account of the fact that a case management decision had already been made, and had not been the subject of an appeal to Employment Appeal Tribunal.

410.1 There have been various preliminary hearings since then (including before Employment Judges Emery, Young and McTigue, which R4 did have notice of). It would not necessarily be open to us, at this late stage, to purport to vary the July 2021 decision of EJ Alliott to add R4 as a respondent. However, in any event, we see no reason to vary it.

410.2 The requirement to obtain an ACAS early conciliation certificate number does not apply to an application to add a new respondent to an existing claim. Furthermore, when a decision is made to add a new respondent to an existing claim, the effect is that the presentation date, as against the new respondent, is deemed to be the presentation date of the original claim form.

410.3 Thus all of C1's complaints against R2, R4 and R5 are deemed to have been presented on 19 October 2020.

410.4 C2's Equality Act complaints against R2 and R4 are deemed to have been presented on 5 November 2020 (the first claim). Her second claim is against the employer only and is about unfair dismissal only and is deemed to have been presented against R2 on 29 April 2021.

Indirect Discrimination – C1 only

411. The Claimant's August 2021 further information alleged:

> Indirect Disability Discrimination refereeing to 2nd respondent redundancy policy and scoring matrix used to make me redundant singled out people with disabilities like me.

412. There are also other mentions of "indirect discrimination", but which, in context, seem to be referring to alleged conduct which, if true, would amount to direct discrimination (or harassment) and not indirect discrimination.

413. If the alleged PCP is that the redundancy process was biased against him as an individual, then that does not amount to a PCP. It was not something applied to other employees.

414. To the extent that, the alleged PCP is the redundancy procedure as a whole, and/or the matrix process in particular, then:

414.1 For the protected characteristic of race, the Claimant has not demonstrated any group disadvantage or even provided any evidence or argument that could potentially lead us to decide there was group disadvantage.

414.2 For the protected characteristic of disability, the Claimant has not demonstrated any group disadvantage.

415. The indirect discrimination complaints both fail .

Harassment In respect of C1

> *32.1 in September 2019, R4/R2 said to C1 that he "should get back in [his] hot box" (in relation to C1's race);*

416. As per the findings of fact, we have not been persuaded that it is more likely that this comment was made than not made.

416.1 We do think that, by July and August 2020, it was C1's sincere and genuine belief that the remark was made. We also think that there could have been more investigation done, by R2 and R5, in July and August 2020. Had that happened, it might have been possible for us to be more certain, one way or the other, whether the comment was remembered accurately by C1, or whether he was mistaken, either in what he thought he heard at the time or else in his recollection 9 or 10 months later, about what he thought he recalled.

416.2 In our judgment, C1 was sincere in his belief, in around July 2020, when trying to recall specific things that had been said to him, that the "hot box" comment was something that was said. However, taking into account that the onus is on C1 to prove to us, on balance of probabilities, that the conduct occurred, our decision is that he has not done so, and this complaint therefore fails on the facts.

416.3 For the avoidance of doubt, R4 has not proven that the comment was not made. He has simply denied it. We have taken into account that he denied other comments too, some of which we have found were made. Therefore his denial carries limited weight.

416.4 However, taking into account that C1 mis-remembered whether he heard the phrase "black bastard" and taking account the discrepancy in his evidence about (what we found was) copying and pasting part of C2's witness statement, and the lack of prompt complaint about the "hot box" allegation, and lack of a clear and unambiguous account from C1 about the surrounding circumstances, we think this is one of those rare occasions in which we should fall back on the burden of proof requirements. C1 has not proved this fact.

417. Had we been satisfied that those words had been said, then, subject to decisions on time limits, it is likely that we would have satisfied that it was related to race and that the purpose had been to violate the Claimant's dignity and/or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

32.2 in September 2019, R4/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R3 threatened C1 with redundancy if he did not take the position (in relation to C1s race and disability);

418. As stated in the findings of fact, we generally accept that the account which C1 gave to R5 in the grievance hearing (in July 2020, so around 10 months later) is accurate. We also accept that, as alleged by R4 in his own grievance: (i) the idea that C1 would be asked to move to Sales did not originate with R4 and (ii) R4 and his colleagues believed that moving C1 could potentially solve two problems: too many staff in Service; not enough staff in Sales. Mr Hearn's account [Bundle 526

onwards] is not massively different C1's account, and is consistent with what was said as part of R4's grievance. It was R4's opinion, as expressed to Mr Hearn and others, that C1's previous Sales experience meant that C1 could and should be the person from Service who would move to Sales, and Mr Hearn (if he was going to lose anyone) did not disagree with the selection of C1 to be the person to move.

419. There are facts from which we could infer that R4's treatment of C1 was related to race. These are the racial insults that R4 made to several people, including, to C2 "Somali Pirate" and, about another colleague, "Indian twat" and, about C1, "black bastard".

420. The evidence satisfies us that the decision to ask C1 to move was in no way related to race. In particular, we are satisfied that the suggestion that C1 move did not originate with R4, but was a proposal made to him by more senior managers and by HR.

421. Taking account of the way in which R4 dealt with other people (including various threats that they might be dismissed, as mentioned in the grievance interview notes), we are satisfied that the pressure which was put on C1, even after he said "no" a couple of times was in no way related to race.

422. Given what Mr Hearn knew about C1's mental health, and that C1's mental health had been the reason for C1 leaving his previous sales role, and was part of the reason for objecting to moving to Sales in September 2019, we are satisfied that the employer knew about C1's disability, or, at the least, had enough information to be on notice that further investigation (such as referral to Occupational Health) might confirm that C1 had a mental health impairment that amounted to a disability.

423. However, there are no facts from which we could infer that the decision to ask C1 to move, or the actions in putting pressure on C1 to move (including raising the possibility of a redundancy exercise if he did not volunteer) were related to disability.

424. The burden of proof does not shift.

425. For the avoidance of doubt, we reject C1's suggestion that R4's purpose, in moving C1 to Sales, was so that R4 would have more control over him, and/or so that R4 would have an excuse/opportunity to dismiss C1.

32.3 between September-December 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (in relation to CTs race and disability);

426. C1 did request this training, and it was standard practice for sales advisers to go on it.

427. There are no facts from which we could conclude that the treatment was related to disability. Had the booking been made for December, it might have had to be cancelled, because of C1's absence (although, in the hypothetical situation in which C1 had been given adequate training, he might not have had that absence). However, either way, booking C1 onto a course, due to take place in December 2019, would have been done earlier than December, and before the Respondents would have known C1 would be absent in December. So his absence in December does not explain why he was not booked on the training between September 2019 and December 2019.

428. There are facts from which we could conclude that not booking C1 on the course between September 2019 and December 2019 was related to race. These are the racial insults which R4 made about various employees, including about C1.

429. We are satisfied that that there were good reasons for not booking C1 on the course during January (he was absent) or February and March (because of his phased return to work) or April onwards (covid, furlough, and, in due course, redundancy exercise). We are satisfied that, from January onwards, the unwanted conduct (of failing to send C1 on the course) was in no way related to race.

430. R4's decision to fail to send C1 on the course was not because seeking to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

431. The failure to send C1 on the training was unwanted conduct. However, when we decide whether, in all the circumstances, it would be reasonable to treat the conduct as having the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, we have to take into account that the threshold is a high one. We must not cheapen the words of section 26 EQA.

432. Our decision is that this conduct does not cross that high threshold. We will decide below whether it amounts to direct discrimination, but the harassment allegation (related to either race or disability) fails.

32.4 between September-December 2019 and February 2020, R4/R2 referred to C1 as "flipper" because he could not afford new shoes at the time (in relation to CTs race);

433. The words used were about the Claimant's footwear. C1 stands by his claim that "flipper" was used, as well as slipper. Our finding of fact was that it was probably "slipper" (only).

434. We believe that it was Mr Worsley's (R4's) intention to humiliate and embarrass C1 over this issue. Our decision is that it did have the effect on the claimant that he felt his dignity was violated and that a hostile environment was created for him.

435. There are facts from which we could conclude that the unwanted conduct was related to race (including, but not limited to, R4's use of the phrase "black bastard" in connection with C1).

436. However, we are satisfied and that this particular conduct was not related to race. We are satisfied that Mr Worsley's actions would have been the same for anybody wearing similar footwear, regardless of that person's race. It was part of Mr Worsley's character to make this type of comment to junior colleagues.

32.5 on 29 July 2020, R5/R2 was bias in the treatment of C1' s grievance outcome (in relation to C1s race and disability);

437. We are satisfied that there was unwanted conduct in the grievance outcome, and, in particular, the usage of the word "banter". However, the usage of that word is discussed expressly in the next allegation, and so, for 32.5, we are considering only the remainder of the outcome.

438. The grievance outcome was related to race and disability in the sense that C1 was alleging that R4's treatment of him was because of race and disability.

439. We are satisfied that R5, in making his decisions and in choosing the wording of his letter, did not have the purpose of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

440. In deciding whether the unwanted conduct had the effect of (a) violating Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, we have to analyse whether it would be reasonable to treat them as having that effect, and that Parliament has deliberately set a high bar for the tort of harassment by its choice of very strong words for section 26 EQA. Our decision is that an employee who brings a grievance is aware that they will (or should) receive a formal response to the grievance from the employer, and the employee ought to be aware that the decision-maker might (a) decide that the grievance (or part of it) is not upheld, and (b) give reasons for that decision. We deal below with whether the outcome was discrimination and/or victimisation. However, taking into account that the grievance did oblige R5 to come down on one side of the fence or another (that is, to decide whether C2 was treated as he alleged, and, if so whether it was connected to race or mental health - or, at least, to decide whether to refer particular allegations to a disciplinary hearing), it would not be reasonable to regard the unwanted conduct (the decisions in the grievance outcome letter, and the way in which those decisions were explained) to have the effect required by section 26(1)(b) EQA.

441. Therefore, this harassment allegation fails.

32.6 on 29 July 2020, R5/R2 used belittling or patronising comment of "banter" to sum up the race discrimination faced by R4 (in relation to C1's race); and

442. The use of this phrase in the outcome letter was unwanted conduct.

443. We find that it was related to race.

443.1 As we commented in the findings of fact, the only thing which R5 - Mr Pickering expressly stated, in the outcome letter to C1, was something which would be dealt with under the disciplinary procedure were the comments made to Dawn, which were not comments related to race.

443.2 Apart from what C1 reported had been said to Dawn, the only other complaint in C1's grievance which was upheld was *"Saying 'Your lot are outside you might want to see to them'."*

443.3 The explanation stated: "*After carrying out thorough investigations we have reasonable belief that the comment was made. Although it is my reasonable belief that the comment was not intended to be racially offensive, I acknowledge that it is how the individual interpreted the wording and that this is not acceptable*."

443.4 Taking the letter as a whole, a reasonable interpretation would be that the only thing that would happen in relation to the "your lot" comments was that R4 would be given some sort of guidance. However, in any event, even if we are wrong about that, and it had already been decided by 29 July that R4 would face a disciplinary hearing for this issue, then the explanation of R5's stance included: "*In conclusion, from the investigations I believe that there are improvements required to Matthew's management style and judgement of "banter" any further action we deem appropriate will be taken privately and confidentially. I do not, however, believe that Matthew's management style is in any way motivated due to race or personal dislike, ...*"

443.5 Our decision is that by using the phrase '*Your lot are outside you might want to see to them'* R4 was making a comment that was related to race, and by describing that comment as "banter" (and not being motivated by race), R5's conduct was related to race.

444. Our decision is that, when R5 used the word "banter", it was not R5's purpose to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We also accept that part of his reason for using the word "banter" is that some of the Respondent's policies used that word, and part of R5's reason for using the word in the letter was that the word "banter" was used in some of the interviews (sometimes by R5, sometimes by others).

445. It was not always the interviewee who first used the word "banter". For example, with R4, when discussing the "hot box" allegation, R5 introduced the questions by stating that: *"… there have been some specific elements of banter mentioned which I will go through. The first one is that …*". Furthermore, it appears to be R5, rather than any interviewee, who categorised the "your lot" comments as "banter".

446. The categorisation of the "your lot" allegation as being an allegation of (inappropriate) "banter" did have the effect on C1 of violating his dignity. The expression "violate dignity" is deliberately chosen by Parliament to designate a very severe effect on a person, which goes beyond the type of upset or annoyance that can sometimes occur in an employment relationship when different people have different points of view, or when an employer makes a decision that an employee thinks is harsh, or unfair or unreasonable. It is a deliberately high threshold, and we are satisfied that this remark crosses that threshold. It caused C1 to believe that his concerns were simply being brushed off and that R5 and his employer had decided there had been some element of a misguided "joke" having been made. It is not simply the use of the single word "banter" in isolation, but the fact that the word was used as part of R5's remarks to C1 that the words had not been racially motivated; an assessment that lacked any explanation. There was no discussion of why an instruction to serve customers who were described as "your lot" amounted to "banter" or why (whether it was "banter" or not) it was not related to race.

447. We take into account that the appeal outcome, a few weeks later, did uphold the complaint that the word "banter" had been inappropriate to the circumstances. However, that does not change our assessment that, as of 29 July 2020, it was reasonable for C1 to perceive the comments as violating his dignity.

448. This harassment allegation is upheld.

32.7 between September-November 2019 and February-March 2020 and July-August 2020, senior management of R2 created a hostile environment. Issues were raised to management by ex-employees on their exit statement and grievances with R2 but nothing was done about it (in relation to C1's race and disability).

449. On the facts, grievances/complaints were not raised prior to July 2020, and nor do we have evidence of comments made in exit interviews prior to then. Thus the allegation that it was unwanted conduct to fail to take action (to respond to complaints about R4) prior to July 2020 fails on the facts.

450. In relation to C1's grievance, there would potentially have been disciplinary action against R4 in relation to comments made about Dawn. Furthermore, the complaints raised by C2 and Leon were investigated and there was to be disciplinary action for those too. By no later than 14 August 2020, the decision

had been made (and communicated to R4) that C1's allegation about "your lot" would be included in the list of disciplinary allegations. Therefore, the specific allegation that "nothing" was done also fails on the facts.

Harassment In respect of C2

32.8 on at least 14 occasions between April 2019 and July 2020, R4 called C2 a "Somali Pirate" (in relation to C2's race);

451. We do not uphold that there were "at least 14" occasions. It did happen more often than once or twice. It happened frequently enough that C2 came to regard it as something that R4 would do from time to time, and that she had no choice other than to put up with it.

452. It was unwanted conduct. It was self-evidently related to race, and would not have been said to the Claimant, or about the Claimant, but for the fact that R4's perception was that she had some Somali heritage. (Indeed, as discussed below, R4 also referred to C2 as a "foreigner", and so it is possible that he regarded her as Somali rather than British, but it is not necessary for us to make a decision about that. The conduct was certainly related to race.)

453. R4 has denied ever saying this, and has not put forward an argument that he did say it, but that it was not intended to cause offence and/or that he thought C2 would see it as some sort of joke, or light-hearted small talk.

454. Taking R4's comments about C2 as a whole, it is plain to us that he does not like her. During the grievance meetings, he alleged that she was difficult to control, and that she was a frequent liar. He claimed that he knew how to handle her, whereas potentially other managers did not.

455. Our assessment is that it is more likely than not that his purpose with these comments was to deliberately seek to create an intimidating and hostile environment for the Claimant.

456. However, even if that was not his purpose, the effect of these remarks (when taken in conjunction with his other comments to C2) was that her dignity was violated and an intimidating, hostile, degrading, humiliating or offensive environment was created for her. The unwanted conduct did have that effect on her, and it is reasonable to treat the conduct as having that effect in all the circumstances.

457. Subject to the fact that we do not confirm that it was at least 14 occasions, this harassment allegation succeeds.

32.9 on at least 5 occasions between September 2019 and July 2020, R4 sprayed air freshener at C2 and made comments about a "Somali smell" or "bullshit smell" (in relation to C2's race);

458. As we have said already in these reasons, we do not accept that C2 wrote down details of incidents contemporaneously. Other than what she wrote in her grievance, and grievance appeal, her first attempt to write things down was around November 2020 when she was giving instructions to her solicitor in readiness for the claim to be presented.

459. We do not have enough evidence to say that it was "at least 5 occasions", but it was more than once, and could have been more than 5 times.

459.1 It is true that on one or occasions, R4 sprayed air freshener at C2, or towards C2, and made comments about "Somali smell" or "bullshit smell".

459.2 R4's own account (which denies using the phrase "Somali smell") was that these actions were justified because C2 was a liar, and he did it when she was lying.

459.3 We are satisfied that he did say, at least once, "Somali smell" and that illuminates his thought processes on the other occasions too. It was unwanted conduct and it was related to race.

460. As we have said in relation to the "Somali pirate" comments, we think it more likely than not that R4 was deliberately seeking to intimidate C2.

461. Even if that was not his purpose, the effect of these remarks and accompanying conduct (when taken in conjunction with his other comments to C2) was that her dignity was violated and an intimidating, hostile, degrading, humiliating or offensive environment was created for her. The unwanted conduct did have that effect on her, and it is reasonable to treat the conduct as having that effect in all the circumstances.

462. Subject to the fact that we do not confirm that it was at least 5 occasions, this harassment allegation succeeds.

32.10 on at least 5 occasions between May 2019 and July 2020, R4 told C2 she should serve "Your lot" in reference to some black customers and was told to "keep it shut" when challenging R3. C2 was threatened that she would lose her job if she told anyone what was happening (in relation to C2's race);

463. As per the findings of fact, C2 was told several times to serve "your lot". For similar reasons to those for the corresponding allegation by C1, we are satisfied that this was unwanted conduct, and that it was related to race. R4 could offer no satisfactory explanation for why he said "your lot" other than to protest that he regarded it as a normal usage of English and that he did not intend to imply that he was categorising customers as "your lot" because he perceived them to be the same race as the sales adviser to whom he was talking. However, the evidence shows that when he said it to a sales adviser, he was referring to a particular set of customers who (R4 perceived were) of the same race as the sales adviser. Had

R4 (as he claimed) simply wanted to draw any sales adviser's attention to the fact that there were some customers, then there is no explanation for why he should use the word "your" instead of saying (for example) "that lot". The evidence showed that he did not say "your lot" because of a belief that these were returning customers who had previously been dealing with a particular sales adviser.

464. These remarks did create a hostile environment for C2. They were part of a pattern of conduct by R4 that violated C2's dignity, and it reasonable to treat the conduct as having that effect.

465. Therefore this harassment allegation succeeds.

466. In general terms, the evidence does support that C2 was told to "shut it" by R4. We were not persuaded that any of the times that she was told to "shut it" was in response to her objecting to the "your lot" comments and we were not persuaded that she was told that she would lose her job if she complained about the "your lot" comments.

32.11 on at least 2 occasions in November 2019 and February 2020, R4 called C2 a "Foreigner" (in relation to C2's race);

467. As per the findings of fact, we do accept this was said.

468. It was unwanted conduct. It is also factually inaccurate.

469. R4 has not put forward an explanation, and denies making the comments. It is possible that it was his intention to intimidate C2. However, C2's statement is very light on detail, and we do not have sufficient evidence to be satisfied as to R4's purpose.

470. If these were the only allegations, then the fact that C2 is unable to provide clearer recollections about the specific conversations in which these comments were made might have led to the conclusion that we were not satisfied that the effect on her was so severe as to bring it within the definitions in section 26(1)(b) EQA. However, we are required to avoid taking too piecemeal an approach. R4 called her a "foreigner" at least twice, and he was the same person who also several times called her a "Somali pirate" and who also sprayed air freshener at her.

471. The conduct is plainly related to race (and to R4's either genuine or feigned opinion that C2's race meant that she was a "foreigner"). Taken in conjunction with other conduct, these remarks did have the effect of violating C2's dignity and it is reasonable in all the circumstances to treat them as having had that effect on her.

472. This allegation succeeds.

32.12 in January 2020, R4 referred to C2 and another black employee of African origins as "something out of the jungle" (in relation to C2's race);

473. As per the findings of fact, we accept that this was said. It is notable that C2 alleged that the two people who potentially heard this comment were C1 and Ilesh, and that neither of them was asked about it by R5, whereas R5 asked several other people – not alleged by C2 to have been present – if they had heard it.

474. Our decision is that R4's purpose was to violate C2's dignity. It was unwanted conduct and it was related to race.

475. This allegation succeeds.

32.13 in September 2019, R4 asked C2 if she was "going upstairs to sniff the carpet" (in relation to C2's religion); and

476. As per the findings of fact, numerous people heard the comment being made (though they did not all hear it said to C2) and there is ample evidence that it was said.

477. It self-evidently a comment which is directly related to religion. It was unwanted conduct.

478. It is likely that R4's purpose was to violate dignity. His intention was to belittle other people's religious beliefs and practices.

479. In any event, regardless of the intention, it did have the effect of creating an intimidating, hostile, degrading, humiliating and offensive environment for C2, and it is reasonable to regard deliberately offensive remarks such as these as having that effect.

480. This allegation succeeds.

32.14 on at least 3 occasions between May and October 2019, R4 made untrue allegations about C2 having a relationship with a male employee called Kayum Ahmed. On occasions he did this in front of other employees whilst showing explicitly sexual videos (in relation to C2's sex).

481. R4 did do each of these two components. He did make untrue insinuations about C2 and a colleague, and he did show explicit videos. We are not satisfied that he did both things at the same time.

482. The comments which he made about C2 and Kayum were unwanted conduct and they were related to C2's sex.

483. It might not have been R4's purpose to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

484. However, R4 had an extremely hostile attitude to C2 generally, and made a large number of insulting remarks to her. C2's perception of these comments was that they violated her dignity and created a hostile and degrading environment for her. Taking into account the treatment of C2 as a whole, it is reasonable to regard this behaviour as having that effect.

485. This allegation succeeds.

Disability Discrimination – C1 Only

18.1 in September 2019, R4/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R3 threatened C1 with redundancy if he did not take the position (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

486. As per our findings of fact, C1 was pushed into moving to Sales, even after he had objected, and even after he had made clear that he left Sales work (with a previous employer) because of the effects on his mental health.

487. He was not directly told by any of the respondents that he would be made redundant if he did not take it. However, R4 did tell Mr Hearn that there was the possibility of redundancies in Service if C1 did not move, and Mr Hearn did mention that to C1. It is clear that there was a risk of redundancy if C1 did not agree to move to Sales and clear that R2 and R4 wanted C1 to be aware of that risk, and used that risk to persuade him to agree to move.

488. None of these things were because of C1's disability. The Respondents have proven that the reason why C1 was moved is the combination of the genuine need to have more employees in Sales and the genuine need to have fewer employees in Service, and because the combination of C1's past experience in Sales, and the fact that he was (perceived by R4 and Mr Hearn as being) in a unique role in Service, meant that R4 and R2 thought he was the natural choice to move from Service to Sales.

489. In relation to disability, the burden of proof does not shift. There are no facts from which we could infer that a hypothetical comparator, whose attributes and abilities were the same as C1's, but who did not have C1's disability, would have been treated any more favourably than C1 was treated.

490. In any event, we are satisfied that R4 - Mr Worsley's and R2 - the Employer's decisions had nothing whatsoever to do with C1's disability. It might be true that insufficient care was taken, and that C1's disability *ought* to have been treated as a relevant consideration. However, it is not true that C1's disability was part of the motivation (even unconsciously) for asking him to move, or putting pressure on him to say "yes" after his initial answer was "no".

491. This allegation fails.

18.2 between September-November 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (C1 compares himself to Yakub, dawn, Simon, Leon, Chris, Brennan);

492. Again, it might be true that insufficient care was taken, and that C1's disability ought to have been treated as a relevant consideration when assessing what training he needed, and when it should happen.

493. However, the burden of proof does not shift. There are no facts from which we could conclude that C1's disability was part of the motivation (even unconsciously) for omitting to send him on the training.

494. This allegation fails.

18.3 in September 2019 (delivered by Steven Hearn), and on 27 February 2020 and in March 2020, R4/R2 threatened C1 with dismissal three times (C1 compares himself to Yakub, Todor, Dawn, Chris)

495. As per the findings of fact, we do accept that C2 perceived that there was a risk of dismissal in September 2019 if he did not agree to move to Sales, and that he was told in February that he might be dismissed if he was considered (by R4) to be unfit for the role, and there was the redundancy exercise (in June, rather than March) which put the Claimant at risk, and which did result in dismissal.

496. However, the burden of proof does not shift for the first occasion. There are no facts from which we could conclude that C1's disability was part of the motivation (even unconsciously) for the information that was given to him that he might be dismissed in September 2019.

497. For the February 2020 incident, we are satisfied that this was not direct disability discrimination. A person with a different medical condition (whether it amounted to a disability or not) would have received the same response from R4.

498. For the redundancy exercise, we are satisfied that this was not direct disability discrimination. R2 used the same selection matrix for all redundancies. A person with a different medical condition (whether it amounted to a disability or not) who had had a warning about absence would have had that taken into account. Likewise, a person who had a warning for something other than absence would have had that taken into account. All the Sales Advisers were put at risk (whether they had disability or not) and those who were selected to be dismissed were not selected because they had a disability.

499. This allegation fails.

18.4 on 2 July 2020, R4/R2 was unfair and bias in respect of C1's redundancy (C1 compares himself to Paul, Leon Brennan, Fathia);

500. For the same reasons that we have just discussed when rejecting the allegations that the third threat of dismissal (the June 2020 redundancy exercise) was direct disability discrimination, we also reject the allegation that the redundancy exercise was direct disability discrimination.

501. C1 was dismissed, and other people were not, but this was on the basis of the matrix and the scoring, which we accepted (as per the witnesses' evidence on oath) was the same matrix, and the same approach to scoring, as was used in all of their branches whenever there was a redundancy exercise.

502. This allegation fails.

18.5 on 27 July 2020, R2 made C1 redundant and a driver called Todor was hired into C1s role (C1 compares himself to Yakub, Todor, Dawn, Chris); and

503. As per the findings of fact, based on the redundancy matrix, C1 would have been dismissed regardless of whether Todor was moved to Sales or not. Had Todor not been in Sales, then there would have been no requirement to reduce the Sales Advisers by 2; reducing them by 1 would have been sufficient. That "1" would have C1 because he came out lowest according to the matrix. Moving Todor to Sales had the result that, rather than C1 alone, it was C1 plus one other (Simon R) who were dismissed as Sales Advisers.

504. There are no facts from which we could conclude that the reason that Todor was made Sales Adviser (after C1 was furloughed, and before the start of the redundancy exercise) was C1's disability.

505. This allegation fails.

18.6 on 29 July 2020, R5/R2 was bias in the treatment of C1's grievance outcome (C1 compares himself to Fatima, Simon, Leon).

506. We deal elsewhere with whether C1's race influenced the grievance outcome.

507. For the allegation that the outcome was less favourable treatment because of disability, a suitable hypothetical comparator would be someone whose relevant circumstances were identical to C1's, including race, and including the grievance complaining about race discrimination, but who did not have C1's disability.

508. There are no facts from which we could conclude that the grievance outcome would have different for such a hypothetical comparator. On the contrary, we are entirely satisfied, on the evidence, that the grievance outcome would have been the same for such a hypothetical comparator.

509. This allegation fails.

Direct Race Discrimination In respect of C1

12.1 in September 2019, R4/R2 said to C1 that he "should get back in [his] hot box" (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

510. For the same reasons given when dismissing the corresponding complaint of harassment related to race, this complaint fails on the facts.

12.2 in September 2019, R3/R2 singled out, blackmailed and bulled C1 in to joining the sales team after he had refused the offer 3 times previously. R4 threatened C1 with redundancy if he did not take the position (C1 compares himself to Steven Hearn, Kamal, Nishma and Paul);

511. For similar reasons to those mentioned for the corresponding harassment allegation, there are facts from which we could conclude that C1's treatment was because of race.

512. However, we are satisfied that a hypothetical comparator of a different race would have been treated the same way. Firstly, the decision to suggest a move had nothing whatsoever to do with C1's race. Secondly, R4's insistence on the move, even after C1 had said "no", was not because of C1's race, and was for the reasons we have discussed above, which included that more senior individuals had suggested to R4 that the change be made.

513. This allegation fails.

12.3 between September-December 2019 and February 2020, C1 was denied training after requesting it several times by R4/R2 (C1 compares himself to Yakub, dawn, Simon, Leon, Chris, Brennan);

514. In terms of time limits, this is an alleged omission. On the Respondents' case, there was never a date on which they did something inconsistent with sending him on the training. On the contrary, on the Respondents' case, the intention was to send him on the training course but:

514.1 For various reasons, this was allegedly not practicable in Autumn 2019

514.2 C1 then had a sickness absence, followed by a phased return, and while it was not appropriate to send him on a full-time training course during the phased return, that would have been possible and appropriate after he had resumed full-time working

514.3 However, Covid and furlough intervened.

514.4 The dismissal then took place prior to the end of furlough, and prior to there being any opportunity for C1 to have the training.

515. If all of those assertions were true, the claim would not be out of time. The time limit "clock" would not have started to run prior to the end of employment. In other words, on the Respondents' case, they would not have done anything that was inconsistent with sending the Claimant on the training, and were, in fact, intending to send him on it.

516. The Claimant does not accept the assertions just listed are all true. Furthermore, the Respondents have produced no evidence that they were intending to send the Claimant on the training course, other than the bare assertion by R4. As discussed in the findings of fact, our decision was that, if it were true that there had been attempts in Autum 2019 to book the Claimant on the training course, then there would have been contemporaneous documentary evidence about that, but no such evidence was sought by R5 during the grievance process (he took R4's word for it) or during the grievance appeal process, and no such evidence has been placed in the bundle for this hearing.

517. It is not asserted by either the Claimant or the Respondents that anyone ever expressly and specifically told the Claimant (orally or in writing) that he would not be sent on the course. Had they done so, then the time limit clock would have started from then, at the latest; indeed it would have started from any earlier date on which the decision, as communicated to the Claimant, was actually made.

518. Our decision, in relation to the failure to send the Claimant on training, is that the burden of proof has shifted. Other staff were sent on the training and the Claimant was not. R4 has made racial remarks about C1 and others (for example, he called C1 a "black bastard", albeit not to his face, and he frequently referred to "Somali pirate" in connection with C2).

519. The Respondents have not discharged the burden of proof. It has not been proven that Staples Corner was too busy to spare C1 for the duration of the course, or that there attempts to book him on it (but it was full) or that ill-health or other absence prevented C1's attendance on the course (or prevented attempts to book him on the course).

520. The person responsible for R2's failure to send C1 on the course is R4.

520.1 There is, of course, a distinction between R4 making a deliberate and conscious decision that he was not going to send C1 on the course (and that he never would do so), and R4 omitting to send C1 on the course (in any given month) while thinking that he might possibly approve it in due course.

520.2 If it was the former, then the decision was presumably made in around September 2019. Our judgment would be that the specific decision was less

favourable treatment because of race, regardless of whether R4 was motivated consciously or unconsciously by C1's race. We would, in that case, extend time, on just and equitable grounds, taking into account that, on this hypothesis, the decision not to send C1 on the course was made secretly and privately, without R4 informing C1 (or, as far as we are aware, anyone else).

520.3 If it was the latter, then, hypothetically, but for C1's dismissal then there might have come a time when R4 decided to send C1 on the course. It is perhaps more likely that R4 would never have actually decided that the time was right for C1 to go on the course, but, in any event, the time limit clock would not have started running in this case, because there was – on this hypothesis – no specific decision by R4 that C1 would never be sent on the training course that the other sales advisers were sent on. In this case, our decision would be that the failure to send C1 on the course when it was practicable to do so (in Autumn 2019) was less favourable treatment because of race, and the fact that there were then later periods (because of C1's ill health, then because of Covid/furlough) in which it was not practicable to send C1 on the course (and during which the failure to send him on the course was not because of race) would not affect time limits.

520.4 On balance, we think it more likely that, rather than R4 having some express and conscious decision-making process where he decided (privately) that C1 would never go on the course, but he would string him along, we think that R4 was thinking in a more short term way. The need for C1 to go on the same training course that the other sales advisers went on was never of sufficient importance to R4 (in Autumn 2019) that he made (or attempted to make) arrangements for C1 to be sent on the course, but he never consciously made a decision that there were no circumstances in which he would approve C1 for the training. His failure was less favourable treatment and it was because of C1's race.

521. This allegation succeeds.

12.4 in late February /early March 2020, R4/R2 called C1 a "black bastard" during an incident in the office where R3 tried to belittle C1 in front of colleagues by counting down to 3 for him. He was abused and called a "black bastard" in front of his colleagues upon leaving the office (C1 compares himself to Yakub, Todor, Simon, Dawn, Chris);

522. As per the findings of fact, it is our decision that, during his employment, C1 did not hear R4 use the phrase "black bastard" to him or about him. If he had heard it used in February or March, then he would have (a) remembered it at the time he was writing his grievance and/or grievance appeal, and at the time he was discussing the grievance with R5 - Mr Pickering and with Mr Kitto and (b) would have mentioned it on one or more of those occasions.

523. Our finding is that the only things which C1 knows about this particular allegation is what he has heard via Leon. The fact that Leon has not given evidence on oath does not prevent us taking account of what Leon put in his written grievance or of what he said to R5.

524. We do accept that Leon heard R4 use the phrase "black bastard" when referring to C1, and out of C1's earshot. This is comparable to R4 using the phrase "Indian twat" when he did not know that Ilesh was within earshot. R4 - Mr Worsley denies saying either of "black bastard" or "Indian Twat". However, it is clear to us that Ilesh had no axe to grind, and no desire to become involved in the complaints made against R4. We are satisfied that the only reason Ilesh said that he had heard the phrase "Indian twat" used by R4 is that he did hear it, in the circumstances which he described to R5. Even though that is only weak corroboration for Leon's assertions, our assessment is that it is good enough. We are not applying the standard of "beyond reasonable doubt". We are satisfied that it is more likely than not that, when R4 thought particular employees could not hear him, R4 was willing to use racial insults about those employees in the presence of Leon. On at least one occasion, he referred to C1 as "black bastard".

525. Our judgment is that, as well as being clearly a racially motivated expression, it is an indication of a lack of respect for C1 as an employee. Even though C1 did not hear the words used, his colleagues did, and that was a detriment to C1. It was a disadvantage to C1 that (some of) his colleagues were aware that the branch manager disrespected C1. We have not received any specific evidence that any of his colleagues treated C1 any worse (or any differently) because they heard R4 refer to C1 as "black bastard", but, in our judgment, that is not a necessary ingredient of its being a detriment. It was a disadvantage to C1 that the branch manager – in front of other people - referred to C1 in these terms.

526. The fact that a claimant was unaware of the conduct (at the time it occurred) does not prevent the conduct amounting to a detriment. See Garry v LB Ealing Neutral Citation Number: [2001] EWCA Civ 1282. In our judgment, the fact that C1's employment had ended before he found out about the conduct does not mean that he did not suffer a detriment as a result of the conduct.

527. This was less favourable treatment because of race and was a contravention of section 39(2)(d) EQA.

528. We regard it as being in time, being part of a continuing act with the treatment which continued up to the grievance outcome. However, in any event, it is just and equitable to extend time on the basis that C1 only became aware of this incident after he found out about it from Leon after the termination of his own (C1's) employment.

529. This allegation succeeds.

12.5 in September-December 2019 and February 2020, R4/R2 singled out C1 when black customers came to buy cars and referred to black customers as "your lot" (C1 compares himself to Yakub, Todor, Leon, Dawn, Chris);

530. R4 - Mr Worsley did use this expression to C1 (as he also did to C2).

531. There are facts from which we could conclude that it was related to race. Those facts include that R4 sometimes expressly alluded to race (eg "Somali pirate", "Indian Twat", "black bastard").

532. The expression "your lot" does call out for an explanation. It was intended to group the claimant in with the customers based on (R4's perception of) race.

533. R4 - Mr Worsley was unable to give any satisfactory explanation. To the extent that he sought to persuade us that he tended to say "go serve your lot" to any adviser, regardless of that adviser's race, and about any group of customers, regardless of the customers' race, our finding of fact is that is untrue. The panel asked him why, in that case, he would not simply have said "that lot" rather than "your lot". We reject his assertion that it was just a clumsy turn of phrase and that "your lot" meant (something similar to) "they are '<u>your</u> lot' because they are customers whom <u>you</u> are supposed to serve as part of your duties".

534. Our decision is that R4 used the expression "your lot" because he differentiated sales staff based on their race, and he differentiated customers based on his perception of their race when he looked at them from across the sales floor. His decisions about which sales adviser he would send across to the customers was (at least some of the time) influenced by race

535. We have to decide whether it was a detriment (within the meaning of that expression in section 39(2)(d) EQA.) We take into account:

535.1 Talking to customers could potentially lead to a sale, which could potentially lead to commission

535.2 C1 has not tried to argue that there were fewer sales opportunities because R4 only referred him to certain categories customers

535.3 R4 has not tried to argue that it was a "good" thing that C1 had the opportunity to sell to customers of (according to R4's perception) a similar race to C1, or that it was a legitimate sales technique for him or R2 to factor in race when deciding on which sales advisers had the best chance of obtaining a sale.

536. C1 has presented his argument that, in and of itself, the phrase "go and serve your lot" is a detriment. We agree. It is an indication that R4's decisions were based (at least partly, and at least some of the time) on race. C1's opinion that such remarks were a detriment to him was not an unjustified sense of grievance. He

was being treated less favourably, because when there were white customers, R4 did not say to a white sales adviser "go serve your lot". The "your lot" was used to single out some, not all, particular races of customer and employee.

537. This is in time as it forms part of a continuing act with the grievance outcome letter which referred to this matter, and supplied R5's (and R2's) assessment of it (albeit Mr Kitto revised R2's position in the appeal outcome letter).

538. This allegation succeeds.

12.6 in September 2019 (delivered by Steven Hearn), and on 27 February 2020 and in March 2020, R4/R2 threatened C1 with dismissal three times (C1 compares himself to Yakub, Todor, Dawn, Chris);

539. Given the comments which R4 made about C1, and R4's involvement in each of the three incidents, the burden of proof shifts.

540. The Respondents have discharged the burden of proof of showing that the mention, in September 2019, of possible redundancy, was, in no sense whatsoever, because of C1's race. It was because the employer believed that Service was overstaffed.

541. In oral evidence, C1 suggested that the third occasion was the redundancy exercise (which started in June 2020, rather than March). In terms of that exercise, the Respondents have discharged the burden of showing that they did not threaten dismissal (to various people, who were affected by the exercise) because of race. There was a genuine opinion, not at all connected to race, even unconsciously, that the number of sales advisers at Staples Corner had to be reduced to 6. (So reduced by 2 if Todor was part of a pool of 8, or reduced by 1, if there had been a pool of 7 which did not include Todor).

542. The other occasion was when C1 informed R4 (around late February 2020) about how upset he had been about the deduction from his wages, and how this might potentially damage his mental health. R4's response was to say that if C1 was not well enough to work then he, R4, would contact HR and C1 might be dismissed (by implication, on grounds of ill-health capability). This was, in our judgment, an unpleasant reaction, and an offer of (for example) referral to occupational health, and/or some other form of support would have been more reasonable/appropriate. However, we are satisfied that a hypothetical comparator, whose circumstances were identical to C1's (including having recently had a significant absence, with fit notes and OH reports matching C1's, and who was reporting that they were very distressed by recent workplace events) but who was a different race to C1 (for example, white) would have been treated exactly the same by R4. He made comparably dismissive remarks to/about other people, including Leon, Dawn and Simon.

543. This allegation fails.

12.7 on 2 July 2020, R4/R2 was unfair and bias in respect of C1s redundancy (C1 compares himself to Paul, Leon Brennan, Fathia);

544. We accept that the decision that Staples Corner had too many sales advisers, and needed to reduce to 6, was made as part of R2's reorganisation plans that affected many branches and were a response to the downturn in business caused by the pandemic. It was not a decision made solely by R4, though he played a part in it.

545. We accept that the selection method (use of redundancy matrix) was not a decision made by R4.

546. The burden of proof does not shift in relation to either (a) the decision to reduce the number of sales advisers to 6 or (b) to use the (particular) matrix. Neither of these decisions was because of C1's race, or because of anyone's race.

547. Once the consultation/selection process was underway:

547.1 We accept that the only item which R4 had input to was technical mastery. For the "technical role mastery", C1 did get the lowest possible rating, namely "basic". However, R4 gave that to 5 out of the 8 sales advisers, including to Simon R and to Todor. One of the three who got a higher rating was C2. There does not seem to be any pattern of giving white employees higher than "basic" or black employees no higher than "basic".

547.2 R4 was also responsible for the informal warning about parking tickets which would have given C1 a "1" rather than a "5" had it been the only relevant item in that category. However, because Steve Hearn had given a formal warning about attendance, R4's informal warning did not count anyway. Because of the formal warning, C1 received a "0" (not "5" or "1") and that "0" would have been the case regardless of the fact that R4 gave him an informal warning.

547.3 The sales figures were just a question of fact that were done for payroll purposes. There has been no explanation of how C1's (or Simon R's) furlough was factored in, or how Todor was assessed on Sales, when he had only been doing it from June 2020 (so a small number of weeks). However, the point is that R4 did not give those grades, and nor where they specific to the redundancy exercise.

547.4 The Respondents have produced only weak evidence re the appraisal, and did not deal with C1's query, during the appeal hearing, when he said he did not agree that he had had one (or, at the least, that he did not know what they were referring to). However, as per the findings of fact, we rely on Ms Pauffley's evidence, given on oath under penalty of perjury, that, at the time, she looked

at the system and saw an appraisal rating had been entered for C1. We have inferred that it was input by Mr Hearn or Simon H rather than by R4.

548. We cannot treat the other sales advisers as actual comparators for the "technical mastery" score. They each had different length of employment and sales experience. There is simply no evidence, that, viewed objectively they all (or any of them) had the same aptitude for the role that C1 had. Rather, we must base our decisions on a hypothetical comparator, being someone of a different race, but whose employment history, and sales skills, and aptitude for the job of sales adviser at Staples Corner was the same as C1's. We have to decide if C1 was treated less favourably (with the technical mastery score) than that hypothetical comparator.

549. There are facts from which we could conclude that the "technical mastery" rating which R4 gave to C1 was influenced by race. These include that fact that R4 used the expression "your lot" when telling C1 and C2 which customers to serve, and the fact that R4 referred to C1 as "black bastard" as well as the references to race, and/or national origins, in comments made about C2, Leon, and Ilesh (or Sayed). These include that R4 and R2 had wanted C1 to move to Sales because they believed he was an experienced sales person.

550. No documents have been produced to show how R4 arrived at the assessment for either C1 or anybody else. The mere fact alone that he did not consistently rate employees who were (for example) "white" higher than employees who were (for example) "black" does not discharge the burden of showing that race played no part (even unconsciously) in the rating of "basic" given to C1. The waters are muddied, slightly, by C1's assertion that he did need training (which might be thought to be supportive of the claim that the 'basic' rating was justified) and R4 asserting that C1 was an experienced salesperson, who achieved respectable commission figures straight away (which might be thought to be supportive of an argument that possibly giving him the same rating as Todor required further explanation). However, in any event, there is simply a bare assertion from the Respondents that the assessment was reasonable, and fair, and ignored race. That comes nowhere near discharging the burden of proof.

551. Thus the complaint that C1's score for technical mastery was less favourable treatment because of race succeeds.

552. However, even in the absence of that less favourable treatment, C1 would still have been dismissed. Had he been given the same rating as C2 (and Ilesh) or even the higher still rating given to Hiva, he would still have been the lowest scorer of the 8 people in the matrix.

553. Thus, this allegation succeeds, in that the Respondents have not discharged the burden of showing that C1's matrix score was, in no sense whatsoever, motivated by C1's race.

554. However, it does not follow that C1's dismissal was because of race, because a higher score for "technical role mastery" would not – in itself – have prevented dismissal.

12.8 on 27 July 2020, R2 made C1 redundant and a driver called Todor was hired into C1's role (C1 compares himself to Yakub, Todor, Dawn, Chris);

555. It is not accurate that, after C1 was dismissed, Todor was made a sales adviser. We have accepted that Todor was appointed as a sales adviser before C1 was dismissed. Indeed, in June 2020, while C1 remained on furlough, Todor (who had not been a sales adviser prior to the start of furlough) was brought back from furlough and commenced work as a sales adviser.

556. R2 and R5 failed to carry out an adequate investigation (in our opinion) as to the exact circumstances which led to Todor being appointed as sales adviser, after furlough had started, but before the redundancy exercise began. In particular, it is surprising that Todor was a driver at the start of furlough, but was brought off furlough to work as sales adviser, while C1 and Simon R were left on furlough. It is our assessment that if an employer had been treating C1's comments seriously, and was genuinely seeking to investigate with an open mind, then the employer would have looked at documents and evidence to find out the specific date on which Todor was told that he now a sales adviser, not driver. R5's simple acceptance that this was "before" the redundancy exercise does not go deep enough. It is inherently implausible that R2 gave no thoughts to redundancy any earlier than Monday 22 June (the date of the announcement to staff). Prior to making the announcement, R2 had given some thought to which roles would be reduced, at which locations, and in which numbers. An assessment of whether the decision to make Todor sales adviser was before or after the decision to reduce the number of sales advisers, would require a proper analysis of who made the decision to make Todor sales adviser, and when, and of what that person knew (at the time they made the decision) about potential redundancies. None of this was done by R5 at the time, and no evidence about it has been presented to the employment tribunal panel.

557. All that being said, for the reasons we have mentioned, we are satisfied that making Todor a sales adviser was not part of a plan to get rid of the Claimant. We are – therefore - satisfied that making Todor a sales adviser was not done because of C1's race.

558. This allegation fails.

12.9 on 29 July 2020, R5/R2 was bias in the treatment of C1s grievance outcome (C1 compares himself to Fatima, Simon, Leon);

559. In express terms, the grievance outcome stated, in relation to R4's alleged comments about Dawn:

> I believe there is a case to answer for. Any action deemed appropriate will be taken in line with the Company disciplinary, and details of that action will remain private and confidential.

560. In relation to the "your lot" comment (the only item "upheld" that related to R4's conduct to C1), the statement was:

> After carrying out thorough investigations we have reasonable belief that the comment was made. Although it is my reasonable belief that the comment was not intended to be racially offensive, I acknowledge that it is how the individual interpreted the wording and that this is not acceptable.
>
> Taking into account the information presented in the meeting and my following discussions, I have reviewed the matter and have decided that based on the information presented, that there is a need for the judgement of "banter" to be addressed. Any further action we deem appropriate will be taken privately and confidentially.

561. There are, therefore, differences.

561.1 What was said about Dawn was not termed "banter".

561.2 What was said about C1 was not, in express terms, said to be something that would be dealt with under the disciplinary procedure, albeit the outcome made clear that there would be some discussion with R4 about his use of "banter".

561.3 The letter did not expressly say that speaking to R4 about "your lot" would be done outside of the disciplinary procedure, but there is a clear difference in that, for the Dawn issue, the disciplinary process was expressly mentioned.

562. In the letter dated 14 August 2020, which invited R4 to a disciplinary hearing [Bundle 894], the letter cross-referenced the allegations in the "investigation summary" [Bundle 824]. The heading of that latter document referred to the grievance brought by C1. The first row refers to the Dawn allegations (as per the grievance outcome letter to C1) and the second row refers to the "your lot" allegations, mentioned in each of C1's grievance and C2's grievance.

563. The other allegations were not upheld.

12.10 on 29 July 2020, R5/R2 used belittling or patronising comment of "banter" to sum up the race discrimination faced by R3 (C1 compares himself to Fatima, Simon, Dawn, Leon);

564. As mentioned in the analysis of the previous item from the list of issues, the grievance outcome letter implied that R5's decision was R4's usage of the phrase "your lot" amounted to "banter". From R5's point of view, he was not using the word to sum up the race discrimination faced by C1 (the reference to R3 in the wording of the list of issues is a typo); on the contrary, he was expressly deciding that (a) it was "banter" and (b) it was not race discrimination.

565. As also mentioned in the analysis of the previous item from the list of issues, while this comment was made in R5's letter of 29 July 2020, by 14 August, he had written to R4 to state that R4 would face a disciplinary hearing for allegations of "Racism, bullying, intimidation, humiliation and discrimination" and there was a cross-reference to an investigation summary which did include C1's allegation about "your lot".

566. At the time of the 29 July letter, it was R5's decision that R4 would not face a disciplinary allegation that "your lot" was a reference to race. R5's decision, as of 29 July, was that it not related to race, but was "banter".

567. This particular allegation has succeeded as harassment, and – therefore – is not upheld as a complaint of direct discrimination. However, we take the decision that it was related to race into account as part of our analysis for items 12.9 and 12.11 of the list of issues.

12.11 on 29 July 2020, R5/R2 did not uphold C1s complaint that he had been threatened with dismissal by R4 (C1 compares himself to Simon, Leon).

568. This is a reference to the part of the grievance outcome letter which reads:

> **Upon expressing feelings of suicide you were responded with "You are not fit to work, I am going to have to call HR and terminate your employment"**
>
> Decision: Not upheld
>
> Unfortunately, I cannot find any evidence to corroborate your statement, nor have you submitted any evidence. Therefore I cannot uphold this element of your grievance

569. For the comparators, it is a reference to [Bundle 825], which is the second page of the investigation summary, and which reads (in part):

> Threatening people with their jobs, with comments such as:
>
> "If you go above my head that's the last thing you will do" raised by Leon ….
>
> "If you ever do that again that will be the last thing you do" raised by Simon [R].

570. A difference is that, for the comparators, the same row of the document, in the final column, lists the evidence which R5 says supports their allegations, whereas, for C1, R5 said there was no evidence.

570.1 On the Respondents' case, that is a material difference between the circumstances relating to C1 and his proposed comparators.

570.2 On C1's case, that is part of less favourable treatment, because for Simon R and Leon, R5 was willing to treat, as corroboration, the fact that similar threats had been made to other people, but, in C1's case, he was not.

571. R5 had already seen Simon's grievance and Leon's grievance by 29 July (when he sent grievance outcome letter to C1) albeit he held his meetings, and issued the outcomes, after 29 July.

572. After 29 July, R5 knew that C1 had appealed, and he knew that Mr Kitto was dealing with the appeal.

572.1 R5 did not write to C1 to say that he was revisiting that aspect of his grievance.

572.2 As part of R5's communications with Mr Kitto, in connection with C1's appeal, R5 did not inform Mr Kitto of what Simon R and Leon had stated. [We do accept that, because of the letter sent by email (by Ms Durston on R5's behalf) to R4 on 14 August 2020, which was cc'ed to Mr Kitto, Mr Kitto could have come to learn of the further information which R5 received. However, nothing was flagged up by R5 to Mr Kitto as being something relevant to C1's grievance appeal and, in fact, Mr Kitto did not read all of the information attached to the email and did not know, as of the Tribunal hearing that he had been selected to deal with a disciplinary hearing for R4.]

572.3 R5 did not include the allegation about R4's (alleged) threat of dismissal (in around February 2020) to C1 in the list of matters for which R4 would face a disciplinary allegation.

573. There is a difference in treatment and a difference in race between C1 (on the one hand) and Leon and Simon R on the other. Something more is required for the burden to shift, but, in this case, we find that there is something more. The circumstances of C1's allegation and the comparators' allegations are so similar, that the difference in treatment does call out for an explanation. We could conclude, from the facts as we have found them, that the reason for the different treatment was race (whether consciously or unconsciously).

574. Taking the facts of the 3 items together (connected to the list of issues 12.9, 12.10 and 12.11), R5's approach towards C1's grievance that included accepting what R4 said, without seeking any corroboration. While he did interview several people and asked some questions, he did not look for documents that would either support or contradict what C1 and R4 were saying, or just shed more light on the issues. In particular, he did not look into the facts (or seek evidence) surrounding Todor's appointment as sales adviser, and he did not seek any evidence in relation to the training course issue. He called the "your lot" remark "banter" that was not related

to race without any reasoned analysis of what led him to that conclusion (other than that he accepted R4's word for it).

575. We accept that, in some respects (connected to the redundancy), R5's rejection of C1's grievance matched the corresponding rejection of the white comparator (Simon R's) grievance. However, in other respects, allegations made by C1 were rejected, when similar allegations, with comparable corroboration, by others were upheld.

576. There are facts from which we could conclude that the difference in treatment was because of race. Our decision is that the Respondents have not discharged the burden of showing that the treatment was, in no sense whatsoever, because of race.

577. Allegations 12.9 and 12.11 succeed.

In respect of C2

12.12 on 5 occasions between September 2019 and July 2020, R4 sprayed C2 with air freshener and made comments about a "Somali smell" or "bullshit smell" (C2 compares herself to other colleagues);

578. We have upheld this as an allegation of harassment. We therefore give it no further consideration as an allegation of direct discrimination.

12.13 in October, November and December 2019, C2 requested holiday leave which was refused by R4. R4 threatened C2 with dismissal if she took sick leave during that time (C2 compares herself to her white colleagues); and

579. As per the findings of fact, C2 has not proven, on the balance of probabilities, what the exact discussion was. She has not proven what she said or what R4 said in response.

580. We do not think it surprising or suspicious that neither R4 nor C2 have an exact recollection of the exact discussion, bearing in mind that it took place more than four years prior to the tribunal proceedings and there was no contemporaneous written record. It was more than 6 months later (in the following July as part of the claimant's grievance) that there was a complaint about it.

581. It is common ground that there was a discussion, and common ground (or, it is our finding, at least) that C2 had a lot of leave left, and did not want to lose it, and that R4 did not want her to take all of it that year.

582. We are satisfied, on the (limited) evidence presented to us, that the decisions he made in relation to C2's holiday requests, and carry over requests, were the same that he would have made for a hypothetical comparator whose race was different. There are facts from which we could conclude that R4 treated C2 badly because

of race, but there are no facts from which we could conclude that any decision to reject leave on this occasion was unreasonable or because of race. Based on C2's oral evidence, it is not even clear that he did specifically refuse a specific request.

583. We think he probably did say something along the lines that if she took sick leave for a period which she had previously made a leave request, and had that leave request refused, then he would take disciplinary action. However, there are enough complaints from other people about R4 making threats of dismissal to them that we are satisfied that he would have said the same thing to a hypothetical comparator of a different race to C2.

584. We have taken into account that R5 - Mr Pickering said that there was a case to answer in relation to what had been said about holiday. However, we do not uphold this allegation of direct discrimination.

12.14 R4 subjected non-white and non-British origin colleagues to abuse about their race or ethnic origins (C2 compares such colleagues to other employees who were white and of British origin).

585. The claimant has not clearly identified which specific comments on which specific occasions that (are not dealt with as separate allegations) she is referring to with this allegation. She refers to comments which she became aware of as a result of the grievance interviews and investigation interviews carried out by Mr Pickering.

586. We do not uphold the allegation that things said, not in the Claimant's presence, to other people and about other people, were less favourable treatment of C2.

587. This allegation of direct discrimination fails.

<u>Victimisation – C1 only</u>

37.1 R5 treated C1 badly for coming forward by not taking his case seriously, carrying out a bad investigation and later upholding similar grievance claims but only for white colleagues, Simon and Leon, for example, being threatened with dismissal, race discrimination and bullying.

588. The Claimant's emails to Miranda Durston on 6 July 2020 were a protected act. Although not in the list of issues as such, his comments in the meetings with Mr Pickering (13 July) and Mr Kitto (12 August) and in the appeal letter (31 July) were also protected acts.

589. In the list of issues, the alleged detriment is R5's outcome (30 July 2020) and so the appeal letter and appeal meeting are not relevant to the claim (being after the alleged detriment, and therefore not part of the motivation for it).

590. We note that, in the Claimant's March 2021 further information, the Claimant alleged throughout that the victimisation continued up to his appeal. At [Bundle 91], the following information was supplied (C1's answers in bold):

> 17. In respect of your claim that "Jonas Kitto was just as bad, cutting you off, rude and not listening to his case."
>
> a. Please confirm if this is solely in relation to your unfair dismissal claim? **no**
>
> b. If not, is this meant to be a disability discrimination, or a race claim?
>
> **victimization and harassment claim**
>
> c. You refer to victimisation in the claim form - is this the type of claim you are bringing in relation to this allegation? **Yes**

591. However, there was no application to vary the list of issues to add any new detriments. The outcome letter of 29 July 2020 [Bundle 553] was a detriment in the sense that that several of the Claimant's complaints were not upheld, and so he did not get the outcome that he wanted. (The same would apply to appeal outcome letter of 17 August 2020 [Bundle 700], but, for the reasons just mentioned, we are not dealing with a complaint related to the grievance outcome).

591.1 As confirmed in Shamoon, [2003] UKHL 11, borrowing a phrase from previous cases an "unjustified sense of grievance" cannot amount to a detriment, but an act which might cause a reasonable worker to take the view that they had thereby been subjected to a disadvantage might be a detriment.

591.2 In deciding which side of that line the rejection of a grievance falls on, it is not necessary (or appropriate) for the Tribunal to substitute its decision for that of the employer about whether the grievance should have been upheld. Where the employee's opinion that the grievance should have been upheld is meritless, then there will be no detriment; however, for the outcome to be a "detriment", it is not necessary for the claimant to go so far as proving that the rejection of the grievance was objectively unreasonable. There is a fairly low bar for them to establish that their disappointment with the outcome is not merely "an unjustified sense of grievance".

591.3 In this case, the Claimant did believe that, to some extent, the Respondent had decided that it was one person's word against another and that his "word" was not good enough. He also thought more investigation could have been done (and, when he found out what other people, especially Leon had said, he was upset and angry that that evidence had not been seen as a reason to uphold his grievance). He was also upset by the way in which the word "banter" had been used in the outcome letter. The Claimant does overcome the hurdle of showing that his actual sense of grievance was more than "an unjustified sense of grievance".

592. It is a fact that (unless the respondents ignored the grievance completely) once the grievance had been lodged, some outcome had to be given. [The same is true of the appeal.] So the Respondents' decision to give some outcome is not victimisation (and nor was it a detriment). The Claimant's argument is that the *particular* outcome (and process leading to it) was victimisation, rather than the fact that *some* outcome was given.

593. In Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust [2019] EWCA Civ 498, the Court of Appeal had to make a decision following an employment tribunal making a determination of victimisation, which had been successfully appealed to Employment Appeal Tribunal. The claimant had attempted to raise a grievance which alleged victimisation, and the employer had declined to deal with it, stating that it had not been submitted in accordance with the time limit in the grievance policy.

593.1 The Tribunal had concluded that "the decision not to allow the Grievances to be investigated when the Policy clearly required that they should be investigated was materially influenced by the content of the Grievances". By "content of the Grievances", it was referred to the fact that the grievances alleged race discrimination, and (therefore) to its decision that the grievances were protected acts.

593.2 The EAT, in allowing the employer's appeal, was in part influenced by the fact that the Tribunal had decided that the decision in question was direct race discrimination.

593.3 In any event, the Court of Appeal's analysis, when restoring the Tribunal's decision, included, at paragraph 95, confirmed that the correct test was to decide if the detrimental handling of the grievance had been materially influenced by the fact that the contents of the grievance included assertions of (race) discrimination. The fact that the detrimental handling of the grievance also amounted to direct discrimination did not prevent a decision that it was also victimisation.

594. We have explained above why R5 - Mr Pickering's handling of the grievance has led us to the conclusion that there were was harassment and discrimination.

595. There are facts from which we could conclude that the failure, in July 2020, to (for example) seek documents about the training course, and Todor's appointment, might have been influenced, to some extent, by a desire to avoid making a decision that R2 (and one of the general managers reporting to him) had discriminated.

596. As against that, following the interview with Leon, and the other later interviews, R5 did, in fact, on 14 August, recommend that there be a disciplinary hearing. He had previously, around 4 August 2020, decided that he would suspend R4. Leon

alleged (amongst other things) breach of the Equality Act by references to "Norwegian".

597. On the evidence, we are satisfied that the reason for the way in which R5 dealt with C1's grievance in the way he did was not influenced by the fact that its contents contained a protected act.

598. The victimisation complaint fails.

Constructive unfair dismissal - C2 only

599. In the findings of fact we have described the sequence of events that led to the claimant sending the email which stated she was ending her employment [Bundle 880] on 5 February 2021. In that email, she did not specify the exact conduct which led her to resign. She referred to "recent experience" and said that "the way I have been treated during my sick leave was unacceptable".

600. In her witness statement, she refers to the "cumulative effect of the above incidents" on page 20 of witness statement bundle at the paragraph 21 which appears on that page. She is referring to the previous 20 paragraphs of her statement which are under the heading "constructive dismissal".

600.1 Within those paragraphs she refers to having been off sick during the grievance investigation and to the grievance outcome upholding many of her complaints.

600.2 She accepts that she received an email from Miranda about R4's departure. She argues that she was the last to be informed. (There is no evidence that C2 was actually "last" to be informed. At least some sales advisers at Staples Corner probably knew before her, but C2 knew in November 2020 that R4 had departed, and she knew the date on which she had been informed, and through December and January she still planned to return to work.)

600.3 She refers to a WhatsApp group that had been created but which did not include her. In our judgement this was not an important part of her reasons for resigning and she made no request to join the group.

600.4 She makes reference to comments which she was told Lewis Geoghan had (allegedly) made about her. However in the period immediately prior to her resignation, the claimant was planning to return to work and our assessment is that whatever she heard about what Mr Geoghan had allegedly said would not have prevented her from returning to work and what was not a significant part of her reason for resigning

600.5 She also refers to delays in being notified about voluntary redundancy, but we are not satisfied that the claimant wanted to take voluntary redundancy or that

the fact that she had to chase Mr Geoghan up for the information played any significant part in her decision to resign.

601. However we are satisfied that C2's reasons for resigning were that:

601.1 In January and early February she was intending to return to work immediately after her fit note expired which was going to be on Thursday 4 February 2021.

601.2 Both from what she was told at the November telephone meeting and from what she read in the Occupational Health reports, C2 was led to believe that she would have a phased return to work.

601.3 She chased Mr Geoghegan about a further referral to OH, and about phased return to work schedule.

601.4 No specific details of a specific phased return schedule were put to her. When Mr Geoghegan did respond to her chasing that up, it was 3 February, when her last certificated absence day was 4 February. So it was 2 days before she would have been due to return to work (in the absence of a further fit note), and Mr Geoghegan's reply stated that no schedule for a phased return was yet prepared those and he was seeking advice from HR.

601.5 At the same time, he mentioned temperature readings for the first time.

601.6 The claimant was genuinely surprised at this request, and told him so. There was no exploration with the Claimant about why she was surprised, or discussion of why (from R2's point of view) she ought to have known. There was a simple decision that (a) she would not be able to start work again for at least 14 days and (b) she would not be paid for that period.

602. So our decision is that the most direct and specific reason for the decision to resign was the fact that she was told (unexpectedly) that there would be a 14 day period in which she was not allowed to resume work and for which she would not be paid. That was coupled with the Mr Geoghegan's delays in responding to her most recent emails about return to work arrangements. The Respondent's conduct caused her to decide that she no longer had trust and confidence in the employment relationship and that resigning was her only option.

603. It is also true that the Claimant claimed to have the readings, and the Respondent told her that they were not willing to allow her to return to work (or be paid) based on what she said. The Respondent invites us to decide that the Claimant was lying. If it is necessary to make a decision on the Respondent's assertion, we will do so at the remedy phase. We do not think it is necessary to do so in order to decide on liability because:

603.1 It is not the case that the Respondent dismissed her for lying. (There was no actual dismissal, at all, of course).

603.2 It is not the case that the Respondent was going to allow her to return to work immediately after or soon after 4 February 2021, but decided that, because she had (allegedly) sought to mislead them about temperature readings, they would not allow her to do so.

603.3 Likewise, it is not the case that the Respondent was going to pay her for the enforced absence, but decided that, because she had (allegedly) sought to mislead them about temperature readings, they would not do so.

603.4 Rather, it is the case that the Respondent's decision to enforce the absence, and insist there would be no payment for the absence, was made, and the Claimant's request for R2 change its mind was refused. While it is R2's position that its refusal to change its mind was justified (because C2 was lying), the decision that R2 would enforce the absence, and insist there would be no payment for the absence would have been no different if C2 had not made the claim that she did have the temperature readings.

604. Our assessment is that R2 fundamentally breached the claimant's contract of employment by informing her that she could not work even though she was ready and willing and (in her opinion) able to do so and that she would not be paid.

604.1 An employer's fundamental obligations are that they will provide work (of the type envisaged by the employment contract) and will pay the employee for that work.

604.2 We accept that in principle, there could be circumstances in which it was not a breach of contract for an employer to decide that the employee's presence on site would be a health and safety risk (for that employee, or for other employees, or for other persons) and that, therefore, it had a good enough reason to refuse to have the employee on site. It would follow that, if there were no other work the employee could do, then that might be a good enough reason for the employer to decide it could not provide work to the employee.

604.3 If the employer's decision that the employee could not come on site was because – within the meaning of the clauses of the contract – the employee was "sick" then the issue of whether the employee was entitled to be paid would be decided by the relevant terms of the contract (express or implied) dealing "sick pay".

604.4 However, where the employee was not "sick" (based on the interpretation of that word applicable to the specific employment contract), then the entitlement to pay would be determined based on the terms in the contract (express or implied) dealing with pay.

604.5 In these circumstances, C2 was not going to be on unauthorised leave. She was going to be absent at her employer's request, not hers.

604.6 C2 was not going to be on "sick leave". That is the opposite of what R2 told her.

604.7 Our decision is that there was no term, express or implied, that entitled R2 to withhold pay from C2, for the period following the expiry of her fit note, in which she was intending to resume work on a phased return, but in which R2 had told her, she could not return. The logical interpretation of Mr Geoghegan's text of 19:50 on 4 February 2021 is that the earliest possible return date which R2 would envisage would be 18 February 2021 (if she was able to provide readings for 4 February to 17 February 2021). We reject any argument that R2's April 2020 letters either demonstrated a pre-existing contractual right to refuse to pay in such circumstances, or represented an offer of variation of contract which C2 accepted, or represented a unilateral variation of contract which C2 accepted by her conduct and/or which she had lost the right to object to. As mentioned in the findings of fact, our decision is that those letters were specific to the furlough period, and set out the requirements for being allowed to resume work immediately after the employer notified the employee that furlough was over and they were expected to be available to work. The letters did not specify any ongoing "new" contractual situation in which all absences would only end provided the employee had 14 days worth of temperature readings. Furthermore, even if those letters had purported to set out such a position (and they did not), nothing C2 did demonstrated an acceptance of a contractual term that she would not be paid if she was unable to produce temperature readings.

605. It is not self-evident that it would have been impossible for the employer to have offered the claimant some work that she could do at home: for example follow up calls to customers and such like. However, we heard no argument or evidence about that and we do not base our decision on it.

606. It is our decision that R2 had no contractual right to inform C2 that she would not be paid for the period which it had decided that she was not able to return to work.

607. Furthermore, and in any event, even if we were wrong about that, our decision is that R2's actions were without reasonable and proper cause and were conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Having failed to proactively come up with a proposed phased return to work schedule, and having failed to inform the Claimant (in our assessment) or remind the Claimant (according to R2's assertions) that she would not be allowed to return to work without 14 days' worth of temperature readings, it responded to her chasing for the phased return details by (a) stating that no phased return proposals had been created and (b) she could not, in any event, return (or be paid) until she produced temperature readings which R2 deemed acceptable. They told her this at a point in time at which it was impossible

for C2 to start taking readings, and have 14 days worth, in time to resume on 5 February 2021.

607.1 We reject the employers argument that the letters sent in April were sufficient to have put C2 on notice of this requirement (even on the assumption that they were actually received by the claimant which she denies).

607.2 Our finding of fact is that once the claimant and her colleagues returned from furlough in early June, they were not required to provide to the employer any documents showing temperature readings (or to sign any disclaimer that they had been keeping the last 14 days of temperature readings)

608. The employer argues that the claimant has been treated the same as other people. Even if true, that is of limited relevance to whether R2 breached the implied term in the claimant's contract of employment requiring trust and confidence. We are not tasked with deciding whether R2 breached the contracts of C2's three colleagues (who were, in any event, in locations other than Staples Corner, and with whom C2 had no contact). However, for completeness:

608.1 for the two July letters, they do not persuade us that those other employees were treated in the same way that C2 was treated in February 2021. Rather they amount to evidence that people who were otherwise due to come back off furlough had their absence extended on an unpaid basis for failure to provide the temperature readings or, put another way, for failure to comply with the instructions in the 21 April letter.

608.2 Likewise the September letter does not persuade us that the recipient was treated the same way that C2 was treated in February 2021. Rather that person had been off with an illness that either was COVID or shared some symptoms with COVID and the employer purported to say that they would not be able to return without 14 days worth of acceptable temperature records.

609. C2 did resign in response to R2's fundamental breach(es) of contract She did not affirm the contract prior to doing so. On the contrary, she resigned very promptly after Mr Geoghegan informed her of R2's stance in relation to the 14 day unpaid period.

610. In relation to R4's conduct towards C2, and in relation to any opinions that C2 might have had about the grievance outcome, or the appeal outcome, C2's first employment tribunal claim, issued on 5 November 2020, made clear that she disagreed with some of the treatment that had occurred prior to 5 November 2020 (and, in particular, she alleged there were contraventions of EQA). However, as well as not resigning prior to 5 November, she did not resign in November, December or January. On the contrary, she engaged in meetings to discuss her absence, and the possible return. She was proposing to return to work in early February 2021, which was many weeks after she had received the grievance

outcome (and appeal outcome) and knew that R4 had departed. Regardless of whether R4's conduct (prior to start of C2's sickness absence) or R2's conduct in relation to grievance might have amounted to any breach of contract, C2 did not resign in response to that conduct, and she had affirmed the contract since it occurred. We would have reached the conclusion that she had affirmed the contract (after the grievance outcome) in any event; however, we also treat paragraph 4 of the Particulars of Complaint for her second claim [Bundle 106] as a concession to that effect.

611. Our decision is that this is not a "last straw" case. It is a case where there was a fundamental breach of contract in early February, and C2 resigned promptly in response to it. She has been dismissed within the meaning of section 95(1)(c) ERA. For completeness, our brief comments on paragraph 9 of the list of issues are:

    9.1 Factually accurate, but not an allegation of wrongdoing by employer

    9.2 C2 was notified promptly by R2 (by Ms Durston, in writing, then orally, in November 2020). Even if other people knew before the Claimant that is because she was off sick, and they were not, and it was not unreasonable conduct by the Respondent if there was a short delay in notification to the Claimant.

    9.3 R2 has not called Mr Geoghegan, but relies on Ms Pauffley's evidence that she investigated and was satisfied that the only reason that the Claimant was not added was that she was on sick leave, and the group was for day to day work issues (only). We are satisfied that C2 was intending to return to work despite knowing that she was not (yet) included in the WhatsApp group.

    9.4 C2 is not able to give first hand evidence of these alleged remarks. On the other hand, nor has R2 presented Mr Geoghegan as a witness to deny them. In any event, as with the WhatsApp group, these (alleged) comments would not, in themselves, have prevented C2's return to work, and (also as with the WhatsApp group) she did not present a grievance prior to resigning.

    9.5 As discussed above, this conduct by R2 does form part of the conduct which amounts to a fundamental breach of C2's contract, and was part of the reason that she resigned.

    9.6 This happened prior to the events in paragraph 9.5, but, when added to that later conduct, does form part of the conduct which amounts to a fundamental breach of C2's contract, and was part of the reason that she resigned.

    9.7 This was not part of the fundamental breach of contract, and did not cause C2 to resign.

9.8 As discussed above, this conduct by R2 does form part of the conduct which amounts to a fundamental breach of C2's contract, and was part of the reason that she resigned.

9.9 As discussed above, this conduct by R2 does form part of the conduct which amounts to a fundamental breach of C2's contract, and was part of the reason that she resigned.

612. There was no potentially fair reason for the conduct which caused the constructive dismissal. The issue of whether it was potentially reasonable to have a policy that employees on long term absence, during the height of the Covid pandemic, would be "banned" from return to the workplace without 14 days worth of temperature reading is not decisive. Even on the assumption that R2 did have the policy in place for all employees (and the evidence that it did have that policy is weak), it did not communicate that clearly to any employees (based on the evidence which we have seen). Very relevantly, it did not (we have decided) communicate the policy to C2 and (even on its own case) did not "remind" her of it during her sickness absence until just before her fit note was due to expire. There was no fair reason to decide that she would not be paid for the enforced absence.

613. C2 was unfairly dismissed by R2.

Statutory Defence

614. R2 denies that any of R5's actions amount to contraventions of EQA. However, for R5, R2 does not seek to rely on the defence in section 109(4) EQA.

615. For any of R4's actions which the Tribunal decides amount to contraventions of EQA, R4 does seek to rely on the defence in section 109(4) EQA.

616. The evidence satisfies us that R2's employees at Staples Corner thought that it was not possible to complain about R4 to HR or to more senior employees. A fairly senior employee, Leon, made this assertion, as did a more junior employee, Ilesh (as did C1 and C2).

617. R4's employer did give him some training about EQA, and it did have policies in place. The mere fact alone that the training and the policies were not sufficient to prevent R4 acting in the way that he acted would not mean that the defence could not succeed (or else there would be no point in including the defence in the statute). Furthermore, as the case law makes clear, we have to analyse what happened before the contraventions, to determine whether the respondent can rely on the defence, as opposed to making a decision about whether their actions after the contraventions was a sufficient/adequate response.

618. All that being said, the defence refers to "all reasonable steps" not "*any* reasonable steps". Providing training, and having policies, are certainly reasonable steps for

an employer to take. However, if the defence were to succeed provided the employer could demonstrate that it told its employees not to discriminate against each other, then it would be rare that a claimant would ever be able to demonstrate that their employer was liable to them for a colleague's breaches of EQA.

619. R4 has stated that he believes that the training which he received was inadequate. It is obviously in his interests that the statutory defence should fail (meaning that R2 is likely to pay the compensation to the claimants, and making it less likely that he will have to do so). We do not accept that a lack of training about what phrases can be used to describe colleagues can explain referring to someone as "black bastard" or "Somali pirate".

620. R4 also points to the fact that R5 was member of a WhatsApp group in which a particular image was shared. R4 has not proven that it was "images" (plural) that were shared. In the break between Day 4 (in January) and Day 5 (in April), R5 produced a supplementary statement which sets out what his opinions are in connection with the image, and what actions he claims to have taken between Days 4 and 5. As part of his denial that he recalled seeing the image at the time that it was shared in the WhatsApp group, R5 commented:

> If I had seen it, I do believe that I would have acted on it as it is an inappropriate message to send in the workplace and could cause offence.

621. R5 goes further, in that he states that he carried out a formal investigation with the employee who sent it, and that the employee also agreed that it was inappropriate. R5 says that he took action against the employee by issuing a reminder of expected standards.

622. It is, therefore, not necessary for us to decide whether it was an inappropriate message. R5 says that it was; put another way, he agrees with R4 that it was an inappropriate image to be shared. In fairness to R2 and R5, the content of the image (which R2 and R5 accept was inappropriate) is not similar to the type of conduct which R4 was accused of; no terms of racial abuse are included, for example.

623. We think it more likely than not that R5 did see the image at the time and that, at the time, he did not think it necessary to speak to the employee who sent the image. At the time, he did not think it was a noteworthy) image, and did not think that it breached the Respondents' policies. Our finding is that the reason he took the action described in the supplementary statement is that he was presented with this evidence at the start of the employment tribunal hearing and realised that R4 was seeking to rely on it (a) in support of R4's argument that R5 was tolerant of this type of image/message and (b) in support of R4's argument that, therefore, this was a reason for the Tribunal to reject the statutory defence argument.

624. R4 first made the allegation, during his employment, in August and September 2020. While it appears that R4 did not hand over this particular image (or any other image) during the grievance (or during his employment, or during the litigation prior to Day 1 of the final hearing), the employer certainly had the opportunity to investigate at the time. Even without knowing which specific images R4 (allegedly) had in mind, the employer had the opportunity to seeks access to the WhatsApp group and proactively check what images were being shared (or, alternatively, it had the opportunity to ask R5 to do so). The employer (and R5, if asked) had the opportunity in 2020 to take action against the person who shared this image. Since it is now R5's evidence that, as soon as he saw the image, in January 2024, he decided that it was inappropriate, it would imply that had he checked the WhatsApp group in around August to October 2020, this image would have stood out to him as something that R4 might have been referring to.

625. The grievance outcome sent to R4, at [Bundle 913] stated, for the allegation about WhatsApp images:

> Our investigation could not find any evidence to corroborate your statement, nor have you submitted any evidence.

626. On balance of probabilities, an employee as senior as R5 would have been made aware that R4 was alleging there were issues with the content of the WhatsApp group. In any event, Tom Ray's outcome letter implies that there has been some investigation. It seems likely that, at the time, the WhatsApp group was checked and this particular image was not one which R5 thought matched R4's assertion that "racial images" were sent. (The alternative would be that the genuine opinion was that this image did match R4's description, but there was a decision to state otherwise in the grievance outcome, and to deny, during the litigation, ever having uncovered such images).

627. So the steps which the employer had taken to avoid discrimination were not such that, at the time, R5 regarded this image as inappropriate, and were not such that any member of the group made any report or complaint about the image (until R4 did so, as part of his reaction to R5's letter calling him to a disciplinary hearing).

628. Further, the steps which the employer had taken to avoid discrimination did not prevent R5 asking if the words "Indian twat" had been said in a "jovial way". [For what it's worth, R2's notes [Bundle 561] record the comment as "So in a jovial way but potentially racist?" whereas Leon's transcript asserts "said in a jovial way but potentially offensive"].

629. In terms of the training itself, as well as referring to the contents of the policies, and giving a case law example (of an employer's liability for a serious physical assault, which was not an Equality Act case), the training referred to "banter" and perceptions of "banter". The impression that we have formed based on the totality

of the evidence, and especially the way in which R5 conducted his stages of the procedure, was that the employer allowed its managers to think that if there was an allegation of breach of EQA, then the likely explanation was that there had been what the alleged wrongdoer regarded as "banter", but which the recipient regarded as offensive. There seemed to be a lack of emphasis on the need to consider that some types of behaviour cannot reasonably be described as a joke that has gone wrong, but is, in fact, conduct which is deliberately offensive and/or is intended to make the other person feel powerless.

630. The additional steps which the employer could have taken were to have a better system of ensuring that employees did not feel that there was no way of making complaints about R4, or feeling that, if they did complain, then (a) they would not be believed and/or that (b) R4 might make things uncomfortable for them.

631. It could have done more to make R4 believe that there might be serious consequences for him personally, including dismissal, if he racially abused colleagues. He (and R5) should not have been allowed to think that there some types of references to race that were acceptable banter, and some that were unacceptable banter. The steps which the employer could have taken could have included firmer guidance from R5 and demonstrable willingness from R5 to put an end to inappropriate conduct in (for example) the WhatsApp group.

632. We do not ignore the Amy Fox emails, which asked managers to be vigilant. However, R5 was R4's manager, and yet R5 held no appraisals with R4, and did not reinforce the message about avoiding discrimination. Although Ms Pauffley and R5 visited Staples Corner from time to time, they were not proactive in ensuring that the employees at that site were not facing discrimination, or that the employees at that site believed that there was a route to raising complaints and having them properly investigated.

633. The defence does not succeed. In accordance with the previous decisions that R2 is liable (subject to section 109(4) for the actions of R4 and R5, and in accordance with our decision that section 109(4) does not apply, R2 is liable for the respective contraventions of EQA by R4 and R5 as discussed above in these reasons, and as itemised in the judgment.

<u>Time Limits</u>

634. C1 had two ACAS early conciliation certificates [Bundle 13 and 14]. In each case, they were issued on 21 September 2020, and his claim form was presented (on 19 October 2020) less than a month later. There is a difference in start dates.

634.1 That for "Robin and day PSA Group" started 27 August 2020, meaning that claims in reliance on that for events on and after 28 May 2020 were in time.

634.2 That for "Go Motor Retailing Ltd" started 17 September 2020, meaning that claims in reliance on that for events on and after 18 June 2020 were in time.

635. On the Respondent's case, since C1 was furloughed on 1 April 2020, and did not return, any allegations about R4's conduct are out of time, and only the complaints about the end of the redundancy process and the grievance are in time.

636. We regard R4's discriminatory attitude towards C1 as a continuing state of affairs that continued up to C1's termination date. The fact that C1 was on furlough meant that there were no day to day racial remarks, but did not bring an end to the discriminatory attitude. On that basis, the claims are in time.

637. Alternatively, R4's conduct by giving a discriminatory score for "technical mastery" was later than 22 June 2020, when staff were notified about the start of redundancy consultation. (Though we accept, as stated above, the dismissal would have still occurred, even had C1 been given a higher score for that category). This most recent act of R4 is a continuing act with all the other contraventions of EQA by R4 (as they relate to C1) and is therefore in time.

638. Alternatively, there was a continuing act up to the grievance outcome (on 29 July 2020), which, we have found to be discriminatory and was given, in part, in reliance on R4's denials. On that basis, all the claims are in time.

639. However, even if there was no continuing act, such that all of the contraventions are in time, as of right, it is just and equitable to extend time.

639.1 C1 believed that a complaint against R4 was pointless, and therefore did not bring a formal grievance until he knew that he was being dismissed anyway. We accept that there are some evidential difficulties (in particular, because the "hot box" allegation, which we have not upheld, was so late, but also because of some other allegations) which might have made it more difficult for the Respondents to collate evidence than if the allegations had been made nearer to the time that they happened. However, against that, there were a large number of employees who were able to give their versions of events. Further, the lack of documents about the training course, or about C1's (alleged) appraisal were not caused by C1's delay in presenting the claim; the absence of those documents, in the Tribunal hearing is because R2 and R5 and Ms Pauffley did not secure them during Summer 2020, when they were still available. Whereas the fact that R4 has been unable to produce the incriminating document from Leon is not, in our judgment, because of a delay in presentation of the claim, but is because the document did not exist in the first place.

639.2 Denying an extension of time to C1 would have the effect of meaning that he got no declaration and no compensation for some significant examples of

contraventions of EQA. Our decision is that this outweighs the prejudice to the Respondents of extending time.

640. Thus all of C1's successful complaints are in time.

641. For C2, the unfair dismissal complaint is in time. The effective date of termination was 5 February 2021, and the claim was presented on 29 April 2021.

642. For the first claim, the early conciliation certificate [Bundle 15] had a commencement date of 29 September 2020 and an end date of 9 October 2020. Since the claim form was presented on 5 November 2020, claims, in reliance on that ACAS certificate, were in time for acts and omissions on and after 30 June 2020.

643. We regard R4's discriminatory attitude towards C1 as a continuing state of affairs that continued up to the date of his suspension on 4 August 2020. The fact that C2 was on sick leave from 27 July 2020 meant that there were no day to day racial remarks, but did not bring an end to the discriminatory attitude. On that basis, the claims are in time.

644. The Claimant's list of allegations [Bundle 43] asserted that there incidents in July 2020. As we have made clear, that is not a reliable contemporaneous document and we do not place weight on it as to the actual dates. That being said, we are satisfied that comments about "Somali Pirate" and "your lot" were said with sufficient frequency that its likely that they were made in July 2020 (as well as earlier) and the successful claims were, therefore, in time as being part of an act which continued until at least 30 June.

645. However, even if there was no continuing act, such that all of the contraventions are in time, as of right, it is just and equitable to extend time. C2 believed that a complaint against R4 was pointless, and therefore did not bring a formal grievance until she knew that other people were also doing so. We accept that there are some evidential difficulties (in particular, because the dispute about 2019 annual leave, which we have not upheld, was so late, but also because of some other allegations) which might have made it more difficult for the Respondents to collate evidence than if the allegations had been made nearer to the time that they happened. However, against that, there were a large number of employees who were able to give their versions of events. The fact that R4 has been unable to produce the incriminating document from Leon is not, in our judgment, because of a delay in presentation of the claim, but is because the document did not exist in the first place. In our assessment, the Respondents defences of the claims would not have been significantly different had the claims been presented sooner. The employer, as of around 14 August 2020, believed that it had sufficient evidence to hold a disciplinary hearing against R4. R4 knew, as of that date, that he had the opportunity to (and the need) to potentially collate evidence that was in his favour.

646. Thus all of C2's successful claims are in time.

Outcome and next steps

647. A preliminary hearing has been scheduled for 27 June 2024. A remedy hearing has been scheduled for 26 and 27 September 2024.

Employment Judge Quill

Date: 10 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
11 June 2024

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FOR EMPLOYMENT TRIBUNALS