EMPLOYMENT TRIBUNALS

Claimant:	**Orville Beckford**
Respondent:	**London & Quadrant Housing Trust**
Heard at	**LONDON SOUTH** **In person**
On:	**19-22 February 2024**
Before	
Chairman	**EMPLOYMENT JUDGE N COX**
Tribunal Member	**Graeme Anderson**
Tribunal Member	**Colin Rogers**
Appearances:	
For the Claimant:	**Mr Beckford – in person**
For the Respondent:	**Mr Nicholas Hill (Counsel)**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is not well founded and is dismissed.

2. The complaint of direct race discrimination is not well founded and is dismissed.

WRITTEN REASONS

1. This is the unanimous judgment of the tribunal. Numbers in [square brackets] in these reasons refer to page numbers in the bundles.

Claims and Issues

2. The claimant was employed by the respondent as a Building Surveyor from 16 April 2018 until his employment was terminated by letter on 23 June 2021. The claimant is a black man who compares himself to others in the workplace who are not black.

3. He brings claims of:-
    a. Unfair dismissal and
    b. Direct race discrimination relating to the conduct of his grievance appeal.

4. Other heads of claim were indicated in the claimant's ET1. However, these were withdrawn in the course of the proceedings before the hearing came before us. In particular:

    a. A complaint of direct age discrimination was withdrawn by the claimant and dismissed in a judgment dated 9 March 2022;
    b. Complaints of direct disability discrimination and unlawful deduction of wages were withdrawn and dismissed by judgments dated 10 February 2023.

5. Although the claimant's ET1 in paragraph 8.2 included a reference to a 'whistleblowing investigation' conducted in response to matters raised in his grievance appeal, the claimant did not bring any complaint or claim under the whistleblowing provisions in sections 103A or 43B of the Employment Rights Act 1996.

6. The claimant was given an opportunity to amend his ET1 to expand on and particularise the direct race discrimination complaint at a preliminary hearing on 10 February 2023 [241]. He did not at any stage, including in the hearing before us, apply to do so.

7. The complaints we were required to determine were therefore limited to the two heads set out above. The specific issues were identified and agreed at a Case Management hearing before EJ Wright on 10/2/23 as follows:-

"1. *Unfair Dismissal*

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely that the claimant had stated that he would never return to work for the Trust and that the relationship had irretrievably broken down.

1.2 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

1.3 The claimant will say that the respondent failed to act reasonably, in that the respondent could have made amendments to the claimant's workload and that there was "a lack of anyone speaking to" the claimant to discuss his issues at work. The claimant will say that the respondent failed to engage an "impartial" person to contact him to discuss his issues.

2. Remedy for unfair dismissal:
[In the light of our conclusion that the complaint of unfair dismissal is unfounded it is not necessary to set out the issues relating to remedy in these written reasons].

3. Direct race discrimination (Equality Act 2010 section 13):

3.1 The claimant is a black man and compares himself to others in the workplace who are not black.

3.2 The claimant alleges that the respondent did the following things:

3.2.2 The respondent on 15 April 2020 sent a "young South Asian male" Lukman Ahmed to hear the claimant's appeal, who the claimant says did not put his camera on during the video call, and who conveyed to the claimant by his tone and attitude that he was not giving the claimant any respect and considered the claimant to be worthless.

3.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

3.4 If so, was it because of his race?

10. Remedy for discrimination
[In the light of our conclusion that the complaint of direct race discrimination is unfounded it is not necessary to set out the issues relating to remedy in these written reasons]. "

The Hearing

8. The claimant represented himself. The respondent was represented by Mr Hill of Counsel.

9. At the start of the hearing (delayed by 30 minutes on the first two days because of public transport problems) we discussed and agreed with the parties a timetable for reading, cross examination of witnesses and submissions. Both parties very ably kept to that timetable. Since the weight of the claimant's case related to the complaint of unfair dismissal, we decided that the appropriate running order was for the respondent to present its case first in order to adduce evidence of the reason for the dismissal and as to reasonableness. The reason for this was explained to the claimant who agreed to this approach. The Tribunal spent time explaining to the claimant the purpose and approach to cross-examination of witnesses, and he conducted that task in a measured and polite manner. We also explained to him the purpose of and a possible way to structure and approach his final submissions.

10. The claimant has formerly served as a soldier and made reference to this in disclosed documents and his witness evidence. The Chairman disclosed to the parties that he had a nephew currently serving in the claimant's former regiment, but that having considered the position and the relevant guidance he was satisfied that there was neither a suggestion nor the appearance of bias and no reason why he could not properly hear the complaints. Neither party objected.

11. We were provided with a main bundle, a remedies bundle, cast list and chronology and a bundle of witness statements.

12. Those documents had not been agreed in advance despite efforts by the respondent over some months to engage with the claimant in that exercise, but the claimant did not dispute their contents at the hearing.

13. The claimant had also not served a witness statement in advance of the hearing in accordance with previous case management orders. However, he told us that he had attempted to serve his statement by email on the Thursday of the previous week although he understood that only part of it was transmitted. The claimant brought a copy to the hearing which was copied by the tribunal. Mr Hill confirmed that he had seen the witness statement at 7.30 on the morning of the hearing, and did not object to the late statement. We therefore read and took it into account.

14. The Respondent's witnesses were:

    a. Ms Hayley Williams (nee McSweeney): Ms Williams was employed as an HR adviser at the relevant time. She gave evidence in relation to the initial grievance investigation and hearing. In this role she assisted Ms Clare Waldock who was the person mainly responsible for this task. Ms Waldock was not

available to give evidence for reasons explained in Ms Williams' witness statement (and which it is unnecessary for us to set out here).

b. Mr Lukman Ahmed: Mr Ahmed is of Bangladeshi descent. He had had been employed by the respondent in a variety of roles since 2000. At the relevant time he was employed as Director of Private Rented Sector and Commercial Property. Mr Lukman heard and determined the claimant's appeal against the findings of his grievance.

c. Ms Charlotte Daisley: Ms Daisley has been employed by the respondent since 2012 and at the relevant times was an HR Business Partner, in after May 2021 Head of Business Partnering. She gave evidence as to the events following the rejection of the claimant's appeal up to the date of his dismissal.

d. Mr David Lewis: Mr Lewis was employed by the respondent in 2020. At the time of the events in question he was employed a Director of Property Services (and Executive Group Director of Property Services since March 2023). He had occupied a series of senior and director level jobs with housing associations and local authorities since 2003. Mr Lewis took the decision to dismiss the claimant and gave evidence in relation to that.

15. The claimant cross-examined the respondent's witnesses on the first day of the hearing. We were satisfied that they were giving their evidence honestly and doing their best to assist us. Mr Lewis in particular struck us as a careful witness who had clear recollections and a good command of detail.

16. The claimant gave evidence on his own behalf. He was cross examined for a full day on day two. Whilst he spoke powerfully about the impact on him of mental health symptoms that he experienced between late 2019 until his dismissal, his recall of dates and details lacked precision. When challenged about his actions and what he wrote during that period he would frequently say that he was not thinking straight or words to that effect. There were also inconsistencies within his evidence. For example, he said that he had not given his solicitor instructions to discuss mediation or settlement on his behalf, but his solicitors at that time (September 2020) wrote to the respondent [607] stating explicitly that the request for structured mediation was made on the claimant's instructions. Also, when challenged as to why he had waited over three and half months to raise the issue of Mr Ahmed's allegedly racist conduct of the appeal hearing, he simply refused to accept that period of delay which was a matter of documentary fact. As a consequence, in some contexts we felt less confidence in the reliability of the claimant's factual recollections where these were not consistent with or supported by documentation, although

the scope for factual dispute was relatively limited because there was a good deal of contemporaneous documentation before us.

17. Both parties provided us with oral closing submissions.

18. We considered our decision in chambers on Wednesday 21 and the morning of Thursday 22 February and gave an oral judgment on the afternoon of Thursday 22 February 2024.

19. After delivering judgment the claimant told us that although he felt that he had been listened to during the hearing, having heard our judgment he felt that he was getting more able to express himself and so requested written reasons so that he could consider pursuing an appeal.

20. In reaching our decision we took into account all of the written and documentary evidence to which we were referred and everything that was submitted to us although in these written reasons we set out only those matters which were most critical to our decision.

Findings of Fact

21. We make the following findings of fact on the balance of probabilities in light of the totality of the documentary and witness evidence to which we were referred.

22. The respondent was a large housing trust. Although we were not provided with details in evidence, we take judicial notice from publicly available sources that it was a substantial employer with significant resources and a functioning HR department. The respondent had a published grievance procedure [832]. This was referenced in the claimant's contract of employment (Clause 13) and contained in the Staff Handbook. It was not suggested that the claimant was unaware of that policy, and we find that he was.

23. The claimant was employed as a building surveyor in the respondent's Property Services division from 16 April 2018, initially temporarily but on a permanent basis from 19 October 2018. He had in excess of two years continuous service before his employment was terminated.

24. He was competent at his job and proud of his work. We find he had a principled view of his and the respondents' obligations to its customers/residents and very firm, and (we find) somewhat inflexible views as to how his work should be carried out and scrutinised.

25. In general he had good working relations with colleagues before the appointment of Mr Wallis as a Senior Surveyor to his immediate team.

26. The claimant was one of a number of building surveyors in the division. In the period leading up to his sickness absence in June 2019, he was one of

a team of three Building Surveyors. His team were engaged on complex works (as distinct from reactive maintenance work which was typically of a lower value). His team were also responsible for party wall agreement work.

27. Before about mid to late 2018 the internal practices and procedures in the respondent's property services division with which the claimant was familiar had involved his procurement proposals and other expenditure proposals being considered and signed off directly by a director of the respondent.

28. Those procedures were changed by the respondent by late 2018 to interpose various layers of scrutiny. Building Surveyors reported to their team's Senior Surveyor.

29. On 5 November 2018 Mr John Wallis was appointed as a Senior Surveyor. The claimant reported to Mr Wallis from 22 November 2018. Mr Wallis reported to the Surveying Manager John Fuller. Mr Fuller in turn reported to Mr Justin McAniskey, Head of Service Delivery. From about this time the claimant's procurement proposals and costings were subject to scrutiny, direct and indirect, at each of these levels.

30. Workload amongst the team of Building Surveyors was supposed to be monitored by Mr Fuller and was intended to be balanced across Building Surveyors.

31. In December 2018 the claimant applied for promotion to the role of Senior Surveyor. He was interviewed for that role in January 2019 by a Ms Cooper (a recruitment adviser) and Mr Fuller. The claimant was unsuccessful. On 22 January 2019 the claimant emailed Ms Cooper asking for feedback on his unsuccessful application. He told us, and we accept that he was given verbal feedback by Ms Cooper. His recollection was that the reason he was given was that it was '*something he said*' in the interview. We find that he was never give any written feedback.

32. The claimant found working under the new arrangements during 2019 increasingly frustrating and difficult. He was upset that he had been unsuccessful in his application while Mr Wallis, who he believed lacked qualifications and experience, had been parachuted into the post of Senior Surveyor to '*act as the eyes and ears of Mr McAniskey'*.

Grievance Process : December 2019

33. The claimant first raised concerns with Ms Dixon, an HR Advisor, in emails between 12 and 21 November 2019 [458-462]. He spoke to Mr Fuller and to Mr McAniskey and told them he couldn't work with Mr Wallis. There was a discussion about the possibility of his working in another team (Mr Chapman's team). The claimant said that he wanted to report directly to Mr Fuller until the matter was resolved. After initially exploring informal resolution, the claimant developed his thoughts and lodged a formal grievance on 3 December 2019 [463-466].

34. The respondent agreed as part of the grievance to consider matters which had arisen up to 9 months previously. This was a concession by the respondent whose grievance procedures envisaged complaints being made within 3 months.

35. The claimant's grievances focussed on Mr Wallis' unfair appointment, his lack of experience and maturity, poor management practices and the adverse impact that that was having on the claimant and the team more widely. He complained that he was undermined and humiliated by Mr Wallis, that he had to fight to get Mr Wallis' attention, and about suspicion within the department that Mr Wallis had been appointed otherwise than on his merits for reasons of 'nepotism' to act as 'the eyes and ears' of Justin McAniskey and that that was resulting in a dysfunctional department.

36. The claimant was unhappy also that he was being singled out by being subjected to different treatment. In particular that Mr McAniskey was dismissive of him – shooed him away – when he tried to get his procurement proposals approved. He was unhappy that Mr Wallis was speaking behind his back directly to consultants working on the claimant's projects. Furthermore, he was (incorrectly as he saw it) having his work scrutinised and pre-approved and amended by Mr Wallis, Mr Fuller and Mr McAniskey before being signed off. He believed, based on his experience and the previous practice of the respondent, that complex projects should be signed off directly by a director and that his proposals should only be considered by a director and not subject to lower-level scrutiny and amendment. He gave a specific example of a project – the Stanisby Road Project – in which he had recommended a comprehensive solution to a long-standing roof leak costing £40,000. This he said would provide a lasting solution. This was rejected by his immediate managers in favour of a much less costly solution of £8000. The claimant said that this would simply require repeat works annually and ultimately greater cost and a less acceptable solution for residents.

37. He also complained of over work. In particular, the failure by Mr Fuller properly to monitor the workload between Building Surveyors and to take proper account of the large volume of work needed on (at least some) party wall cases. He also said that his position was exacerbated because the two others in his immediate team, Mr Mitchell and Mr Plummer, spent in the region of four hours a day working on professional exams and mentoring/being mentored in that regard, leaving the claimant to do all the work.

38. In the context of the procedures for promotion to Senior Surveyor the claimant was also unhappy about the limited feedback and explanation he received in connection with his own application for that post [463-465].

39. On 11 December 2019 [466], the Claimant's grievance was acknowledged by letter. He was advised that the grievance meeting would be held on 20 December 2019, that Clare Waldock had been appointed to deal with the grievance and he was advised of his right to be accompanied.

40. At the grievance meeting on 20 December 2019 [467] the claimant's union rep did not turn up. He said he was happy to continue unaccompanied. [467]. At the start of the meeting he challenged Ms Waldock that she knew Mr Wallis. Ms Waldock confirmed that she knew of Mr Wallis but had not worked with him. Ms Williams told us that Ms Waldock had been appointed to chair because she was from outside of the claimant's business area. The claimant did not ask for Ms Waldock to be removed as chair at the time.

41. Before us the claimant contended that Ms Waldock should not have been appointed to conduct his grievance because she was not impartial, had been appointed to her role because of her long-standing relationship with senior managers and that both she and Ms Williams together were unsuited to the task of hearing his grievance because "*they were two young women with no technical understanding of the surveying role*".

42. We accept Ms Williams' witness evidence, consistent as it is with the contemporaneous documents, that Ms Waldock was appointed because she was from outside of the claimant's department in line with the respondent's grievance procedure. We find that she was not appointed because of her relationship with the parties complained of.

43. At the meeting the claimant raised the following issues in summary:

    a. Complaint 1 : that the respondent had unfair recruitment procedures and that Mr Wallis had been appointed through favouritism (to be Mr McAniskey's eyes and ears) and lacked experience and qualifications, and that in relation to the claimant's application for promotion he had not received sufficient feedback: he said Ms Cooper had just told him that he had failed to get the job 'because of something you said' and that Mr Fuller had simply shrugged his shoulders (or sat back and crossed his arms) in response to the request for feedback

    b. Complaint 2: Mr McAniskey treated the claimant unfairly by 'shooing him away' when he approached him in connection with a procurement proposal for a job the claimant was working on (the Stainsby Road project) which had been rejected or changed by Mr Wallis.

    c. Complaint 3: that as a result of Mr Wallis' inexperience in management the team was adversely affected and the claimant was being undermined and was not supported. Examples he gave included his work and proposals on the project at Stanisby Road being challenged and varied by Mr Wallis/Mr Fuller; Mr Wallis going behind the claimant's back to talk directly to consultants working on his projects and behaving immaturely'; and that he had to fight to get Mr Wallis' attention.

    d. He asked to report to a different Senior Surveyor and to be given a full debrief from his application for promotion.

44. Ms Waldock asked if he would engage in mediation. He said that he would not.

45. Following the meeting Ms Waldock investigated the grievance with Ms Williams' assistance. They interviewed Mr Wallis, Mr McAniskey, Mr Fuller, Mr Waite (a building surveyor), Mr Chapman (another Senior Building Surveyor), Ms Cooper (in connection with his application for promotion) and two technical co-coordinators (Ms Bushell and Ms Johnson). These individuals had been suggested by the claimant. Interviews were conducted in January and February 2020.

46. On 21 February 2020 Ms Waldock advised the claimant of the outcome of the investigation into his grievances [518]. She did not uphold Complaint 1 relating to unfair recruitment processes. She concluded that Mr Wallis had been appointed through the appropriate recruitment processes within the respondent but acknowledged that there were rumours in relation to his appointment. She did not uphold Complaint 2. She had interviewed Mr McAniskey and he explained to her his position, the number of people reporting to him (70 people) and that the departmental procedures had changed from previous practice. She did not uphold Complaint 3. She referred to the fact that Mr Wallis had been a manager with the respondent already for a number of years, had been through a fair recruitment process and that therefore he had the relevant skills.

47. We find that the Respondent through Ms Waldock did not conduct a fair and reasonable investigation into Complaints 1 and 3 as regards the allegation that Mr Wallis was unfairly recruited to a position of superiority over the claimant. Her stated reasons for not upholding these complaints were not supported by the evidence which was provided to her about Mr Wallis' appointment. We accept Ms Williams' evidence before us that Mr Wallis had been appointed to the role of Senior Surveyor before the separate exercise to appoint a further person to that role which the claimant applied for in December 2018. However, the information from Ms Waldock's interviews was in fact that Mr Wallis' answers about his recruitment and appointment were vague [490]: he said he did the test, didn't agree with it, was told it was two hours then one hour, and couldn't recall the interview'. He identified Mr Fuller and Ms Bushell as people to speak to. Mr Fuller was in fact not asked about Mr Wallis' interview at all [492]. Ms Bushell [496] (who administered but did not mark the tests) said it became apparent that Mr Wallis did not really know what he was doing in the test and he "w*asn't to the level of what the other people were, from my understanding it was surprising, he is a good day to day surveyor, been a few occasions since then where I have asked questions and he doesn't have the technical knowledge*". Ms Cooper was not asked about Mr Wallis' recruitment [513].

48. As regards the element of lack of feedback in Complaint 1, this was not upheld. We find that a reasonable investigation was carried out. Ms Waldock was told by Ms Cooper [513] that the claimant had scored 13.5 out of 30 and was not yet ready for the role, although we note that there was no evidence of a written record of scoring or that that information was

previously communicated to the claimant. Mr Fuller told Ms Waldock that he gave the claimant oral feedback at a sit down meeting. No feedback was given in writing. The claimant's grievance was that Mr Fuller simply shrugged. We do not accept that account as accurate. The claimant said at one point in his evidence to us that he may not have performed to his best in the interview [531] and that is consistent with the account of the feedback meeting given by Mr Fuller [494].

49. As regards Complaint 2 about McAniskey's management, we find that a reasonable investigation was carried out and that the finding was supported by evidence. Mr McAniskey described having 70 staff below him and that his practice (whilst it may have differed from previous practice before his appointment) was applied to every project put on his desk. The claimant had not pointed us to specific examples of unfair treatment from Mr McAniskey directed towards him personally.

50. As regards Complaint 3, about Mr Wallis' management style, behaviours and abilities, we find that the reasons given by Ms Waldock for rejecting the complaint were not a fair and reasonable summary of the totality of the evidence obtained during the investigative interviews. On the contrary, several interviewees were critical of Mr Wallis experience, technical knowledge and abilities, and we have mentioned above that the evidence before Ms Waldock did not support the conclusion that he was appointed through a fair procedure. We accept the claimant's evidence that Mr Wallis struggled to manage the team and that at least some of those whom he managed or came into contact with did not have confidence in Mr Wallis' abilities. His evidence in this respect was consistent with the views and reservations expressed by some interviewees. His account was, in general, consistent with the later findings of an independent report by Cambell Tickell to which we refer below.

51. Ms Waldock recommended mediation to try to address tensions between the claimant and Mr Wallis as well as other management action and steps to address rumours and morale in the team. These were reasonable suggestions to address the practical day to day problems arising from the appointment and management of Mr Wallis. However, the claimant said that he would not mediate and, when offered the possibility of being managed by someone else, he said that he just wanted to come to work and get on with the job [894]. We find that this was not a reasonable response by the claimant to the situation and contributed to some extent to the start of the breakdown of the working relationship and the relationship of trust and confidence.

52. On 25 February 2020 [883] the claimant informed Ms Williams that he disagreed with the grievance outcome. On 26 February the respondent agreed to extend time for the claimant to lodge an appeal against the grievance letter (the respondent's grievance procedure mandated an appeal be lodged within 5 days of the outcome letter (para 5.6)).

Appeal Process : March - April 2020

53. On 2 March 2020 the claimant lodged an appeal by email [521]. He set out his reasons [523-525]. The matters he raised on his appeal [523-525] were in summary:-

    a. As against HR

        i. The grievance hearing was not impartial. In particular Ms Waldock was known to Mr Wallis and Mr McAniskey. Evidence of gross misconduct was disregarded, witnesses were not called, points were not investigated and witnesses were asked leading questions.

        ii. He was dissatisfied with the response he had been given to his request for Feedback.

    b. As against Mr McAniskey:

        i. He subjected the claimant to a procedure for project approval which was not applied to anyone else;

        ii. He overspent on a project the previous year.

    c. As against Mr Wallis:

        i. He had been promoted without passing an interview or test;

        ii. That adversely affected the functioning and happiness of the team; and

        iii. There were various examples of poor conduct or management by Mr Wallis (which the claimant set out).

54. The claimant produced a list of 15 people whom he described as '*his witnesses*' and the questions he felt that each witness should have been/should be asked, or the topics they should be questioned about. The list included people who had been interviewed during the grievance investigation but included several additional names.

55. On the same day 2 March 2020 [521] Ms. Daisley emailed Ms Bishop in HR to pick up the claimant's appeal and suggested a Mr Rob Hunter "as the independent manager if he can't then someone at Director level".

56. On 18 March 2020 Ms Bishop emailed to ask Mr Ahmed if he could help 'as we need an experienced director for the job' [844].

57. The claimant alleged that the respondent deliberately sent a '*young South Asian male*' to hear his appeal. In essence the claimant was contending that (adapting wording from his own later – April 2021 - direct subject access request) Mr Ahmed was brought in to do him harm, and that Mr

Ahmed was racist because the claimant's experience was that men from a South Asian background regard dark skin as inferior.

58. Ms Daisley's evidence was that Mr Ahmed was in the event asked instead of Mr Hunter because Mr Ahmed had experience of hearing appeals, because of the nature of the appeal and because he was from a different directorate.

59. We accept the evidence of Ms Daisley. Her account is consistent with the contemporaneous correspondence. We find as a fact, that Mr Ahmed was selected and asked to conduct the appeal because he was a) sufficiently senior and b) outside of the claimant's business area. He was therefore an appropriate person to conduct the appeal as envisaged by the respondent's appeal procedure. We accept Mr Ahmed's evidence that the issue of race (his or the claimant's) was not discussed with him at all prior to his appointment.

60. On 19 March [844] Mr Ahmed agreed to be appointed to conduct the appeal against the grievance.

61. We interpose to note that lockdown intervened on 23 March 2020 and required the appeal to be conducted remotely.

62. On 25 March 2020 Ms Bishop notified the claimant of the proposed appeal hearing date of 1 April 2020 to be held by video due to remote working.

63. On 31 March 2020 [527] the claimant confirmed he still wanted to go ahead with the appeal and was content to proceed without being accompanied.

64. Ms Bishop spoke to the claimant about a possible rescheduling because Mr Ahmed had been appointed to a COVID 19 response role. The claimant was given the option to ask for a different manager to conduct the appeal or, alternatively, delay the appeal for Mr Ahmed to become available. The claimant, we find, agreed to Mr Ahmed continuing and on 1 April 2020 Ms Bishop wrote to confirm that Mr Ahmed would remain as the hearing manager with the claimant's agreement. The appeal was rescheduled to 15 April 2020.

65. The Appeal hearing was conducted remotely on 15 April 2020. The claimant was present with Mr Ahmed, Ms Bishop and a notetaker. A note of the hearing was produced [530-534]. We accept that that note was a substantially accurate record of the appeal hearing.

66. The clamant alleges, and repeated in his witness evidence before us, that Mr Ahmed did not put his camera on during the video conference call. He relies upon this as one aspect of Mr Ahmed's dismissive and racist conduct towards him in the course of the conduct of the appeal. He went further in his evidence before us and asserted that the other participants on the call eventually did likewise.

67. Mr Ahmed had no recollection of that being the case. He could not at this distance in time recall details of the call. The claimant's allegation that the other participants also turned off their cameras was developed after the finalisation of the List of Issues and so the relevant witnesses were not called.

68. The claimant's evidence did not satisfy us on the balance of probabilities that Mr Ahmed's camera was in fact off, or that if it was Mr Ahmed was aware of it. The minutes of the appeal hearing do not record that the claimant raised at the time any difficulty or discontent relating to cameras. The claimant did not in the period immediately after the appeal raise that point with the respondent. He did not raise the point when he was later sent a copy of the minutes of the appeal hearing on 12 May 2020 [550].

69. Mr Ahmed started the meeting by stating the reason for the hearing and that that he had reviewed the documentation relating to the appeal. He took a narrow view of his functions on the appeal. He said:" *The appeal hearing is not normally intended to cover ground, which was previously discussed during the grievance meeting (grievance process). Its' purpose is to provide a forum for review of the process and consideration of specific factors as outlined in your grounds of appeal."*

70. The hearing then proceeded through a series of questions and answers relating to the claimant's grounds of appeal. Mr Ahmed concluded with a rough estimate for when a decision would be provided and a warning that Mr Ahmed's decision would be final.

71. The claimant alleges that Mr Ahmed conveyed to him by his tone and attitude that he was not giving the claimant any respect and considered the claimant to be worthless.

72. The minutes disclose that the hearing was brisk and relatively short. Mr Ahmed used businesslike language appropriate to the task he was performing.

73. We did not find anything in the content of what Mr Ahmed said that conveys to an objective reader an attitude of disrespect towards the claimant, or from which it could reasonably be inferred that race was a factor in how he conducted the appeal.

74. It is of course not possible to assess Mr Ahmed's 'tone' in the hearing, but we heard live evidence from Mr Ahmed. We accept his evidence that racism against the claimant as a black person played no part in Mr Ahmed's conduct of the hearing and therefore we find that he would not be likely to have adopted a tone which would reasonably have conveyed to the claimant that it did.

75. Following the hearing, Mr Ahmed interviewed only one of the people the claimant suggested should be questioned - TC. We find that he took this course because he had adopted the above-mentioned narrow view of his task in conducting the appeal.

76. Mr Ahmed issued an appeal outcome letter on 6 May 2020 [547]. In summary Mr Ahmed dismissed each of the grounds of appeal. As regards the allegation of professional misconduct this was not dealt with because it had been referred to management in accordance with company procedures. He said that he did not re-interview any of the witnesses identified by the claimant in his notice of appeal (other than TC) because the claimant did not elaborate on their relevance to the appeal.

77. We consider that the approach taken to the appeal process was too restrictive and that consequently it did not address shortcomings in the grievance investigation and outcome – in particular, in relation to the fairness of the internal recruitment procedures and their effect on the claimant himself and on the team managed by Mr Wallis. The reason for asking the further witnesses to be reinterviewed was set out in the Claimant's grounds of appeal but this was not adequately considered or followed up by Mr Ahmed.

78. The position at this stage therefore was, as we find, that there were shortcomings in the respondent's responses to the claimant's grievances.

Welfare/Return to Work Meetings : April – December 2020

79. In the interim, on 20 April 2020 Ms. Williams had referred the claimant to Occupational Health [536] because he had raised concerns about stress as a result of his current grievance and eyesight due to working from home during the pandemic [536-9]. He told the Occupational Health professional that he had underlying conditions and was on medication including for stress but that this did not affect his ability to carry out his day-to-day role [544].

80. On 12 May 2020 [550] the claimant received, acknowledged and did not challenge the minute of the appeal meeting. He sent to the respondent a Direct Subject Access Request (DSAR) relating to his grievance investigation documents and the scoring of his application for the Senior Surveyor position.

81. Next day 13 May 2020 [557] he explained that this request was a precursor to his beginning tribunal proceedings. He said that the appeal had failed on a number of technicalities and that he had only wanted a change of manager initially. We note that that course of action had been offered to him during or following his grievance interview but he did not accept it at that time.

82. Since March 2020 he had been working remotely. A period of continuous sickness absence began on 9 June 2020 [572]. The claimant was signed off work until 3 August 2020 initially.

83. On 17 June 2020 in an email Ms Bishop referred the claimant to the respondent's Employee Assistance Provider (EAP) [575].

84. A welfare meeting took place on 17 July [583] conducted by Mr Wallis and a HR representative by Zoom. Mr Wallis tried to ask a series of standard questions about return to work after 46 days of absence but the claimant became upset and said that: '*I am f**cking pissed off at work. I am not happy that you are counting the days....I am off work sick I am not having a good time*". He referred to the previous referral to Occupational Health and the meeting adjourned to allow Mr Wallis to read the OH report. Thereafter the claimant said that he would contact EAP to get an independent perspective and that he was not ready to discuss return to work.

85. The respondent responded to the claimant's DSAR request on 9 August 2020 providing documents from his personnel file [598]. The claimant responded that he was unhappy with the contents of the response [597].

86. The claimant was signed off again until 3 September and a further remote welfare meeting took place on 26 August 2020 with, we infer, John Fuller and Ms Bowdery from HR. The claimant was advised that his full sickness pay expired on 13 August 2020 and that he was now on half pay until 12 November 2020. The claimant said that he did not know if was coming back to work, that it was not about the money. He had not contacted EAP and complained again about the way he had been treated in the team, including further allegations of racist behaviour towards him from the team. He was asked if he had raised these points before but his answer, and how he wished to move on was not clearly expressed. A further reference was made to Occupational Health next day [590].

87. The next Occupational Health meeting took place on 26 August 2020 before Ms Lewis, an Occupational Health Advisor [593]. Her report of 4 September 2020 stated that:

"In my opinion (sic) has developed some psychological symptoms which appear to have arisen in response to issues within his employment. I do not think he has a serious mental health problem, rather he is displaying a response to these situations that have put him under significant strain.

The priority now should be for management and Orville to engage about these matters to identify, as quickly as possible, whether it is possible to reach agreement about circumstances in which he would feel able to return to work or not and given the circumstances I do not think there will be a medical solution to the situation.....

I do not think I can give a definite answer as to when this gentleman might be able to return to work, or the prospects for his reliable service and attendance thereafter. This will likely depend more on the outcome of your management discussions with him than on any medical factor.

Providing the current circumstances are concluded in a timely way, in whatever manner, then I do not envisage any long-term impact on Orville's psychological health and hence I think it unlikely that the disability

provisions of the Equality Act, 2010 would be relevant to his case, although ultimately this is a legal and not a medical decision.

In my opinion Orville is medically fit to continue in his current role as long as work-related concerns can be addressed and resolved.

88. Before us the claimant was critical of the conclusion reached by Ms Lewis and suggested she was negligent.

89. Following the OH Report Ms Bowdery invited the claimant for a follow up meeting with her and Mr Wallis [606]. In that email she also reminded the claimant that his current GP certificate had expired and that he needed a further note "*otherwise your absence will be deemed unauthorised*".

90. The claimant declined to attend that meeting. In his email of 8 September [603] he said that he had cancelled because he had no confidence anything positive would come out of it. He asked why he would want to meet with Mr Wallis: his grievance was about him and was still unresolved and he would definitely say things uncomfortable to him. He gave some examples of poor COVID compliance by Mr Wallis. *"I could go on about the poor practices, racist behaviour, favoritism, inappropriate behaviour, professional misconduct from the beginning to end of a four-hour meeting, but I believe that the report recommends input from managerial level far more senior than a Senior Surveyor".* He said that he did not appreciate being threatened (which was a reference to Ms Bowdery's pointing out that he needed a further GP note) and attached a further sick note to 3 October 2020.

91. Whilst the respondent's standard welfare procedure [see p 610] involved the meeting being chaired by the employee's line manager, we find that it was insensitive and inappropriate given the background to the claimant's concerns and the diagnosed causes of his stress for the respondent to propose the Mr Wallis should conduct or chair such a meeting with the claimant.

92. The claimant consulted a solicitor. On 29 September 2020 [607], his solicitor wrote to the respondents stating that the claimant had instructed her to invite the respondent to engage in an organised mediation. She stated that *"Ultimately Mr Beckford does want to return to his position, but feels it must be in a manner that offers him support with his workload, eliminates his perception of discriminatory behaviours and allows him to engage with colleagues without feelings of animosity. "*

93. On 6 October [898] Ms Daisley for the respondent replied welcoming mediation and stating that they would proceed to make arrangements. The letter also asked her to encourage the claimant to engage with a welfare meeting to be rescheduled.

94. The reference both to mediation and a welfare meeting resulted, we find, initially in a confusion between the respondent and the claimant's solicitor [899] as to what the claimant was wanting in relation to mediation and the

respondent's wish to continue with return to work/welfare procedures. The matter was however discussed and clarified.

95. On 5 November 2020 [903] Ms Daisley for the respondent responded that they wished to facilitate the claimant's return to work, and that if he did not wish to engage with an in-house mediation team, then the respondent would appoint an independent mediator from ACAS.

96. In the event nothing was organised. On 24 November 2020 [905] the respondent chased up the claimant's solicitor. The solicitor replied that she was trying to contact the claimant. We find that by then the claimant had ceased to instruct those solicitors because of financial considerations. Be that as it may, he did not engage in the ACAS or other mediation that had been offered by the respondent.

97. Instead, the claimant appears to have spent time preparing a 'synopsis of concerns' [609]. He emailed Ms Bowdery on 3 December saying that he was now ready to attend a welfare meeting and would provide his notes in advance of it.

98. Ms Bowdery asked if the claimant was happy for that meeting to be chaired by Mr Wallis [609]. The claimant replied on 9 December [609] *"What makes you think that I want anything to do with Wallis. I would rather die than meet with Joseph Wallis. White privilege and Nepotism has left me suffering extreme hardship. My car payment wasn't paid this month, all of my professional subscriptions payments have been stopped. I suppose the next big thing is bailiffs will come and take my car away".*

99. Ms Bowdery apologised and proposed that the welfare meeting be chaired by Mr Lewis the Property Services Director [610]. The claimant thanked her for *'facilitating the meeting with someone that isn't and/or wasn't directly involved in this dirty business*".

The December 2020 Return to Work Meeting with Mr Lewis

100. Mr Lewis held the welfare meeting on 22 December 2020 [611-615]. This was shortly before the claimant's statutory sick pay period was due to expire on 24 December 2020. The meeting was also attended by Ms Bowdery as HR adviser who took a note.

101. We accept, as did the claimant by email on 4 January 2021, that the notes of the meeting are a substantially accurate record, although some of the language, being in note form, is not always clear.

102. Mr Lewis began by explaining the purpose of the meeting to hear and talk through the claimant's concerns and consider what is reasonable and practical for the claimant to return to work.

103. The claimant set out at some length the background and his feelings about his previous complaints. Amongst his comments the notes record that he said that *"Lukman was a south Asian, colonial thing. The way he*

spoke, I don't talk. One tribe against the other. How am I going to be heard fairly?'.

104. Mr Lewis acknowledged the claimant's account, thanked him for his honesty and asked what the respondent needed to do for the claimant to return to work. The claimant said: *'I think if could return to work I would become clinically depressed. Don't expect to have look over my shoulder....Face didn't fit then, it doesn't fit now"'.* Mr Lewis clarified that the claimant was saying that he couldn't see himself returning because he would become clinically depressed. The claimant said *"Can't return , nothing good then. Culture is so poor, nothing to be gained....they have burnt me out."*

105. Mr Lewis asked: *"What would be satisfactory, what would be the right outcome ?".* The claimant replied '*Unfortunately if I have to lose everything I will the way I have been treated is not good enough I would be happy to consider parting paths , I have done my best it hasn't worked*."

106. Mr Lewis explained the options for bringing the employment relationship to an end: *"We can go through a process, or you could resign. You would be dismissed eventually if you are saying that you will not return to work. There are pathways natural conclusion, resign if not, irrespective, formal process, which is ultimately dismissal. Which pathway are you thinking about?*

107. The note of the claimant's response is not entirely clear. Doing the best we can, he appears to have said his heart was not in being dismissed, but went on to say that; "*People like me do harm...I would have to go and sell my knowledge." He concluded by saying: "I have a duty to my family. If I come back here I would end up self-harming and clinically brain dead. They treated me so bad"*.

108. Mr Lewis reiterated that his preference was for the claimant to return to work but that "*you have very clearly said you don't see that as your future to be at L&Q. Clearly a firm absolute conclusion we would want to find a way to your desired outcome*. … *I didn't know where you stand on this, understand all the background, you explained that eloquently. Also said you do not want to return. Not that conclusion your ideal would have been to return, but you can't. Really strong language, if that is your conclusion. If that is your absolute position.* He went on to say: "*Trying to be clear about where we go from here you don't see that you will return and we have to agree on the next steps, cant leave it here. Your ultimate aim is to bring your employment to and end either through voluntary resignation or a formal process*"

109. The claimant replied: *"I hear you, its not my choice, if I came back. If you want to threaten me, if I resign, I will find any money to fight you, I will re - mortgage my house. I can't just walk away. Realised you need to learn some lessons."*

110. Mr Lewis answered *: "To be clear, this is not a threat. Simply being clear of where we go with this. You have been away for 76* (sic – we understood this to be a typo for 16 months) *months director (sic) is for you to be at work, understand where you are at, direction. My desire would be for you to return to work. I have listened to you, quite clearly, you don't see yourself returning to work, we need to agree where we go with this. We cannot stand this position, if you're not coming back there are some choices. I will need to work through a formal process to exit, we have to bring this to a conclusion*."

111. The claimant suggested that the respondent could help him to move on. This was then explored in discussion between them. The claimant explained that he would need 3-4 months to retrain and to survive for 6 months with his credit repaired. Mr Lewis acknowledged this request and said that that " *gives us something to think about. Really helpful for me, to hear very clearly your perspective, heard that you won't be coming back, what you want is space and time to retrain and you estimate that to be about 6 months, that is very clear. What we will do, is I will take this away and discuss and come back to you.*" He promised to do so likely week commencing 4 January 2021.

112. On 24 December Mr Lewis wrote to confirm he would be in touch again in January 2021 [616].

Deterioration in the working relationship: January 2021

113. We pause the factual chronology at this stage to record our findings in relation to the position as it was following this meeting.

114. We find that until this meeting the respondent had failed adequately to respond to the claimant's prima facie legitimate concerns and grievances about, in particular, the disfunction in the management team. The respondent was largely responsible for the deterioration of the claimant's trust and confidence in the respondent and, at least to some extent for adverse impacts on the claimant's health.

115. As regards his appreciation of the state of the employment relationship, however, the claimant's evidence before us was difficult to follow and inconsistent. The claimant told us that he <u>was</u> prepared to keep working at the respondent but that he <u>could</u> not return to the same team under Mr Wallis / Mr Fuller. He said in his evidence before us that he would have been happy to work for the respondent in a different section such as fire surveying or in their eco energy section (both areas in which he said, and we accept, he had an interest and/or prior experience).

116. However, neither of these positions or possible outcomes were stated or conveyed to Mr Lewis. The position expressed by the claimant at the meeting was that he did not wish (or could not) to return to work at the respondent and instead required 6 months' pay and an opportunity to retrain. Before us he also sought to say that he was not talking about a

pay off, but a handover period, but this is inconsistent with his own case that he could not work anymore in the Wallis/Fuller department.

117. We find that Mr Lewis genuinely sought and clearly expressed a desire to explore possible options with the claimant and his wishes for a return to work but that from the meeting Mr Lewis reasonably understood the claimant to be saying definitively that he would not be coming back to work with the respondent.

118. The claimant told us that he did not feel he could horse trade, but we find that that is exactly what he was doing when setting out what he wanted by way of exit. He was happy to talk to Mr Lewis at that time because he was senior enough in the organisation to satisfy the claimant and was someone who, it was clear from the meeting notes, the claimant was happy to negotiate with.

119. The claimant was at this stage still an employee. He had been receiving sick pay and, we find, was content at that stage to continue as an employee, and chose not to resign, whilst agreement as to the terms and timing of the termination of his employment were being concluded.

120. What happened after Christmas was, regrettably for everyone involved, a serious deterioration in the claimant's behaviour that ultimately resulted in the claimant's dismissal without agreement. The claimant told us, and we accept, that he was becoming increasingly unable to cope mentally at this time with several aspects of his personal life as well as managing his work-related dispute.

121. Returning to the factual chronology, the claimant's correspondence initially focused on historical complaints and his suggestions for management improvements at the respondent.

122. On 4 January 2021 the claimant acknowledged the minute of the hearing with Mr Lewis as correct and thanked Mr Lewis for listening to him '*unlike Mr Ahmed'*. The claimant then started to send to the respondent documents relating to managerial behaviours apparently in reference to his historical concerns. On 5 January 2021 [622] he sent a document entitled '*Shiny Façade and Crumbling Cores'* which was a document prepared by a third party – a former employee - highly critical of L&Q customer facing work. He also attached document referring to the contribution of his previous regiment to the army. He forwarded documents to show previous proposals by him had been signed off directly by directors, and a list of further points about historical conduct by the respondent [629].

123. On 11 January the claimant wrote to the respondent saying that his statutory sick pay had stopped on 24 December and that he was in severe financial difficulty [638]. The respondent replied on 12 January 2021 by email advising him that his company sick pay (13 weeks full pay, 13 weeks half pay) and his statutory sick pay entitlement expired on 24 December 2020 and referring him to an ethical credit union [637].

124. On 15 January 2021 the claimant replied [639] to the Respondent, Mr Lewis and his union (of whom he was also critical). He refers to taking equity release to cover his legal costs and threatened that if he began legal proceedings, he would have to follow it through. He said "*Do you really want me to air L&Q dirty laundry in public. Can you imagine what a godsend it would be to leaseholders that have been complaining about the shoddy service that clouded their quality of life for years? I'd be happy to walk away and put this down to experience but to be honest I'd really like to expose racism, white privilege and nepotism in social housing using L&Q as a classic example"*. In the course of cross-examination the claimant strenuously denied that he had accused the respondent of white privilege and said that this is not a view that he would espouse. He belatedly accepted when shown this email that he had done so.

125. Later that day he sent an email saying that his equity release was imminent and that: "*if I have to take this money I will not agree to any settlement because it will be more important for me to tell my story….I'm fed up of being the victim. You might as well do your worse because this cant go any further"* [642]. He also criticised the respondent for referring him to a credit union [643].

126. In response the respondent appears to have taken the claimant's complaints about poor management practice at the respondent and his treatment seriously. On 19 January 2021 Ms Daisley for the respondent informed the claimant that they had instructed Campbell Tickell to investigate the allegations independently [645]. The respondent also referred him to their health support line. While that report was being prepared, the respondent put settlement discussions on hold [646] and proposed to organise a follow up welfare meeting with Mr Lewis and a further referral to OH to report on his continuing sickness absence and next steps.

127. In hindsight, given the claimant's financial position if the respondent had previously been minded to revert with a settlement payment in early January it is unfortunate that some interim payment or arrangement was not considered rather than putting that matter on hold, but we find that the reason for the respondent's conduct in this regard was that it was to investigate the position and the validity or otherwise of the claimant's allegations before resolving matters with the claimant.

128. The claimant in his evidence before us challenged the independence of Campbell Tickell and therefore the value of their work. He said (which was not disputed) that they had previously received work from the respondent and therefore were dependent on them and lacked impartiality. He also said that they were not specialised 'whistleblower' investigators and so their engagement was inappropriate.

129. We accept the claimant's evidence that Campbell Tickell were a 'step change' specialist, or at least did not specialise in whistleblowing investigations. We find that they had been appointed without a tender and that they had previously done consultancy work for the respondent.

However, we find that they were appointed by the respondent because they were external consultants. The evidence before as to the extent of their previous work for the respondent did not support an inference or finding that Campbell Tickell were financially dependent on the respondent. We find that the respondent genuinely considered that Campbell Tickell were capable of conducting a fair investigation into the claimant's allegations. It was not in itself unfair or unreasonable for a company with knowledge of the respondent's operations to be appointed to conduct the investigation. Campbell Tickell proposed to and did appoint a HR and recruitment specialist – Ms Matthews – as one of the people to conduct the investigation. There is no evidence that she had any previous connection with the respondent. We find also that the report produced was competent and thorough.

130. Campbell Tickell contacted the claimant promptly on 20 January 2021 [851] and summarised the claimant's complaints which would be the subject of the investigation on 25 January 2021 [852]. These included: failure to provide feedback on the claimant's interview, racial discrimination, systemic racism, nepotism and white privilege, poor management practice in the service delivery team where the claimant worked, fraudulent activity and breach of CIOB practice in that team. The claimant was kept advised of the anticipated timetable of 2-3 weeks.

131. Cambell Tickell met with the claimant on 3 February 2021 [660] and 26 February 2021 [661]. They conducted a series of interviews with witnesses on 11 February and produced a report on 24 March 2021. The respondent was not provided with copies of the interviews for reasons of confidentiality of witnesses. We find that the report and methodology were fair and thorough.

132. On 24 March 2021 Campbell Tickell issued a letter to the claimant detailing the outcome of their report [654]. All of the heads of complaint which had been identified as live were not upheld with the significant exception of the complaint of poor management practices in the service delivery team. Campbell Tickell made a number of recommendations in light of their investigation. In particular, they concluded at paragraph 8a) [656] that "*We advise that the relationship between you and L&Q has broken down, and we accept your view that this cannot be rebuilt. Discussions (ideally through ACAS) should be pursued so that you can leave your employment in an appropriate way.*" . They also made recommendations to the respondent to address poor management practices.

133. We were told by Mr Lewis, and accept, that a corporate reorganisation had already begun, and that the recommendations of the report were to be incorporated into those changes. The respondent provided the claimant with information about the restructuring and he was invited to meetings about it [884]. He responded that he was unwell and unable to attend. The respondent also provided the claimant with information about steps taken in response specifically to the Campbell Tickell report sometime later in April 2021 [877].

134. On 25 March 2021 [672] the claimant emailed the respondent to say he was not happy, he said that he would be speaking to his solicitor and would have a 'war chest' in a week's time. He said that he stood by: *"the rights of the service recipients to have their concerns met while all around me were people having jolly fine times. From the time the money hits my bank account and I cover all my debts anything that could have been handled reasonably will no longer be an option: its my life and you are making me suffer beyond all reasonable sense. I'd dearly love to move on leaving all this behind me but equally appealing is becoming an activist: the more it drags on is the more appealing'*.

135. We consider that this email conveys an element of threat which was intended to hasten a settlement offer. The claimant confirmed to us in his evidence that from about this time he was becoming *'more activist'* .

136. On 27 March [674] the claimant emailed the respondent to tell them that his mother had passed away. He said that "*As long as I live I will never get over how bloody minded you have all been because an employee wanted to meet his duty of care because the customers deserved it'. You lot are* properly *awful employers'* .

137. On 31 March [675] the claimant asked for a copy of the detailed Campbell Tickell report and said that he had contacted ACAS. He continued: '*If discussions fail and I can't use TUTU to mediate then I will want to go to court and not tribunal"* (We understand TUTU provide mediation services).

138. On 8 April 2021 [677] the claimant emailed the respondent (Ms Chris Gillam) in response to a text (unseen) which he had received from Ms Gillam which had touched him. Amongst other things about his domestic situation his email said "*I have a near complete 8 page battle plan that I was/am planning to share with you: it's a new version that sent to James Tickell. Essentially it all resolves around peaceful guerilla tactics to cause maximum reputation damage to the organisation and to the individuals involved.* " He also referred to that document as being likely to cause personal difficulties for Mr Wallis and his family. He went on say "*I have a campaign organiser from the black labour movement who checks on you regularly waiting to mobilise…. However I'll keep my action plans on hold until or if we can't find an agreement".* Towards the end of his email he says "*Having had time to think about what it would take for me to move on and put things behind me I think that the following was a reasonable request: I think that you should pay me 6 years salary …" "I'd love to walk away and talk about this no more"*.

139. We find that this email was intended to and did convey a threat to the respondent including individual employees which was intended to hasten a settlement offer.

140. The claimant told us that the 6 years' salary figure came about as the result of him receiving informal legal advice as to the calculation of his compensation in the context of a tribunal claim. We accept that

explanation, but it does not change the fact that, as we find, this email was intended to convey, and did convey, a threat to the respondent and its employees.

141. Ms Gillam responded in neutral terms on 10 April 2021 [676]. She said that 6 years' salary would not be a possible level of settlement because it would exceed what a tribunal would award if the claimant brought a claim. But she said that she would endeavour to avoid delays in the conciliation process with ACAS.

142. In similar vein was the claimant's email of 11 April [676] that said (amongst other things) "*if ACAS fails it will be a very interesting few months/years for us"*.

143. On 13 April [679] he sent an email which stated " *I complained to you that some useless people that you appointed as manager were preventing me from doing my job: and here I am despondent and good for nothing. Fuck the lot of you… The bunch of useless bastards that you employ nobbled me because I am too capable. …. Fuck the lot of you, fuck you, fuck you… I too am exhausted and can no longer breathe.* "

144. The claimant told us that when he wrote this email he was at his lowest ebb.

145. Ms Gillam in response again offered support through the Employee |Assistance Programme, cautioned him against the use of inappropriate language but continued to offer to support him.

146. On 19 April 2021 the claimant was invited to a return to work meeting because his medical certificate had expired [681] and the email informed him that he was now technically now no longer off sick, so that the previous discussions with Mr Lewis about leaving were no longer on hold. In other words, he was technically required to return to work. The claimant responded saying that his advisors would contact them [682] to have the matter dealt with at tribunal. In effect he declined to attend the back to work meeting.

147. The claimant then made another DSAR [863] relating to his employment records, appraisals etc.

Dismissal Process : April 2021

148. On 22 April 2021 [685] Mr Lewis wrote to the claimant saying that considering his refusal to attend return to work meeting, the fact that he was no longer certified as sick and the contents of his correspondence, that the respondent was considering his further employment with the respondent. The position was, as Mr Lewis summarised that the claimant had said that he never intended to return to the respondent, but that the claimant had not resigned and was still therefore an employee. He said *"Given the above it is clear to me that due to your perception of how you have been treated whilst employed by L&Q, or which no evidence has*

been found in support, the relationship between L&Q as your employer and you as an employee has irretrievably broken down and as such L&Q as a business and as your employer is left with no other option but to consider terminating employment on grounds of some other substantial reason, namely that your working relationship with L&Q as your employer has irretrievably broken down; you have become unmanageable ; your conduct and correspondence with members of HR has been inappropriate and threatening; your conduct generally is causing substantial disruption to the business due to the time that has been put in by many different individuals to try to facilitate your return to work; together the above have led to an irretrivably (sic) breakdown in the relationship of trust and confidence between you and L&Q.". Mr Lewis stated that he will present his recommendation that the claimant's employment be terminated and the reasons for it. The claimant would have a chance to make representations before a decision would be taken and that he had the right to be accompanied.

149. On 28 April the respondent sent to the claimant a bundle of relevant documents evidencing that the relationship of trust and confidence had irretrievably broken down and convened a meeting to discuss termination [690]. He was advised again of his right to be accompanied and asked if any disability adjustments were needed.

150. On same day [693] the claimant responded saying that *"there is nothing that I've said that wasn't justified given your behaviour.....we will have to go through your Deceit, Intimidation, Isolation & Exclusion, Minimisation, Diversion, Undermining, creating a feeling of uselessness, blocking advancement and growth. Prior to my grievance I believe that I was a model employee but then you fixed the outcome. I was still a model employee leading up to and after the appeal but you arranged for that to go against me as well. Then you did nothing; just left me in a void with nowhere to go. The relationship had clearly broken down and I had no faith in you looking after my interest. You however just wanted me to go away burned out and depressed.....You used a south Asian person to do me ill at the grievance hearing; and now you are using a black man to get rid of me; classic colonial racism."* He agreed provisionally to a meeting but later requested more time. A follow up email on 30 April asked the respondent to correspond with his solicitor at Slater Gordon.

151. In the interim the claimant progressed further DSAR requests [699700]. These involved information about the respondent's CEO and Mr Ahmed's emails. It included a passage attacking Mr Ahmed and his appointment again. *"Lukman Ahmed was brought in to do me harm - Lukman Ahmed is racist - I know that from experience - His south Asian background is that dark skin is inferior; it is rare for us to intermarry; that's how incompatible we are. I asked for an older male to chair the appeal. Lukman was not older than anyone; I did not ask for a person of colour because there is no guarantee that they would support me; for many reasons. I am British have been a UK citizen for over 60 years; I have more in common with an older British white person than a young south Asian. Lukman Ahmed was sent*

to do me ill; email will show. I asked for an older person and he wasn't. I believe that his emails about me will say a lot."

152. On 10 May [870] the claimant wrote again in response to Mr Lewis' letter. He said: *" the relationship between L&Q broke down and was irretrievable from the time Lukman Ahmed abused me at the appeal hearing"*.

153. The claimant then provided a further sick note. As a result, the process to consider his dismissal was put on hold so that he could be seen by OH. The OH report was conducted by a consultant in OH. His report of 18 May 2021 [706-9] stated (amongst other matters):

> *His latest medical certificate runs only until the end of this month but he tells me he doesn't envisage returning to work with you then, or indeed at all, given he views his working relationship with you as 'irrevocably broken down' …..I can envisage no adjustments whether reasonable otherwise that would facilitate a return to work '*

154. We note that the claimant was also critical of the competence and conduct of this OH assessment.

155. On 5 June 2021 the claimant tweeted that the respondent is *"Practically a criminal housing empire"*.

156. On 16 June 2021 the claimant replied in detail to Mr Lewis' letter of 22 April 2021 [710-728]. In that letter (which included attachments) he said: *'The fact that a black man* [this was a reference to Mr Lewis] *used highly offensive words that are nothing short of character assassination does not make it any less racist".* He agreed that the relationship with the respondent had broken down irretrievably – he asked *"why would I want to remain with L&Q...."*. He listed a multiplicity of reasons for the breakdown and blamed the respondent for it, including (but not limited to) detailing his deep dissatisfaction with the way his grievances had been handled including that Mr Ahmed had spoken to him "*in a manner that he would if speaking to a lower caste person"* and multiple other aspects of his treatment by the respondent. In answer to criticism of the language he had used in correspondence with HR he said that '*HR deserve all the critic (sic) thrown at it*'. He described himself as *"burned out and depressed".*

157. In the course of cross-examination, and also in a question from the tribunal the claimant was asked whether, after he had 'become activist' (a phrase he used in his email of 25 March 2021 to HR [672]) he thought he could have gone back to L&Q. He said that at that time he was just fighting, he didn't know what he was doing, that he was on medication, but that he thought that he would have found a way to make peace and go back, and that he could have 'broken bread' with other directors.

158. The claimant's evidence did not convince us that this was true we find that his evidence was influenced by a retrospective aspect. We recognise that he was under significant stress at that time, and that that was

exacerbated by financial problems and bereavement. However, by the time of the meeting to consider dismissal the claimant had described the respondent as 'properly awful employers' [674] that it was 'not business as usual' [676], he had prepared 'an 8 page battle plan' of 'peaceful guerilla tactics' to 'cause maximum reputational damage to the organisation and to the individuals involved' [677] , he had relied on third party on-line materials which alleged, among other things, that the respondent was 'practically a criminal housing empire' [717] and that staff were 'corrupt'. The direction of travel was, we find, to seek to maximise a termination payment. Our conclusion is supported by the opinion of the OH Consultant [708] who "*did not see any prospect whatsoever of Mr Beckford returning to your employment*".

159. The claimant finally met with Mr Lewis on 17 June 2021 [730-734]. Ms Daisley and Ms Bowdery (as a notetaker) were present. We accept those meeting notes as a substantially accurate record.

160. The claimant was not accompanied by a representative or colleague but indicated that he was happy to proceed. He confirmed that he had received and responded to all the matters in the documents attached to the invitation to the meeting.

161. Mr Lewis confirmed that he had read and taken into consideration the claimant's 32-page detailed written response. He set out the purpose of the meeting as being: "*to consider whether your unwillingness to attend internal meetings your unwillingness to return to work generally and your behaviour and allegations in correspondence towards HR staff whilst you have been off work has resulted in the relationship between L&Q as your employer and you as an employee, to irretrievably break down. I am therefore here to consider if I should terminate your employment on grounds of some other substantial reason, namely:*

• That your working relationship with L&Q as your employer has irretrievably broken down;

• You have become unmanageable;

• Your conduct and correspondence with members of HR has been inappropriate and threatening;

• Your conduct generally is causing substantial disruption to the business due to the time that has been put in by many different individuals to try and facilitate your return to work;

• Together the above have led to an irretrievable breakdown in the relationship of trust and confidence between you and L&Q.

162. Mr Lewis asked if the claimant wanted to make any further representations. The claimant again blamed the way in which the respondent dealt with his grievance and appeal as being the cause of the breakdown. Mr Lewis asked him what outcome he wanted. He was then

critical of the Campbell Tickell report. Mr Lewis put to him that the relationship had clearly broken down and asked if he didn't want to return. The claimant replied "*Not wanting to return, I cant' return*". Mr Lewis asked what the respondent could do to support the claimant, as he was still employed. The claimant said that he was suffering severe financial problems and asked that Mr Lewis expedite the decision.

163. Mr Lewis sent a termination letter on 23 June confirming termination of the claimant's employment with the respondent for some other substantial reason. The reason stated was as set out above at the start of the termination meeting – namely some other substantial reason – the breakdown of the relationship of trust and confidence. The letter stated that termination was with effect from 17 June 2021 but this was later corrected to 23 June 2021. It referred to payment of 4 weeks pay in lieu of notice.

164. On 1 July 2021 the Claimant was advised of his final payment arrangements and date his P45 would be provided.

165. On 1 July 2021 the claimant indicated that he wished to appeal the decision to dismiss him [750] because he had been interrogated and brow beaten. The respondent agreed to extend time for him to appeal, but on 26 July 2021 [751] he said that he was not going to appeal.

166. Conciliation began on 1 July 2021 and ended on 16 July 2021. The claimant presented his complaint on 20 September 2021.

167. In the interests of clarity we set out separately our reasoning and conclusions in relation to each head of complaint: unfair dismissal and direct race discrimination.

UNFAIR DISMISSAL

Relevant Law

168. Section 94 of the Employment Rights Act 1996 ("ERA 1996") confers on an employee a right not to be unfairly dismissed.

169. The test for unfair dismissal is set out in ERA 1996 section 98. Under section 98(1) a dismissal may be fair if an employer can 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 98(2) - i.e: one of the four potentially fair reasons set out in section 98 (eg: capability, conduct, redundancy) or for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (SOSR).

170. There is no statutory definition of SOSR. However, the authorities make clear that the reason relied upon, must be substantial, that is not frivolous or insignificant. That will depend upon the facts and circumstances of each case. It must also be a reason of a kind that could

justify dismissal rather than the imposition of a lesser sanction on an employee holding the job they actually held.

171. Under s98(4) '… *the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.*'

172. Tribunals adopt a 2-stage test when determining whether a dismissal is fair for SOSR.

a. Stage 1: Was SOSR the sole or principal reason for the dismissal ? The burden of proof is on the employer to establish the reason and that that reason could justify the dismissal of an employee holding the role in question rather than necessarily showing that it actually did justify the dismissal: Willow Oak Developments Ltd v Silverwood [2006] EWCA Civ 660; [2006] IRLR 607 paras 15-16. The tribunal must not consider the justification, reasonableness or fairness of dismissing for SOSR at stage 1.

b. Stage 2: Was the employer's decision to dismiss for SOSR reasonable in all the circumstances (including the size and administrative resources of the employer ?). This is determined in accordance with equity and the substantial merits of the case. Here the burden of proof is neutral. The tribunal will need to investigate the reasonableness of the dismissal, but the onus is neither on the employer to prove it was fair, nor you to prove that it was not (*Boys and Girls Welfare Society v McDonald*).

173. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision: British Leyland v Swift [1981] IRLR 91 CA. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed including to the question of whether any investigation was reasonable in all the circumstances, and to other procedural and substantive aspects of the decision to dismiss a person from his employment: Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA.

174. One of the key reasons relied upon in this case is the breakdown of trust and confidence. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462, the House of Lords held the implied term of trust and confidence to be as follows:

'The employer shall not without reasonable and *proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'*

175. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant's position: Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

176. The duty not to undermine trust and confidence is capable of applying to a series of actions which individually can be justified as being within the four corners of the contract: United Bank Ltd v Akhtar [1989] IRLR 507, EAT.

177. We note the words of Mummery LJ in the Court of Appeal in Leach v Ofcom [2012] EWCA Civ 959 that:

"Breakdown of trust is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal …The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever the conduct reason is not available or appropriate."

178. In terms of the guidance to be drawn from the above criticisms, employers who believe trust and confidence in an employee may have broken down and are considering dismissing the employee should always focus on the underlying reasons as to why that position has been reached and then, based on those underlying reasons, seek to select a more conventional reason for dismissal. Mr Hill for the claimant submitted to us that the alternative ground relied upon was conduct.

179. As regards conduct dismissals, conduct is potentially fair reason justifying dismissal. The tribunal approaches such dismissals in three stages three stages: (1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct? (2) did they hold that belief

on reasonable grounds? (3) did they carry out a proper and adequate investigation? British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. The burden of proof of stage one is on the respondent. The second and third stages of the Burchell test are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693). Finally, the tribunal must decide whether it was reasonable for the respondent to dismiss the claimant for that reason.

180. As regards procedure, the EAT (Langstaff J in Jefferson Commercial LLP v Westagate (UK EAT 1028 12 SM) has held that a dismissal for SOSR due to breakdown in trust and confidence was fair despite no further meetings or discussions being held to attempt to resolve issues, where to have further meetings just to restate the position would be to require the parties to go through a meaningless charade simply for the sake of it. Section 98(4) has to be applied sensibly and with regard to the substance of the case.

181. The ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) is issued under s199 TULCRA 1992 and provides basic practical guidance to employers, employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace. Paragraphs 32 – 47 deal with grievances. There are conflicting authorities on whether and when the ACAS code applies to SOSR dismissal: see Rentplus UK Ltd v Coulson [2022] ICR 1313. The respondent proceeded, as did we, on the basis that the ACAS code would apply on the facts of this case.

Contributory fault

182. Under s123(6) of the Employment Rights Act 1996, where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. For contributory fault, the claimant's conduct must have been culpable or blameworthy; it must have contributed to the dismissal; and it must be just and equitable to reduce the award by the amount specified.

Unfair Dismissal – Conclusions

What was the reason for dismissal ?

183. We find that the principal reason in the mind of Mr Lewis, the decision maker, for dismissal was that the relationship of trust and confidence between the respondent and the claimant had irretrievably broken down by 17 June 2021 at the latest.

184. Mr Lewis set out in advance of, and in the course of the dismissal hearing and referred in the dismissal letter [737] to his reasons for dismissing the claimant. Both lists summarise a number of reasons which

together led to an irretrievable breakdown in the relationship of trust and confidence. Having heard his evidence we accept that those reasons were genuine.

185. Mr Hill for the respondent submitted that in the alternative the principal reason for dismissal was conduct. We note that Mr Lewis' notice of the dismissal hearing, the dismissal itself and the termination letter listed four components which resulted in the breakdown of trust and confidence, namely: the working relationship had broken down, the claimant had become unmanageable, the claimant had undertaken threatening and inappropriate correspondence with HR, and the claimant's conduct generally had caused substantial disruption to the respondent's business in the form of time taken up by individuals seeking to facilitate his return to work. These elements do rely on conduct by the claimant, and those elements together inform and add weight to the reason for the dismissal. However, we are satisfied on the totality of the evidence that this is a case where the principal reason for the dismissal was and is appropriately regarded as being for SOSR, and in particular that the relationship of trust and confidence had broken down.

186. The claimant had consistently expressed in his correspondence with HR, to Campbell Tickell and to the OH consultant in May 2021 that he could not return to work for L&Q. He expressed this position in a number of different ways, including agreeing that the relationship had irretrievably broken down, but was consistent in his position since December 2020 that he could not return to work for L&Q. We recognise of course that his position was always that the cause of the breakdown was the respondent's conduct, but by the time the decision to dismiss was reached it is clear to us that both the claimant and the respondent were both clearly expressing their opinion that the relationship of trust and confidence had irretrievably broken down.

187. This reason alone, or viewed cumulatively together with the individual elements, amounted to a substantial, non-trivial reason which could justify dismissal.

Did the Respondent Act reasonably in treating that as sufficient reason for dismissing the claimant in all the circumstances?

188. We find that in all the circumstances the decision of Mr Lewis to dismiss the claimant fell within the range of reasonable responses as they appeared to Mr Lewis at the time of his decision having regard to equity and the substantial merits of the case.

189. The question of reasonableness involves consideration of both procedure and substance.

190. We consider first the issue of substantive reasonableness.

191. By the time Mr Lewis was making the decision to dismiss on 17 June 2020 the position facing him was that the claimant had from December

2020 consistently made clear that he could not return to work for L&Q and by May 2021 there was no prospect of him doing so or being willing to do so. In light of the many critical statements made by the claimant, including that the relationship between them had broken down and that there was no intention on the part of the claimant to return to work, it is clear that Mr Lewis had reasonable grounds for his belief and his conclusion that the relationship of trust and confidence had broken down.

192. In considering whether he acted reasonably in treating that reason as a sufficient reason for dismissal we are satisfied that dismissal fell within the range of reasonable responses open to Mr Lewis. Indeed it is difficult to envisage, in all the circumstances, what alternative the respondent had other than dismissal.

193. In so concluding we have taken into account our findings that the claimant's initial grievance was not adequately investigated or dealt with at the time, and that the conclusions and approach of Mr Ahmed on the appeal was also flawed to some extent – although not for the reasons asserted by the claimant. After the appeal stage the claimant had good reasons to feel that his complaints had not been fairly or properly investigated or addressed. The welfare meetings arranged or to be arranged before Mr Wallis were also insensitive. We therefore considered whether the decision to dismiss fell outside the range of reasonable responses because more weight ought to have been given to the claimant's continuing and initially legitimate sense of grievance about the respondent's own culpability in failing adequately to address the claimant's complaints in 2019/2020 in the respects we have identified. We note also that the respondent had opinions from OH reports that the claimant was experiencing illness and stress as a consequence at least in part of his perception of the treatment of his grievances.

194. The claimant himself identified a fact from which we should find that the respondent failed to act reasonably in reaching the decision to dismiss, namely that the respondent could have made amendments to the claimant's workload and that there was a lack of anyone speaking to the claimant to discuss issues at work: the respondent failed to engage an impartial person to contact him to discuss his issues.

195. We observe that things are not always perfect in employment relationships. Compliance with the implied term of trust and confidence depends upon how the employer and employee respond to challenges when they arise.

196. The claimant had not taken up early suggestions to allow him to change managers. The claimant's sickness absences began in June 2020 (by then COVID had also become a factor in the way work could be done). The respondent offered support to the claimant with welfare meetings in July and August and a reference to OH in September 2020, and in later months by references to the EAP and ethical lenders. The respondent also responded positively (initial confusion having been resolved) to the suggestion by the claimant of a structured mediation to address his

concerns. Critically in December 2020 the claimant had a lengthy welfare meeting with Mr Lewis at which he was given the opportunity to discuss the widest possible set of options to resolve his sickness absence and any dissatisfaction with the historical treatment he had received. At that stage the claimant appeared to Mr Lewis to be resolved to end his employment on terms as to 6 months pay and some training. He had concluded that he could not return to work and it would have been reasonable for both the claimant and the respondent to recognise at that stage that principal responsibility for the breakdown lay with the respondent.

197. However, after that meeting, and from early 2021 the claimant, who remained as an employee (albeit unpaid) and continued to engage with absence reporting and OH meetings, made a series of very serious criticisms of the respondent. In our judgment these were intended by the claimant, at least in part to create pressure on the respondent for a better financial settlement, although we accept that he may also have been motivated by a principled wish to assist residents. In any event looked at through the eyes of the respondent the claimant's points raised serious issues about their own conduct, including but not limited to their conduct towards the claimant.

198. The respondent adopted a reasonable course of action to address those concerns. They initiated a review by Campbell Tickell. Although the claimant expressed dissatisfaction with that report, and the choice of Campbell Tickell, we consider that it was a fair, thorough and sufficiently independent exercise which did uphold one of the claimant's existing complaints about poor management practice which had framed his working environment. The fact that the respondent had had poor working practices in place around the claimant was acknowledged in the Campbell Tickell report. This was a topic that was actively discussed during the meeting on 17 June 2021 to consider dismissal [732-733]. It was therefore clear that previous management shortcomings which had precipitated the claimant's grievance were in Mr Lewis's contemplation when considering the decision to dismiss. There had been subsequent organisational change which implemented and in part adjusted in response to the Campbell Tickell report, and the claimant had been kept informed of these. The claimant, however, remained implacably critical of the respondent and was not open to continued employment in any form with the respondent.

199. Furthermore, in his interactions with HR staff the claimant repeatedly used offensive and abusive language from which ultimately he refused to resile. That language included racial stereotyping and accusations of racist behaviour against in particular Mr Ahmed, but latterly also Mr Lewis. Even before us, the claimant declined to withdraw those comments. We heard from Mr Ahmed that those comments were offensive to him.

200. The position before Mr Lewis on 17 June 2021 was therefore accurately summarised in his termination letter and the decision to dismiss in all the circumstances was one which was within the range of reasonable responses.

201. As regards procedural fairness, we are satisfied that the steps taken by the respondent leading up to the dismissal of the claimant were fair and reasonable in all the circumstances.

202. We acknowledge that historically the respondent's dealings with the claimant's initial grievance investigation and appeal were flawed and that that contributed to a continuing source of stress and frustration for the claimant. However, he was subsequently given the opportunity to propose a solution to his complaints in December 2020, and was offered mediation on a number of occasions both before and after the December 2020 meeting with Mr Lewis and where issues which appeared to involve his health arose, he was provided access to OH.

203. In the period leading up to the decision to dismiss the claimant was warned in the emails of 22 April 2020 from Mr Lewis [685] and 28 April 2021 from HR [690] that dismissal was being considered. He was advised of the grounds which were being considered and he was provided with relevant documentation relied upon by the respondent and supporting those grounds. He was advised of his right to be accompanied and of his right to make representations. We note that the position presented to him was that Mr Lewis would be presenting 'his recommendation' that the claimant's employment be terminated, but that he would have the opportunity to make representations before a decision would be taken. He was advised that if the decision to dismiss for SOSR on the basis of a breakdown of trust and confidence that dismissal would take effect immediately and he would be paid in lieu of notice.

204. The letter of 28 April 2021 also invited the claimant to advise if he had any specific needs at the hearing arising from a disability. We note that on 18 May 2021 Dr Murphy (Consultant in Occupational Medicine) had stated his belief that the claimant presentation of mental health symptoms amounted to a disability.

205. On 30 April 2021 [695] the claimant requested and was granted an extension to the hearing date for his mental health and for the availability of his solicitor, and to afford him extra time to review the supporting documentation. This was granted and the claimant's detailed response document was provided on 16 June 2021. There is no suggestion that the claimant was not allowed sufficient time to prepare his representations.

206. At the hearing the claimant was not accompanied but confirmed that he was happy to proceed without support. The notes record that the claimant had received and responded in detail to the respondent's document pack and that Mr Lewis had read the claimant's documents. The hearing was scheduled for an hour, which was sufficient time to allow free-ranging discussion. The claimant was given a reasonable opportunity to make points orally and to state his position. Mr Lewis inquired whether there was anything further that could be done for the claimant. He explained that he would take further time to consider his decision. We are satisfied that he gave genuine consideration to that decision before it was communicated on 23 June 2021.

207. The claimant was advised of and offered a right of appeal (including consent to an extension of the prescribed timetable for lodging an appeal). He later confirmed that he did not wish to proceed with it.

208. In these circumstances we find that the dismissal was procedurally fair.

209. In reaching our conclusions we have taken into account the fact that at least some of the factors relied upon as leading to the decision to dismiss for SOSR included conduct. In relation to specific instances of misconduct (for example the use of abusive or discriminatory language by the claimant and the general category of his having 'become unmanageable') the ACAS Code of Practice on Disciplinary and Grievance envisages a meeting and an appeal, and at paragraphs 19 to 21 a series of written warnings. In the present case, in relation to the 'conduct' elements there had been no meetings or written warnings before the meeting with Mr Lewis on 17 June 2021 specifically dealing with the conduct allegations. However, in our view the position had been clear to the respondent since December 2020 that the claimant was not interested in continuing to work for the respondent. The effective reason for dismissal was that the relationship had by June 2021 at the latest broken down irreparably. A meeting was in any event held with Mr Lewis to discuss the respondent's grounds, the claimant had a right to make representations and to appeal. In those circumstances, we do not consider that further meetings or a series of written warning escalations would have had any meaningful part to play in the process. Neither would potentially have led to a different outcome in the circumstances. This is a case which brings into play the approach in Jefferson (Commercial) LLP v Westgate .

210. The complaint of unfair dismissal is therefore not well founded and is dismissed.

DIRECT RACE DISCRIMINATION

Relevant Law

211. Section 13 of the Equality Act 2010 (EA) provides, so far as relevant that (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. EA Section 4 includes race as a protected characteristic. Section 9(1)(a) provides that race includes colour.

212. The burden of proof in relation to a complaint of direct race discrimination is set out in section 136 of the Equality Act 20210 (EA). It provides that: (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.

213. The first step is to determine, on the balance of probabilities, the primary facts proved, including any appropriate inferences which can be

drawn from those facts. The burden at this stage is on the claimant and a respondent's explanations are disregarded.

214. It is not sufficient for a claimant merely to prove a difference in protected characteristic and a difference in treatment. Something more is required: Madrassy v Nomura International plc [2007] EWCA Civ 33. Unfair or unreasonable treatment on its own is not enough to shift the burden: Glasgow City Council v Zafar [1998] IRLR 36. It is important for the tribunal to stand back from the detail and look at the cumulative picture: Anya v Oxford University [2001] IRLR 377 CA.

215. If the claimant has proven the facts sufficient to support this conclusion at Stage 1, the burden of proof shifts to the respondent to prove, again on the balance of probabilities, that what happened to the claimant was 'in no sense whatsoever' because of the relevant protected characteristics – in this case race and disability.

216. In determining whether a claim for direct discrimination succeeds, the Tribunal must ask itself in all cases the reason why the treatment complained of occurred, and whether it was because of the protected characteristic: Shamoon v Royal Ulster Constabulary [2003] UKHL 11. If the decision in question was significantly (that is more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

217. The reason why a person acted as he or she did is a question of fact, but their reasons may be conscious or unconscious: CC of West Yorkshire v Khan [2001] ICR 1065 HL (obiter) at paragraph 39 per Lord Nicholls : R (on the application of E) v the Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2010] IRLR 136 SC per Lord Phillips (p) at paragraph 21.

218. A tribunal should expect cogent evidence for the respondent's burden to be discharged. But the respondent only has to prove that the reason was not the forbidden reason, it does not need to show that it acted fairly or reasonably: Law Society v Bahl [2004] EWCA Civ 1070.

219. Where a tribunal feels able to and does make an explicit finding as to the reason for the claimant's treatment, it is not an error of law to do so, and in so doing the application of the above guidelines on the stage 1 and stage 2 reverse burden of proof approach becomes otiose: Fraser v University of Leicester UKEAT/0155/13/DM; Hewage v Grampian Health Board [2012] IRLR 870 SC.

220. Direct discrimination depends upon there being (or that there would have been) less favourable treatment than others. The claimant must therefore identify an actual or hypothetical comparator whose circumstances are the same, or not materially different from those of the claimant, but without the relevant protected characteristic: EA s 23(1). That is to say the comparator's circumstances must be sufficient to enable an

effective comparison: CC of West Yorkshire v Vento [2001] IRLR 124, EAT per Lindsay (P): Hewage v Grampian Health Board [2012] UKSC 37.

221. There must be a causal connection between the characteristic and the treatment based on the wrongdoers conscious or subconscious reason for doing what they did: Nagarajan v London Regional Transport [1999] IRLR 572.

Time Limits

222. A claim of direct discrimination must be presented before the end of the period of 3 months starting with the date of the act to which the complaint relates: S 123 (1) EA.

223. The Tribunal has the widest discretion to extend time where it is just and equitable to do so: EA s 123(1)(b). The requirement is only to ensure that all factors have been taken into account: Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. It is for the claimant to apply and to show that the extension should be granted, although there is no formal burden of proof: Polystar Plastic v Liepa [2023] EAT 100.

Direct Race Discrimination : Conclusions

Direct race discrimination – substantive claim

224. By the time the case came before us, there were two limbs to the claimant's discrimination complaint:

a. that the respondent's employees (Ms Daisley) selected Mr Ahmed because i) he was a South Asian male and ii) he was 'brought in to do the claimant harm' because (in summary) South Asian Males discriminate against black men; and

b. that Mr Ahmed, an employee of the respondent, behaved in a racist manner during the call, by reason of the tone he used or the dismissive way he dealt with the claimant (including not putting on his camera).

225. Taking the first limb, the claimant did not support his suggestion that there was a disposition towards racism against black people amongst males of south Asian heritage with any substantial evidence.

226. Included within the bundle in documents sent to the tribunal in response to directions were references to the claimant's own understandings and experience [184] where he said that: *"there is an issue with some Asians and people of African descent because many still adhere to the principle of caste called jati.....I have experienced casteism on at least five times before (sic) ...they mainly all (sic) in Asian shops and out-and about."* There was also a reference to an extract from a report by

"Asian Network" entitled 'We don't marry black people'. The extract stated "*Amit, who is British with Indian heritage, kept his relationship with Michelle, who's British with Ghanaian heritage, secret for years - because he feared his family's reaction. He says that racist attitudes about black people in his community can be influenced by colourism and the caste system in some south Asian countries. Rapper Raj Forever's music draws on his Jamaican and Sri Lankan heritage. But growing up he was made to feel like an outsider in the Asian community and has heard offensive slurs used to describe black people.Report by Asian Network - Produced and filmed by Nalini Sivathasan Additional filming by Suhail Patel.".* We were not provided with any more information about this report or its authors.

227. We considered that this evidence was insufficient to support the claimant's assertion in part ii) of limb a) above. In any event we found Ms. Daisley's observation on limb a) in her witness statement compelling. She said: "delib*erately appointing a south Asian person as a way of somehow ensuring that the claimant would be treated less favourably would have been an incredibly far-fetched and rather ridiculous plan. In addition to being totally against the respondent's practices even if the claimant's stereotype of south Asian people was true and we knew about it we would have had no way of knowing whether Mr Ahmed ….'met the stereotype' and would discriminate against the claimant for being black. Therefore the idea that we deliberately appointed Mr Ahmed so he would discriminate against the claimant is completely preposterous"*.

228. Applying the first stage of the burden of proof provisions in s 138 EQA, in relation to limb a) we find that the claimant has not proven facts from which a tribunal could infer that he was treated less favourably because of his race.

229. In any event, we found as a fact that the reason why Ms Daisley on behalf of the respondent appointed Mr Ahmed was because he was a) sufficiently senior and b) outside of the claimant's business area and therefore an appropriate person to conduct the appeal as envisaged by the respondent's appeal procedure. We are satisfied that the reason for his selection was in no way connected with the claimant's race. It is noteworthy also that the claimant consented to Mr Ahmed conducting the appeal when he had an opportunity to suggest a different person because Mr Ahmed would need an adjournment. He did not raise this as an issue of race until more than three and half months after the hearing.

230. As regards limb b) - the complaint that Mr Ahmed behaved in a racist manner during the appeal hearing call, by reason of the tone he used or the dismissive way he dealt with the claimant (including not putting on his camera), we have set out our relevant findings of fact above. In summary (i) it was not proven that Mr Ahmed's camera was in fact off, or that if it was Mr Ahmed was aware of it; (ii) we did not find anything in the record of the content of what Mr Ahmed said that conveys to an objective reader an attitude of disrespect towards the claimant, or from which it could reasonably be inferred that race was a factor in how he conducted the appeal (iii) we accept Mr Ahmed's his evidence that racism against the

claimant as a black person played no part in his conduct of the hearing and therefore he would not be likely to have adopted a tone which would reasonably have conveyed to the claimant that it did.

231. Although we found that the conduct of the appeal process by Mr Ahmed was in some respects deficient, and that he did not engage with all of the issues the claimant had asked to be reconsidered, that fact alone provides no evidential basis from which an inference can be drawn that the error was in any way connected with the claimant's race.

232. In any event, we find on the that the reason why Mr Ahmed conducted the appeal in the way he did was because he considered himself to be acting in a professional manner and conducting an appeal in the way he believed was appropriate (although we considered that he erred in that regard). We are satisfied on the totality of the evidence that Mr Ahmed's conduct in relation to the appeal was not in any way connected with the claimant's race.

233. We record that Mr Ahmed stated in his evidence that: *'it is important to register how offensive I find these comments and that I consider them to be nothing short of racial harassment'. I refute any allegation that ii treated the claimant unfairly discriminaotorially or without respect and I deny anything I did during the appeal process had anything whatsoever to do with his race.'*

234. In conclusion the claimant did not prove facts from which the required inference could be drawn of less favourable treatment because of race. But in any event, even if we are wrong in that conclusion, we were satisfied on the evidence that the conduct complained of was not because of and was in no way connected with the claimant's race. The complaint of direct discrimination on the grounds of race therefore fails.

Timing Issue

235. The act to which the direct discrimination complaint relates is the appointment by the respondent of, and the conduct of the appeal hearing by Mr Ahmed. The appeal decision letter was dated 6 May 2020.

236. Taking account of the extension for ACAS conciliation the 3-month period expired on 30 July 2020. The claimant's ET1 was presented on 20 September 2021, 14 months later. Although the expanded paragraph 8.2 at sub paragraph 10 of his ET1 refers to this matter, the length of the period of delay is very considerable. Furthermore, the substance of the claimant's complaint on this ground was not raised with the respondent within three months of the alleged discriminatory act.

237. The respondent relied upon a contention that the discrimination claim was brought out of time and so the tribunal lacked jurisdiction to hear it. The respondent had sought to have the complaint struck out at an earlier stage in the proceedings but this issue could not be dealt with before the main hearing before us due to judicial resource restraints.

238. In the event, given that the parties and their witnesses were present and prepared for a full hearing and that the determination of the discrimination head would not add significantly to the time or complexity of the hearing, we decided as a matter of case management that it would further the overriding objective of dealing with cases justly to proceed with the hearing and to consider and express a view on the timing issue and any just and equitable extension of time as part of our deliberations.

239. In the event we decided that it was in the interests of the overriding objective having heard the parties' evidence to make findings of fact and make a determination on the merits of the race discrimination claim rather than on the timing issue alone.

240. Having decided to hear and in the event to dismiss the discrimination complaint it was unnecessary for us to decide whether it would be just and equitable to extend time for this claim to be brought.

241. However, in case we are wrong in our conclusions above we record that we considered that we would have exercised our discretion against extending time.

242. The claimant advanced no good reasons before us to justify the delay in bringing the claim. We nevertheless take account of the fact that he was struggling with mental health issues at times during this period and that a symptom of his condition was a reluctance to engage with correspondence and tasks in relation to this complaint and the claim more widely. A letter from his GP practice dated 13 September 2022 [169] says that he had been suffering from symptoms of low mood anxiety and stress and that that had a large impact on his ability to respond to any letters and emails. He also provided a consultant's report dated 28 November 2023 to similar effect. As against this we note that he was capable of making detailed DSARs within a week of the appeal outcome letter on 12 May 2020 and at least by September 2020 he had the benefit of legal advice.

243. There was some prejudice to the respondent arising from the delay in that Mr Ahmed was unable to recall the facts relating to the functioning of the camera during the appeal hearing. On the other hand, if time was not extended the claimant would be deprived of the ability to bring one of his two grounds of claim. That would in principle be a significant disadvantage to him, especially given that the remedy might in principle have been a more significant financial remedy than for unfair dismissal.

244. However, had we not proceeded with the substantive hearing, it would in our view have been possible to have taken a view on the merits of this head of claim without conducting a mini-trial. Had we done so we would have concluded that it appeared to be a complaint which lacked merit.

245. Balancing all these factors we would have declined an extension of time on just and equitable grounds.

Employment Judge N Cox

Date: 19 April 2024

Judgment sent to the parties on:
7th May 2024

For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing, or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.