EMPLOYMENT TRIBUNALS

Claimant: Mr D Kaggwa

Respondent: Telent Technology Services Ltd

Heard at: Reading **On:** 5, 6 - 8 December 2023, 18 & 19 June 2024 and in chambers: 9 July & 2 August 2024

Before: Employment Judge Anstis
Ms C M Baggs
Ms F Tankard

Representation
Claimant: Mr O Foy (counsel)
Respondent: Ms K Hosking (counsel)

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

A. INTRODUCTION

1. The claimant was employed by the respondent as a Systems Engineer (Level 3) from December 2014 until his resignation which took effect on 23 August 2022.

2. In the period with which this claim is concerned, the claimant was based at the respondent's Heathrow depot and worked in south London on its contract with Transport for London for maintenance and installation of traffic signals.

3. The claimant's claims are of race discrimination (direct discrimination and harassment) and unfair constructive dismissal. The parties had prepared for the purposes of this claim an agreed list of issues which is included as appendix 1

to this decision. This omits questions of remedy, as this hearing and judgment addresses only questions of liability.

4. For the purposes of his race discrimination claim the claimant refers to himself as black. The parties agreed that as (i) the claimant contacted ACAS on 15 December 2021, (ii) his early conciliation certificate was issued on 25 January 2022 and (iii) he brought his claim on 12 April 2022, any complaint of an act of race discrimination that occurred before 13 December 2021 is brought outside the standard time limit for an individual act of discrimination.

5. This hearing was listed to take place in December 2023, but could not be completed in the time allocated then, particularly as the listing had been reduced from four to three days. The hearing resumed in June 2024, with the delay being due to the difficulties in establishing a date when the tribunal and parties were all available. We have since taken time for consideration of the claim in chambers.

B. THE FACTS

Introduction

6. The claimant is an experienced traffic signal engineer. We heard that there were three kinds of work carried out by the respondent on traffic signals under its contract with Transport for London. The first was planned preventative maintenance or servicing work. This included "periodic inspections" (or "PIs"). The second was diagnosing and fixing faults that had arisen. This was called corrective maintenance. The third was configuration work – commissioning new traffic signals or revising the operation of existing traffic signals.

7. Much of the claimant's claim concerned his view that he was being given too much low-level work (in particular, PIs) and should be given greater opportunity to do what he saw as higher level work – configuration work.

The claimant's role

8. The question of the work that the claimant was undertaking was not a new one. The claimant describes in his witness statement having resigned in May 2016 in protest at not getting the correct level of work, although he was persuaded to withdraw his resignation on being promoted to a level 3 engineer.

9. Following this the claimant agreed a new contract of employment describing him as a "*Systems Engineer – Level 3 reporting to Geoff Johnson with TCMS2*". TCMS2 was the relevant contract with Transport for London.

10. The claimant says:

> *"From the first day, I realised that my new direct Manager,* [John Fisher] *had not been briefed on what my duties were. The first assignment he gave me was a week's worth of "basic routine" PI inspections. I immediately*

pointed out to him that it was not what I had agreed with [John Graham] *when I accepted to remain within the Respondent's employment. I then got* [John Graham] *involved for clarification which I realised displeased* [John Fisher] *as he was not happy to see that I had challenged his authority."*

11. The claimant continues:

"I clearly recall stating to the management that I detested the boring mundane low level experience work within PI and reiterated that I was resigning for a similar reason and upon return had been assured of career prospect roles that required higher level engineering experience. I specified that like any other systems engineers with equivalent high level engineering experience, I found this routine low level work as not challenging to me nor increase my knowledge or experience, nor did it provide any advantage or value to my career progression."

12. Despite the claimant's protests, matters did not improve. He says:

"As time past, I realised he had now normalised this and to my chagrin, it had become a core part of my daily routine and responsibilities. In effect, I was now assigned less of my original overall work role. I was now routinely assigned just basic PI work i.e. nothing like I had been promised. My office in-tray would be filled with routine PI inspections work and email sent to me to pick up and complete. I continued to desperately raise my objection to this realignment of my job to [John Fisher]*."*

13. Mr Fisher sees things differently. He says that he (Mr Fisher) was the leader of the Preventative Maintenance team. The claimant had been assigned to report to him so was on the preventative maintenance team. He says:

"One of the main responsibilities of a Systems Engineer in the Preventative Maintenance team is to complete periodic inspections ("PIs") of traffic signals. Every traffic signal in the UK must be inspected at least once every year. During a PI, the Engineer will examine the physical condition of the signal, check site documentation, and complete tests (including 'Red Lamp Monitoring') to ensure that the signal is operating correctly."

14. Mr Fisher elaborates on this:

"On average, an Engineer completes 3 PIs per day which meant that there were over 400 PIs to cover across the team during the period of [colleague]*'s absence and his alternative duties. It was a team effort and everyone, including myself, helped out with PIs during that time. I made it clear to* [the claimant] *that it would not be a permanent change and only while we were short-staffed.*

[The claimant] *was not only doing PIs during this time. He was also doing other work, for example: auditing traffic sites, auditing BLC sites; and*

providing follow-up technical support on PI faults. He also did some corrective maintenance shifts as and when required."

15. The claimant has named two (white) comparators who he says were treated better than him as regards allocation of work. They are Andy Dancer and Paul Duffy. Mr Fisher says that they did different work because they were part of a different team – the corrective maintenance team, which was managed by a different manager.

16. The respondent accepted that the skills of the engineers on the two different teams were interchangeable, and that there were times when corrective maintenance engineers would help out on the preventative maintenance team, and vice versa.

17. Mr Fisher acknowledged the claimant's frustration at being allocated PI work, but it was his position that PI work was within the scope of his role as an engineer on the preventative maintenance team and that it was necessary for the claimant to do this work, particularly when the team was short staffed.

18. While, we think, broadly accepting the division of managerial responsibility and at least nominal difference between the teams, it was the claimant's position either that the dividing line between the two groups was not substantial or that if there was a real divide it was nevertheless the case that the engineers operated across both kinds of work and there was nothing to stop the respondent allocating PIs to Mr Dancer or Mr Duffy rather than him.

19. The evidence we have seen and heard leads us to the conclusion that there was a proper distinction drawn by the respondent between the corrective and preventative maintenance teams. The skills of the engineers on each team were interchangeable and each could (and did) carry out work for the other team. However, the division into teams only made sense if each team predominantly did one kind of work. The claimant was on the preventative maintenance team and so predominantly did preventative maintenance work, which included PIs.

July 2021

20. On 8 July 2021 Mr Fisher was notified by an auditor for Transport for London that they were "*failing a PI carried out by David on 5 July 2021 as the Red Lamp Monitoring ("RLM") had not been completed correctly*".

21. Mr Fisher describes RLM in this way (and his account is not substantially disputed by the claimant, nor is the account of the problem reported by Transport for London):

"… every pedestrian crossing in the UK has a built-in safety feature to help prevent an accident if the traffic lights fail. If a red traffic light fails, the system will log a fault with the controller within half a second. If a second

red light at the same traffic stop fails, the pedestrian crossing will automatically shut down. Engineers are required to complete RLM during a PI to check that this safety feature is functioning properly.

When completing RLM, the Engineer will climb a ladder to the top of the first traffic signal, remove the red light from the signal head, check that the light has gone out and then check that a fault has been logged with the controller. They should then cross the road to the second traffic signal on the same phase, remove the red light, check that the system has shut down, and then check that this has been logged with the controller. Once completed, the Engineer should plug the lights back in, reset the fault log and turn the lights back on …

If the time taken between removing the first and second red lights is less than around 2 to 3 minutes, this would usually indicate that the process has been completed too quickly and not in the prescribed way. When I reviewed the fault logs sent to me by TfL, I could see that the first red light was removed by David at 14:19 55s and the second red light at 14:19 56s – a second apart. On the same day, he removed a red light at 14:23 36s and the second at 14:23 45s – just 9 seconds apart."

22. From 6 - 13 July 2021, the claimant was off sick.

23. On 15 July 2021 Mr Fisher received another report from Transport for London of RLM carried out by the claimant which had again showed too short a time between the first and second red light being removed. Mr Fisher says "*Given David's experience and expertise, he should not have been failing PIs so I wanted to speak to him to understand what had happened.*"

24. We consider this to be an entirely reasonable response by Mr Fisher to circumstances in which one of his most experienced engineers had been caught by the respondent's client failing to properly carry out basic safety tests as part of his PIs.

August 2021

25. On 13 August 2021 Mr Fisher invited the claimant to what he (Mr Fisher) described as a "*informal fact-finding meeting … to discuss the failed PIs*". This meeting was also attended by Aaron Dhaliwal of HR.

26. Following the meeting, meetings notes were sent to the claimant. While disagreeing with them, the claimant did not take up an invitation to provide any corrections of his own to the notes.

27. Having heard the claimant's account of events, Mr Fisher decided to take no further action against him in relation to the failed PIs.

September 2021

28. At the end of September 2021 the claimant was sent an invitation to an absence meeting following his absence in July 2021. Mr Fisher says "*I admit that there was an unfortunate delay in organising the absence meeting with David. I was on annual leave between 29 July and 12 August 2021. David was on bereavement leave from 23 to 27 August 2021. He was also on annual leave on 30 August 2021 and from 6 to 10 September 2021. I was then unavailable for work from 13 September 2021 to 24 September 2021.*"

29. Mr Fisher says that the "*recommended action*" under the respondent's absence procedure in respect of the claimant's previous and July absences was a first written warning, but he (Mr Fisher) decided to remove the July and some other absences from the claimant's record so that his Bradford Factor reverted to 1 and no action was taken under the absence policy.

30. We note that we now have two instances (the RLM failures and the absence) in which Mr Fisher may have been justified in taking a stricter approach to the claimant but he in fact took a more lenient approach.

October 2021

31. Mr Fisher says:

> *"In around October 2021, I was contacted by the Commissioning Manager … about an opportunity for an Engineer to assist the Commissioning team with the Capital Works project.*
>
> *David had expressed an interest in this type of work and I knew that he had previous experience as a Commissioning Engineer … so I volunteered him to help."*

32. On the face of it, this is exactly what the claimant had been seeking for a number of years: work on commissioning, which the claimant regarded as being the most appropriate kind of work for someone with his skills and experience. Unfortunately it did not go well.

33. Beyond putting the claimant forward for the work, Mr Fisher had little to do with the claimant's assignment on commissioning work. For this work the claimant was to work with and under Wesley Lincoln, Senior Commissioning Engineer.

34. Mr Lincoln accepted that in his position as "Senior Commissioning Engineer", the "Senior" element signified that he had managerial and supervisory authority, not that he was a particularly experienced or well-qualified commissioning engineer. Other engineers who reported to him were likely to be better able to carry out the technical commissioning work than he was.

35. We will come on to describe what happened, but it appears that Mr Lincoln adopted a relaxed approach to the claimant's assignment for commissioning work. Mr Lincoln puts it this way in his witness statement: "*David's name was*

put forward by his line manager ... I was really pleased about this because I knew that David was an experienced and capable Engineer, who had previously held a commissioning role … at Siemens, so I thought that he would be able to hit the ground running."

36. For these purposes the configuration task undertaken by the claimant and Mr Lincoln did not involve designing the code that was used for the relevant signal controller. That was prepared elsewhere. The configuration task undertaken by engineers in Mr Lincoln's team was the uploading of the code to the relevant signal controller (done on site) and subsequent testing of the code to ensure it worked as intended.

37. The claimant and Mr Lincoln were due to meet for the first time at the Heathrow depot on 7 October 2021. Alongside the meeting invitation he received the claimant also received full details of the work required for the configuration. The claimant left home early to meet Mr Lincoln at the Heathrow depot, but in the meantime Mr Lincoln had been called out to a site in Clapham. Mr Lincoln had sent the claimant a message just before 06:00 telling him (the claimant) to come to Clapham, but the claimant had not seen that message before his arrival at the Heathrow depot.

38. The claimant subsequently drove to Clapham where he met Mr Lincoln and two other engineers. They had a conversation which included that one of the engineers was due to retire in a month or so's time, leaving a vacancy in the commissioning team.

39. The claimant and Mr Lincoln met at the Heathrow depot on 12 October 2021, the day before the claimant was due to undertake two commissioning tasks.

40. There was by this time an issue about some software that the claimant needed to be installed on his laptop in order to be able to carry out the commissioning work. There was some confusion in evidence before us about what exactly the problem was. Mr Lincoln's view was that to get the necessary software the claimant had to request it via "Telent Package Manager" in which case, subject to authorisation from his line manager, it would be made available for him to download with 24 hours. It was not clear whether the claimant even had the "Telent Package Manager" available to him, although Mr Lincoln seemed to take it for granted that all engineers had this available to them. It seems the matter remained unresolved by the end of the day. Our impression was that there was a difference in approach between Mr Lincoln, who considered that the claimant needed no or next to no induction on the commissioning work, and the claimant who was expecting things to be set up for him, rather than having to take matters into his own hands. The claimant knew that he was not fully equipped for commissioning when he went to site on 13 October 2023.

41. On 13 October 2023 the claimant attended a site with a view to commissioning it. Mr Lincoln was there, as was a representative from Transport for London and a sub-contractor.

42. Exactly what went wrong with the commissioning was not entirely clear. It was described in different ways at different times by different witnesses. In his oral evidence Mr Lincoln identified the root cause as being that while the configuration code was correct and either the claimant or the subcontractor had the ability to upload it to the signal controller, the signal controller could not receive the code because its firmware was not up to date. In principle the claimant could have updated the firmware but he was not able to because he did not have the correct software to do so, nor did anyone else who was on the site including Mr Lincoln and the sub-contractor. It seems that the same or related problems happened across two sites that were attempted to be configured.

43. The outcome of this was that Mr Lincoln (and by extension the respondent) looked foolish, having failed in the presence of his client to complete basic commissioning tasks. Mr Lincoln took out his frustrations on the claimant. He says "*In the heat of the moment, I did raise my voice and make a couple of sarcastic comments to David about the level of supervision he expected. It was unprofessional and I regret it. I let my frustration get the better of me and I take full responsibility for that. I did not make any comments directly in front of the client, but I do have a loud voice so there is a chance they may have overheard.*"

44. The claimant's allegation that "*on 13 October 2021, Mr Lincoln made a number of derogatory and disparaging comments about the claimant in front of the client*" is not substantially disputed by the respondent, nor is the related allegation of harassment: "*the derogatory comments made by Mr Lincoln in front of the client on 13 October 2021*".

45. It is equally not disputed by the respondent that subsequently "*the claimant was removed from all future commissioning works*" – in other words, he was not given any more commissioning assignments by Mr Lincoln.

46. On 18 October 2021 the claimant wrote to Mr Lincoln to ask why he had been removed from "*future capital works*" – i.e. commissioning jobs. Mr Lincoln relied that "*you have been removed from these capital works as you are no longer required to carry these out.*"

47. The exchange between the claimant and Mr Lincoln continued by email that day, and was copied to Mr Fisher and Pamula Manning. The claimant said:

> *"Hi Wesley,*
>
> *Thanks for responding to my email. I regret to that see you have come to this decision following last week's site incident. I am aware that you did not discuss this with my manager John F. I would therefore appreciate if you could give me a reason as to why am no longer required for this role otherwise I will have to put this down to that incident which was an embarrassment of us as Telent in front of the client (Tfl)."*

48. Mr Lincoln replied: "*Rather than play email tennis, I am happy to sit with you and John at Heathrow and outline my observations from last week, just let me know when you are both available and I will make sure that I am free.*"

49. Also on 18 October 2021 the claimant wrote to Mr Fisher and others, with the subject "*Incident that happened on site on 13 October 2021*", saying:

> *"The situation started way before the 13th the day we were supposed to commission the two site.*
>
> *1. I believe we did not do enough site pre-commissioning preparation and my work colleague found it convenient to find me to blame.*
>
> *2. It began the moment I arrived on site when Wesley start slagging me off in front of the client (Tfl) and in his own admission said he "enjoyed slagging people off especially me" David"*
>
> *Two. He started question my past commissioning experience by suggesting that I was only following others commissioning Engs. In my reply and trying to defend integrity I told him to mind what he was saying, reminding him that some people don't enjoy being slagged off as a polite way of saying, I didn't enjoy it.*
>
> *More went on that lead to both site commissionings to be abandoned and I think in the end this made him even more frustrated, blaming me and my manager using rude words of not having availed me with necessary software to do the job. Wesley indicating to me that he wasn't on site to commission nor to train me. I tried giving him all sign to show him that this was not necessary to the point that I had to called my manager JF and HR.*
>
> *I was so upset being abused and found his actions so demeaning and disrespect in front of the client.*
>
> *Some of evidence of his actions were captured in the phone voice recording to you as you have acknowledged this morning.*
>
> *I appreciate your intentions to investigate this matter and I hope this colleague will not be allowed to treat anyone else in the same manner. I am ready and happy to provide more information during your investigations."*

50. The list of issues describes this as being a grievance.

51. On 20 October the claimant replied to Mr Lincoln, saying:

> *"Thank for responding to my emails. I understand the matter is already being handled by management. I would suggest that we wait for their response."*

52. The claimant says:

"I was then back to the dull, normal, "inspections" work … So instead of returning to the dream commissioning job I had wanted to do, I was now back to the "old role" of PIs. I found this extremely disheartening. I recalled the conversation about the opportunity to work on the commissioning site once [former colleague] *retired. I wondered when I would go back."*

53. On 27 October 2021 the claimant sent an email to John Fisher saying:

"Good morning John,

It is now over a week since I received this email from my work colleague Wesley informing me that I had been remove from the new role you had assigned to me. This email was copied in to yourself which made me to believe that it was a joint decision. However, I have not received any communication from you to confirm that this was the case and that is the purpose of this email.

As I have said before I am still a committed employee to Telent and very much interested in the role you want me to do. I am more than capable to carry out all works in relation to that role of a commissioning Engineer.

I would appreciate if you get back to me in regards to the issue raised above."

54. In response, Mr Fisher arranged a meeting to take place on 9 November 2021 between the claimant, Mr Lincoln and Pamula Manning (Senior Contracts Services Manager – that is, Mr Fisher's manager). He wrote to the claimant on 28 October 2021, saying:

"I have arranged for us to have a meeting at Heathrow depot on Tuesday 9th November (this is the earliest date that myself Pam and Wesley can all be at the depot at the same time)."

55. The claimant replied to this, saying:

"John

Thanks for the invite to discuss issues I raised to you. I still don't understand why am no longer required to work on any capital works as suggested by my colleague Wesley without any explanation from my manager.

I do not believe Telent operates in this matter where an individual could decide whom they want to or not to participate in particular duty concerning work without a decision from the management.

I believe I should still carry on doing the job you personally offered me until a decision is reached in the upcoming meeting. Kindly let me know the program for next week and I look forward to any capital works jobs, let it be

commissionings and prom changes which I have done very well in the past for many years."

November 2021

56. The claimant says:

> *"On 2 November 2021 Dave Miller, one of the engineers in my team – that I trained, mentored and supervised met with at the site … and showed me how the new software (Service Now) would work. He then informed me that he had been asked by* [Mr Fisher] *to carry out some audits on me.*
>
> *I felt frustrated as I was still training DM and I was responsible for audits in PIs. For years I had trained people and they got promoted over me which appeared to be happening again."*

57. Mr Fisher says:

> *"In around September 2021, Dave Miller and other engineer … were trained how to use "Service Now" which was a new software launched by telent to complete PI forms electronically on a tablet.* [The claimant] *was on annual leave when the training was being rolled out. I asked Dave Miller* [and the other engineer] *to show the rest of the team how to use Service Now. Davie Miller met with* [the claimant] *on site on 2 November 2021 to show him how to do this.*
>
> *I do not know what conversation happened between Dave Miller and* [the claimant] *on that day. However, during Dave's phased return to work in September 2021, he was assigned to carry out some internal audits on all of the team's PIs, including my own, as part of his alternative duties. He was auditing the PIs that David and others had covered during his absence."*

58. On 9 November 2021 the so-called "mediation meeting" took place at the Heathrow depot. There are no notes of this meeting, so we are reliant on the individual accounts of the meeting that the witnesses gave in their oral evidence.

59. This is Mr Fisher's account of the meeting in his witness statement:

> *"At the meeting, Wesley admitted that he had acted unprofessionally and he apologised to David for raising his voice. However, David did not accept this apology. Wesley then apologised again and David did eventually accept it. I was happy that David had accepted Wesley's apology and I honestly thought the matter was closed.*
>
> *Wesley then left the room, and Pamula and I had a conversation with David about his preparation for the commissioning works. We talked about the importance of David taking ownership for his preparation, but David claimed*

that was not in the wrong at all and that I should have made sure that he was prepared. I explained that it was not my responsibility to do this for him and that I had set aside time for him and Wesley to prepare on 7 October. David is a senior System Engineer with a lot of industry experience. If David did not have his laptop or equipment ready for the commission, he should have escalated this to someone before arriving on site with the client. However, David was still adamant that I should have taken responsibility to get his laptop set up."

60. Ms Manning says:

"We started the meeting with just myself, David and John in the room. John and I explained to David that the purpose of the meeting was to follow up on his email from 18 October 2021 and to discuss the failed commissioning and the incident between David and Wesley.

I remember that David was very agitated from the start of the meeting. I was conscious that David had issues with high blood pressure, so I reassured him that we could end the meeting at any time. We then invited Wesley into the room.

Wesley admitted to being frustrated that David was not ready for the commission on 13 October, despite having ample time to prepare. He felt that David had not taken ownership of his work, and said that David should have phoned him to let him know that he was not prepared before turning up to site with the client. He accepted that he may have used swear words and that he was out of order for speaking to David in that way. He was clearly upset at himself for letting his emotions get the better of him, and I felt that he was sincere. He held his hands up and apologised to David.

David was not happy with Wesley's apology at first. We asked David what outcome he was looking for but David did not reply. Wesley then apologised again and David said that he did accept it. Wesley then left the room ...

David then turned to John and said that he did not feel like he had received the right support from him. John explained that he had arranged a pre-meet for Wesley and David before the commissioning date to prepare. Despite quite a long discussion, I did not feel that David was willing to accept accountability, so I decided to end the meeting and asked John to leave the room."

61. Both Mr Fisher and Ms Manning suggest that this "mediation meeting" as in accordance with the provision for informal resolution in the respondent's grievance policy.

62. The claimant's witness statement does not suggest that this meeting was improperly convened or that it was wrong to establish this kind of meeting. He

does, however, suggest that the respondent took too long to arrange the meeting.

63. The claimant says:

> *"As soon as I walked into the meeting, PM handed me a "Job Description" and asked if I had seen it before ...*
>
> *She was surprised that I hadn't seen that Job Description. At that point I could not remember or confirm that I had been given one in the past but informed her that I knew part of my roles was to assist JF liaising technical issues with the clients.*
>
> *… I was a little surprised. This meeting was NOT about me or my Job Description but was about my complaint against WL. Somehow, I felt things were not in order.*
>
> *…*
>
> *Wesley Lincoln joined the meeting at this point. I felt some relief that finally the grievance was to be discussed. PM then started the meeting. We would like to establish what happened during the incident on the site etc.*
>
> *JF outlined it ... DK and WL were on site and something happened; DK left me a voice message and I asked him to send me a report in bullet points of what happened. That's why we are here.*
>
> *WL then explained –it was an unfortunate thing that happened on site and its because David was not prepared. DK used to commission sites so he (WL) expected that someone of DK's experience would be better prepared. "David has been working in the company longer than I have so I would have expected him to have this software". He stated that he was frustrated because his level of expectation is very high. It cost us a day and we were not able to do the work. This was patronising and upset me. Meaning that I wasn't telling the truth. He said that he was a professional with high expectations and indeed respected anyone who worked with him to have the same standard.*
>
> *Pamula then interjected and started asking me a number of questions.*
>
> *- Why didn't you have the software David?*
>
> *- Why were you not prepared?*
>
> *- PM kept insisting that from the day I had been invited to do the work up to the time of the start of the work, I should have had time enough to do the prep work.*

- Both WL and PM were talking at me. I was not allowed to explain or clarify anything.

- I tried to explain - we were given new laptops so we need IT authorisation to enable the upload of this software.

Wesley then said ... I (WL) know you (DK) are stressed and I do apologise for what happened that day but half of what you said in your report was untrue. I was stunned.

This implied that I had deceived the management about the sequence of events and the incident. This patronising flimsy non-apology was being stated in front of JF and PM. I knew his status in their eyes meant he would be believed over me

I said that he (WL) knew that I was not telling lies.

- To my amazement and confusion, JF who had the voicemail evidence – the one person I had relied on - remained silent.

- To compound it, BP from HR whom I had called on the day of the incident wasn't at the meeting. This was in itself quite telling about what or who HR considered a priority. HR had attended every lesser meeting about me without fail. How could a misconduct meeting by WL not be something worth attending? Once again, I questioned my treatment by Telent compared with other individuals.

Then both WL and PM were talking at me - reiterating the reasons why it was all my fault and that the blame was on me.

JF - my manager - whom I had reached out to and who had overheard the conversations and had voicemail evident still – stayed mute.

…

Pamula then said, this is not going anywhere and with that the discussion was shut down …

PM's next statement was the clearest indication to me that I had been misled and made to think that the meeting was anything to do with WL and his misconduct. Her next statement showed me that some Telent employees were clearly privileged and were treated accordingly. Others like me would not be believed, or treated with respect or shown they were deserving of dignity. How could I request a discussion on the misconduct of the chosen privileged few. They would never face the consequences of anything. I in turn was about to realise that the meeting was all about my supposed misdeeds.

PM said David we need to have an open and honest discussion about your performance to avoid you spending 5 hours on a job ...

PM asked - Why did you order 3 spare equipment parts for one diagnosed fault?

PM further questions me - We need to have an open and honest discussion about your performance.

I told her that I was OK with that as I don't have any issues and turned to JF and reminded him that I frequently called him to ask if my performance was OK, if there was anything he wanted to comment on etc. JF invariably responded to say if he had any issues he would tell me. "I see your communications with the client, you always copy me in, and everything is ok."

So I turned to JFs Manager - PM in utter confusion but she didn't respond to that Statement.

I could not understand the reason or source of her comments or information

If not JF then who and where and more importantly why?

In my mind I couldn't understand what she was implying.

…

I had come to the harsh realisation that the meeting hadn't been about my grievance at all. No one was concerned about Wesleys abuse and misconduct in front of a client.

It was supposed to be an investigative meeting about WLs misconduct. Instead, it was now about me DK.

The narrative I realised had now been manipulated by WL, PM and JF to make me look like a poorly performing Engineer, with an irresponsible attitude to company resources etc."

64. On 25 November 2021 the claimant wrote to Mr Fisher, saying:

"As we have discussed before, last week I had a chat with Paul and Andy Dancer and both agreed to work with me to gain more knowledge on Mag detection.

It is important for me to confidently check this detection while carrying out PI inspection. It will also enable me train my team and help them do the same.

So let me know your thoughts so that I can arrange to meeting up with one of the Engineer mentioned above."

65. Mr Fisher replied the same day to the claimant and a colleague, Paul Duffy, saying:

"I have updated the engineer rota in agreement with Geoff you to spend sometime looking at magnetometer faults and for David Kaggwa to get some refresher training.

Please speak to each other about best place to meet. We will be assigning any LIVE mag faults on service now in the morning of the 1st December (if we have any on the system)."

66. The claimant replied "*Thanks John*".

67. On 29 November 2021 Mr Fisher wrote to the claimant saying:

"Hi David

I have had to postpone this overview training due to Paul Duffy availability.

I will re-schedule in a couple of weeks."

68. The claimant did not see the email from Mr Fisher until later that day. He describes the matter this way in his witness statement:

"On 29/11/2021, I called PD to confirm the review and where we would be meeting. PD told me he had been told by JF that the review was to be with Dave Miller (DM) instead of me.

So, without discussion or notice, JF cancelled the training that I had initiated and arranged and gave it to DM. As usual, with no respect for me i.e. no courtesy call, (just an email I would discover later), Management had once again halted my progress. I felt stressed and frustrated at my insignificance in their eyes.

Once again my development was blocked – just to keep me in PIs.

I had been demeaned again in front of my colleagues and a junior who I mentored.

DM was junior to me, someone that I had mentored and still advised and was still a member of my team. Initially I thought Paul Duffy (PD) had mixed us up as we are both called Dave. But he was just as confused about the situation."

69. The claimant wrote to Mr Fisher, saying:

"Hi John

I called Paul earlier before seeing your email to plan for our Wednesday meeting and he told me that he was going out with David Miller to train on mags this Wednesday which I thought was a mistake. Now that we both know that Paul is available on Wednesday, does that mean that I continue with our original plan and I arrange to go out with him."

70. Mr Fisher replied:

"Please work a maintenance early shift on Wednesday. Paul Duffy is going out with David Miller as agreed with Geoff Johnson."

71. The claimant says:

"JF then sent an email clearly stating that DM was to go to my training session and asked if instead I could do an early maintenance shift!. I felt the familiar burst of anger, frustration and disappointment.

- *So – it was nothing to do with PDs availability. JF wanted me to do routine Maintenance.*
- *JF didn't show me any respect as a valuable employee. I wasn't worth consulting for my consent to reschedule the training I had set up.*
- *I was so frustrated and so my stress levels went even high again. However, as per previous incidents, I knew management wouldn't care. After all, I was NOT treated the same as other people in Telent."*

72. Mr Fisher says:

"the training had to be postponed as it turned out that Paul was already scheduled to be off-site on 2 December training Dave Miller. Dave Miller was due to receive this training for the first time as part of his phased return to work. Geoff had not told me about this, so I was not aware of the scheduling clash when I arranged David's training. I emailed David on 29 November 2021 to let him know that I would reschedule his training in a couple of weeks"

73. In his witness statement, the claimant describes the Mag training as being "*the last straw … I started to think I would never get anywhere so I had no choice but to leave*". He continues "*Yet I didn't want to go. I liked the work, if they would let me do it and progress. I had colleagues I got on with and most were my good friends.*" By the point of the Mag training, we also note that many, although not all, of the events described below in relation to the commissioning vacancy had occurred.

The commissioning vacancy generally

74. Parts of the claimant's claim related to what has been called "the commissioning vacancy". This arises from the retirement of a colleague whose first name was Bobby but whose surname was unclear during the hearing, where we were given two different surnames. We will call him Bobby. It is not disputed that Bobby was a commissioning engineer who was due to retire and who would be replaced.

75. Mr Lincoln is best placed to give an outline of what happened with the commissioning engineer vacancy. While the claimant may dispute some of the reasons given by Mr Lincoln, and the procedure he operated, we do not think the timeline he sets out is in dispute:

> *"In October 2021, we advertised a vacancy for a Commissioning Engineer based in Heathrow. The vacancy was advertised both internally and externally. Any telent employees who were interested in the role could apply by sumitting their CV on Pulse. Given that the successful applicant would be working in my team, I was asked to conduct the interviews.*
>
> *I am aware that David is claiming that he should have been approached for the role and invited to an interview. However, that is not the way we recruit for vacancies at telent. No-one was approached for the role or invited to apply. Anyone who is interested in a vacancy must follow the correct process and apply via Pulse, and there are no exceptions to this.*
>
> *There were 4 candidates who applied for the role - 3 internal applicants … and 1 external applicant ... I began conducting interviews during the week commencing 15 November 2021. I would like to stress that none of the applicants were 'approached' for the role – they were interviewed because they applied.*
>
> *After careful consideration, I offered the role to the external applicant … on 25 November 2021.* [He] *was my apprentice for 6 months when I used to work at Siemens. However,* [he] *is not my "friend" – I only know him as a former colleague - and the reason I offered him the role was because he was the strongest candidate and scored highest out of the interviews.* [He] *declined the offer on 16 December 2021.*
>
> *I then offered the role to* [the person] *who scored second-highest in the interview process and was well-qualified for the role, but he also turned down the offer.*
>
> *As the role was not filled, the vacancy was readvertised in January 2022. John Fisher asked for the closing date of the vacancy to be extended by one week to give David (who had been on sickness absence) extra time to apply. I agreed to extend the closing date to 21 January 2022. However, David still did not apply.*

> *After the closing date, I interviewed 1 external applicant. The 2 remaining internal applicants … were still short-listed. Out of these 3 applicants, the strongest candidate was* [one of the internal candidates] *(Senior Maintenance Engineer).*
>
> [He] *was not fully-qualified for the role, but he interviewed well and I was impressed by his enthusiasm so we chose to create a trainee commissioning role for* [him]*. This meant that the Commissioning Engineer vacancy was never filled."*

76. That sequence of events explains why Mr Fisher may later have thought the job was taken by someone from Siemens.

77. One of the unsuccessful internal applicants was described by the claimant as being a former trainee of his. It seems that the claimant first knew of the commissioning role was on being telephoned for advice on his application by this trainee on 11 November 2021. The claimant says that on 18 November 2021 he was called by that same trainee who told him (the claimant) that he (the former trainee) had been put forward for the role and was being interviewed for it despite telling Mr Lincoln he was not interested in it. The claimant accepted in evidence that this former trainee was black.

78. By 1 December 2021 the claimant had heard from two internal applications (including his former trainee) that they had not been offered the role, and that "*they were told that they needed someone with more experience and who was ready to start commissioning straight away.*"

79. On 3 December 2021 the claimant sent an email to Mr Lincoln and Mr Fisher saying:

> *"I have come to know that Bobby is leaving and today is his last day. I am sure you are aware that i have been interested in this position for some time. Please let me know if it is available and I am ready to be interviewed for the position."*

80. Mr Lincoln replied, saying "*Unfortunately the role was advertised and interviews have been carried out for Bobby's replacement last month.*"

81. That is consistent with the timeline outlined by Mr Lincoln. The interviews had been carried out and by the start of December the position had been offered to (and not yet declined by) the external candidate.

December 2021

82. The claimant was off work with high blood pressure from 6-9 December 2021, and attended a return to work interview with Mr Fisher on 13 December 2021.

83. The notes of the meeting include these as "underlying reasons that contributed to your illness":

> *"Got excited about the commissioning role it went wrong I was not at fault for anything. I am unhappy at the meeting with Pam Wesley and John. I am angry that I did not get told about the vacancy for commissioning. Wesley should of told John about the vacancy."*

84. Under "is there anything Telent can to help", the claimant is recorded as saying:

> *"I don't like doing PI's its boring and does not interest me if I use it I will lose the skills. Disappointed that the mag training got cancelled. I am thinking and feeling about leaving which I don't want to do."*

85. We can see in this and the earlier remarks many of the themes that later came up in the claimant's evidence at this hearing. He was bored with PIs and felt his career was stagnating. The "*commissioning role … went wrong … I was not at fault*". "*I was unhappy at the meeting with Pam Wesley and John.*" He should have been told of the commissioning vacancy arising on the Bobby's retirement. He was "*disappointed that the mag training got cancelled*" and was thinking about leaving.

86. From this meeting on the claimant secretly recorded his meetings with managers. Transcripts appear in the supplemental bundle with were provided with.

87. This shows that the commissioning vacancy was the first thing discussed in the meeting. Mr Fisher says that he was not aware of the vacancy. He was told that interviews had been arranged but did not know they were for a commissioning role. He says the job vacancy would have been advertised internally on the respondent's intranet ("Pulse"), but the claimant says "*some of us, we hardly log on to that*". Mr Fisher says he only knew that Bobby was leaving when he (Bobby) posted a message on WhatsApp giving his personal number. The claimant asks "is the position gone now?" and Mr Fisher says "*I believe its been filled by one of Wesley's mates from Siemens*", although he also acknowledges he is not sure about that.

88. The claimant says that following this meeting he called HR about the commissioning vacancy and was told that it had been filled.

89. It seems to be at this point that the claimant contacted lawyers and first contemplated allegations of unlawful discrimination against the respondent. He (or his lawyers) contacted ACAS for early conciliation on 15 December 2021.

January 2022

90. Mr Fisher says:

> *"I don't often look on Pulse unless I am looking for a new role myself. However, sometimes, I will do a search and send my team a list of vacancies just in case they are interested or know anyone externally who*

may be interested. On 4 January 2022, I sent a list of vacancies to my team which included the Commissioning Engineer vacancy which was still 'live'. The closing date for applications was 14 January 2022.

To support David, I confirmed that the closing date for applications would be extended by one week to allow him to apply. However, David did not apply for the role."

February 2022

91. The claimant was off sick from 2 February 2022. He says:

"The stress increased over time during work. I had realised, I was going nowhere and my blood pressure was a problem and I started to get frequent panic attacks. The panic attacks became worse over time especially on Sundays when I knew I was going into work. Eventually my GP who had been monitoring my health advised that I take time away from work to recover. My GP signed time off work".

92. The claimant did not return to work prior to his resignation.

April 2022

93. The claimant submitted his tribunal claim in April 2022.

July 2022

94. There are no relevant issues for the period of the claimant's sickness absence, up to the point of his decision to resign. This followed an occupational health letter dated 23 July 2022 addressed to Mr Fisher, which said:

"I understand that Mr Kaggwa is currently absent from work. The referral indicates that it is because of high blood pressure.

Mr Kaggwa reported that he has in fact been absent from work for the past six months because of stress, depression and anxiety symptoms which he attributes to problems at work over the past three years. He stated that he is currently having counselling and there is also a tribunal case currently ongoing. He was therefore reluctant to again have to explain the background details. However, I was able to gather that he was unhappy in his role, perceived that his career was not progressing, and believes that the work he was doing was not at the right level for his experience and seniority.

…

Mr Kaggwa reported that he was working full-time but often beyond his contracted hours. He explained that he was field-based and would travel all around the M25. He stated that he has been in this role since 2016 but in

the same industry for 26 years. He would like to return to work because he is not used to being away from work for such long periods of time. He does feel that he needs to have a discussion with his managers about what sort of role he will be carrying out, but would like to have somebody there with him for support. He was upset by Management's comments in the referral that he had not applied for any internal vacancies. He explained that these were presented to him when he was unwell and at the time he was not in a fit state to apply for new jobs.

In principle, this gentleman is fit to return to work. However, it does appear that he perceives a problem with his current role and would like to be moved to a role that is more appropriate to his skills and level of experience. I would therefore recommend that Management plan to meet with him in order to discuss this, with a support person of his choice present. If agreement can be reached and an appropriate role identified, I would recommend a phased return to work, starting with 50% of his contracted hours and building up gradually over the first four weeks of his return to work.

If Mr Kaggwa can be moved into a role where he is happy and feels valued, I would expect him to be able to provide reliable service and attendance in the future. However, if concerns persist, we would be happy to review him and advise Management again."

95. The list of issues identifies the "last straw" for the purposes of the claimant's constructive dismissal claim as being "*the meeting on 8 August 2022 in which the claimant says there was a failure to consider any amendments to his role in the light of the Occupational Health report dated 23 July 2022, and in which he says he was subjected to a dismissive attitude notwithstanding his lengthy sickness absence.*"

96. In the claimant's closing submissions the last straw is described as being "*the failure to follow the OH recommendation*". Mr Foy says "*Bina Pankhania and JF tell the claimant that he will return to his current role only*". (Bina Pankhania being the HR representative at the meeting.)

97. The notes of the meeting describe it as being a "wellbeing meeting", with the reason for absence being "anxiety". The meeting was held remotely, via Microsoft Teams.

98. The notes of the meeting record Mr Fisher saying:

"Our main concern is your health and wellbeing we want you to come back to work and you want to come back to work and you want to come back to work, we have set up the phase return for you which is flexible its achievable as well until we sit down and establish the return to work and discuss the OH report with you, where we are at the moment I fully understand you say need to take that jump and deal with it, however it must be difficult for yourself as you stated earlier on today when the email came through and

you got a notification about the meeting it then triggered your high blood pressure, its difficult."

99. Ms Pankhania says:

"We will take one step at a time, we will take it in stages you coming back on a phase return to your current job role to see how you are, we will always have discussions with you regarding your role. If you are going to be well to come back on a full-time basis."

100. The claimant replied "*so, when you say my current role*", and Ms Pankhania says "*It's your current job role*". (Or, per the claimant's amended notes "*Well whatever your role is that you left before you went off sick. That's what you're coming back to.*")

101. There is then the following exchange:

"JF Which the Tech Support for the PI Team, its dealing with faults that they can't repair and put back, not talking about replacing lamps, lenses or tactiles but I am not talking about general backing boards realignment , its what you first came across to do for us in upskilling the PI Team getting them to fix as many faults as they can and taking up ownership of the technical follow up faults if they raise. Getting back to the PI Audits and audit of the sites, when you moved across from the Maintenance Team by John Graham is what you will be doing to head up tech support of the PI Team. Its not to say that is what you will be doing for good we need to get you back into work what you are doing and we can look at the next step which was highlighted in the report that you want to get involved in more things technical etc. The career progression and the options we can look at once your back to work. You were before in Maintenance doings shift pattern and then John Graham moved you across to PI Team.

DK: Does this involve PIs?

JF: No, when you first came across on the team you weren't physically going out doing PIs, you were doing audits on it but that is nowhere near what you were doing, just the tasks you were doing when David Miller was of on long term sick.

BP: You have been out of the business for 6 months, what we want to see you gradually coming back to role before [the amended notes from the claimant add "you went off sick"]*, gradually ease you back in and give you any training support that you require, we are going to look at other things that you want to do which is on you stated in the OH report, we can look at other roles, however we need to phase you back into work, we can say there is a role here, however we don't know how it will be for you when you physically come back. We*

have a new performance development plan in place called "My Journey" which sets out individual objectives, a lot of things have happened whilst you have been out of the business, so John will update you accordingly in what is happening in the business/dept and the changes across the business. Does that make sense?

DK: Yes

JF: You are not going to come back doing PIs, your coming back to do the task and activities that you were doing before you were covering someone's sickness period. Does that give you confidence and assurance you're not coming back to what you left doing?

DK: I am just worried that I will be stuck with just doing PIs, I have had discussions many times it just gets me worried.

JF: You are not going to be physically asked to go out and do PIs and ask the 75 questions etc, you will still be involved in the PIs doing your job, we can't bring you back into another position that don't currently have, it will be a phase return back internal PIs etc, follow up faults timing queries, spoke to TFL's, I will not be giving you 10-12 PIs to do a week, back doing your old role, as your back getting more confidence and working full time and getting your skills and knowledge back up that's when we can look at other options, at the moment there isn't anything I can move you into. [The claimant's amendments add: "There's no not getting away from coming back to the PI team I'm afraid. That's just not something that telent can do for you" with the claimant replying "I don't want to be anywhere near PIs".]

DK: When it comes to the knowledge when I get myself together I am very confident even when I was off sick people would call me when they didn't know I was off sick at the time and I helped them out a bit. When it comes to knowledge there is no problem, I have been doing this over 20 years. My only worry is that I will be stuck on PIs, which how I see I have moved back career wise, that is where my stress was coming from. I believe the job description is the same, my anxiety is that if I'm over there is there any technical support jobs that's what makes you keep your experience up. John knows there isn't much in PIs and I have seen it many times. Any new technology the comes up the software or upgrade you mess it up but the time you realise your PIs so surprises that I didn't know some of that stuff. This was making me feel that I was staying behind and I am not picking up anything.

JF: That is something we can talk about in the meeting, John has outlined the phase return plan with the tasks for you, just bring you

back to speed what is going on within the business. Looking at other roles, do you have access to Pulse?

DK: Yes I do

BP: Recruitment are now called Talent Acquisition, they put adverts for the job roles within Pulse, were you aware of it?

DK: No not really, I have discussed that with John

BP: Anybody who is employed within Telent can apply for any role which they think they have the right skillset for there are also recruiter's names and details on Pulse who ever you need to contact regarding the specific role, I'm not just talking about the dept you work in I am talking about across Telent, I am not sure what is on the re you can have a look if your see if there is a job out there let us know and we will get in contact with the right recruiter and they will help and support you in what we can do I the mean time.

…

JF: One thing I had noticed on the OH report that they have recommended that you come back at 50% on your 40 hour a week and do 20 hours, now my phase return I put together was based on you doing 2-3 hours a day only, we were no way getting you up to 20 hours a week purely because when I did put the plan together I didn't have the report until it got sent through to us and I am more than happy to stick with the plan I have pit in place which is little and often catching up with safety briefing, doing a bit of driving for a couple of hours and then stopping, reading emails etc and gradually build you up we got to do some site assessment stuff on you for sector 8 because you been off has gone. I set up the first site assessment in Croydon near to you, and I would do the inspection and that will be for the day.

JF describes the phase plan on the meeting in what tasks will be set through the weeks to gradually ease DK back into work. JF explained that its completely flexible and fluid document, if DK finds reading 10 IDS and toolbox alerts and can comfortably read 20 that is fine, nice easy pace DK can control keeping in touch with JF.

JF: You are also going to get paid once you get back into work I know when you were away getting respite and at home that was the key element was the financial aspect of it. The sooner you come back you will be getting paid by Telent. I know at the moment you are thinking about PIs and you hate it don't want to do it, you still will be having thoughts about your income. It's a steady programme if its less we can ramp it up or go straight into sector 8 assessment onsite

we can do, its entirely flexible to get back into work. However if its too much or overloaded having high blood pressure we can ease off. How does that sound?

DK: Ok, sounds good"

102. The meeting appears to end with an agreement to meet face-to-face at the Heathrow depot at 12:30.

103. The claimant submitted his resignation by email on 23 August 2022, saying:

"Please accept this letter as my formal resignation from the role of Systems Engineer at Telent Technology.

As per my employment contract I am giving a month's notice. My last day will be 24th September 2022.

My various experiences over the last few years have resulted in my illness. This has only worsened to the extent that I can no longer work at Telent without further exacerbating my ill health.

My GP, still has me signed off sick and as such, for any communications, I shall only be available via phone or email."

104. The claimant's witness statement concludes:

"Myself and the Respondent had welfare meetings during which there was a discussion about phased return to work. However, it was apparent to me that they want me to go back to the same role and duties that were causing my illness against the advice of their instructed Occupational Health Therapist. As a result of that together with the advice from my GP to reduce my stress level, I had no choice than to resign from the Respondent's employment on 23/08/2022."

C. THE LAW

Direct discrimination

105. Under s13(1) of the Equality Act 2010:

"A person (A) discriminates against another (B) if, because of [race]*, A treats B less favourably than A treats or would treat others."*

106. Section 23(1) provides that "*On a comparison of cases for the purposes of s13 … there must be no material difference between the circumstances relating to each case.*"

107. For both the claims of direct race discrimination and harassment the claimant has the benefit of the burden of proof provisions in s136 of the Equality Act 2010:

> *"(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."*

108. The position is accurately summarised in the claimant's closing submissions:

> *"The fact that a claimant has been treated less favourably than an actual or hypothetical comparator will therefore not be sufficient to establish that direct discrimination has occurred unless there is "something more" from which the court or tribunal can conclude that the difference in treatment was because of the claimant's protected characteristic (Madarassy v Nomura International plc [2007] IRLR 246 (CA)). However, if there are facts from which the Tribunal could conclude that discrimination occurred, the burden of proof shifts to the Respondent to provide an adequate non-discriminatory explanation for its actions."*

109. The Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37 at para 32 said:

> *"it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

110. We also accept the claimant's submission that:

> *"the discriminatory reason need not be the sole or even principal reason for A's actions; it only needs to have had a significant influence on the outcome. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause."*

111. In that submission, "significant" must be read as meaning "more than trivial".

Harassment

112. Section 26(1):

> *"(1) A person (A) harasses another (B) if:*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of:
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B ...

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

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

Time limits in discrimination claims

113. Time limits are dealt with under section 123 of the Equality Act 2010 as follows:

"(1) [discrimination claims] *may not be brought after the end of:*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable …

(3) For the purposes of this section:

(a) conduct extending over a period is to be treated as done at the end of the period,

(b) failure to do something is to be treated as occurring when the person in question decided on it.

114. It is agreed between the parties that any acts taking place before 13 December 2021 are brought outside the standard time limit, if treated as individual acts of discrimination.

Unfair constructive dismissal

115. Under section 95(1)(c) of the Employment Rights Act 1996 for the purposes of unfair dismissal law an employee will be considered to have been dismissed if "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*" That is known as a constructive dismissal.

116. Although the respondent is right in its closing submissions to say that the contractual term relied upon by the claimant has never previously been

specified, everyone has proceeded on the basis that the claimant's position was that the respondent's actions amounted to a repudiatory breach of the implied term of trust and confidence, and that is made clear in the claimant's closing submissions, possibly also with some supplemental reliance on "*an implied term that the employer will give an employee a reasonable opportunity to obtain redress in respect of a grievance …*" (WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516).

117. The claim includes a "last straw". This is addressed at para 4.91 of the IDS Handbook (Vol 3):

> *"The Court of Appeal in Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA, confirmed that, to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting the last straw does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer. As always, the test of whether the employee's trust and confidence has been undermined in this context is an objective one.*
>
> *Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it – Williams v Governing Body of Alderman Davies Church in Wales Primary School EAT 0108/19. The EAT considered that in such a case the final act is 'not a last straw in the legal sense at all'."*

118. As for "waiver" or "affirmation", we accept the following from Mr Foy's submissions:

> *"The general principle is that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance, or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, then they will have waived their right to accept the repudiation. Lord Denning put it this way in Western Excavating (ECC) Ltd v Sharp [1978] QB 761:*
>
> > *"The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.""*

119. As the claimant points out in closing submissions, a constructive dismissal is not necessarily unfair. However, it is not argued by the respondent in this case that, if there was a constructive dismissal, it was fair. The respondent's argument is that there was no constructive dismissal in the first place.

D. DISCUSSION AND CONCLUSIONS

Introduction

120. We will work through the individual acts of alleged less favourable treatment that the claimant complaints of. Setting aside the exact description of events, in general the matters complained of occurred. The more significant question (at least in terms of the discrimination claims) is whether any of them amounted to direct race discrimination or racial harassment.

121. There is nothing in any of this that specifically references or refers to the claimant's race, so if we are to find unlawful discrimination (or matters from which we could conclude that there had been unlawful discrimination) it will have to be on the basis of inferences. In his closing submissions Mr Foy helpfully collected the matters he relied upon as suggesting that the claimant had been subject to unlawful discrimination. The primary points made were:

    a. Different treatment to the two other systems engineers.

    b. Different treatment to Mr Lincoln.

    c. Different treatment to Mr Miller.

    d. Mr Lincoln's reference to "I enjoy slagging people off, *especially you*" (Mr Foy's emphasis).

    e. "*wholesale failure to follow internal policies and to spring meetings on the Claimant without notice and to fail to consider any adjustments to his role after a long sickness absence*"

122. We will consider this alongside the individual allegations of discrimination and as a whole. We will take as headings the individual allegations in the list of issues. We will refer to the related allegations of direct race discrimination and harassment together. While they have a separate legal basis it we did not see any grounds on which we could find that something that was not direct race discrimination was nevertheless racial harassment, or vice versa.

The discrimination allegations

3(a) the Claimant was not given the level of responsibility or variety of higher-level technical work compared to Mr Duffy and Mr Dancer throughout his employment. In particular, the Claimant was made to do an excessive number of periodic inspections. (see also para 5(d) in respect of harassment)

123. This allegation is essentially true – the claimant was not given the level of responsibility or variety of higher-level technical work compared to Mr Duffy and Mr Dancer. However, as we have found in our fact-finding, the reason for this was not the difference in race but it was that the claimant was on the preventative maintenance team and his comparators were on the corrective maintenance team.

124. Ms Hosking is correct to say in her closing submissions that:

> *"Dancer … and … Duffy are not valid comparators for the purposes of a direct discrimination claim. They were systems engineers in the corrective maintenance team and not, like C, in the preventative maintenance team; their work was assigned by Mr Johnson, whereas C's work was assigned by Mr Fisher. C accepted in oral evidence that they had different areas of responsibility from him and that their team did not do PIs …"*

3(b) the Claimant's absence investigation arising from his absence from 6 July 2021 to 13 July 2021 was not progressed in a timely manner, as required by the Respondent's internal policy

125. The claimant was off sick from 6-13 July 2021. There was no meeting concerning this until the end of September.

126. It is not entirely clear what provision of the respondent's internal policy the claimant is relying on. Perhaps it is para 5 of the "Absence Policy and Procedure", which refers to return to work interviews in the following manner:

> *"On the day an employee returns to work following any period of absence, it is recommended the line manager arranges a return to work interview with the employee and completes the return to work form on the Managers Page on HR.net. This meeting or call will discuss the employee's period of absence and ensure that they are well and sufficiently fit to return to work in their role. The line manager will discuss any concerns that they have regarding the employee's absence record, advise them of any trigger levels that they may have reached and agree any actions to be taken."*

127. The respondent's closing submissions on this point say:

> *"C and Mr Fisher both had absences covering most of August and September 2021. It was therefore put to C in cross-examination that the delay in the absence investigation was not because of his race, and he replied, "No, I don't think it was." R therefore assumes this allegation has been withdrawn."*

128. It is clear from the claimant's closing submissions that the allegation is not withdrawn, but the respondent's reference to the claimant saying that he did not think this delay was race discrimination is correct. That allegation cannot go any further as an allegation of race discrimination.

129. We also note that while it may be possible to argue that a delay in such a procedure is less favourable treatment, the overall outcome of this delayed process was favourable to the claimant. As discussed in our findings of fact, Mr Fisher was less strict with the claimant on his absences than he could have been.

3(c) – 3(i) – the 13 August 2021 meeting (and 5(a), (e), (f)(i) and (g)(i)))

130. These allegations concern setting up of the 13 August 2021 meeting, the meeting itself and follow-up (or lack of follow-up) for that meeting.

131. The prompt for this meeting was that Mr Fisher had been notified by TfL of two PIs carried out by the claimant where TfL audits suggested the claimant had failed to correctly carry out RLM tests. The audits suggested that the claimant had taken shortcuts on the RLM tests.

132. It appears to us that this would have been a significant cause for concern. As the claimant himself emphasised, he was an experienced engineer for whom PIs and the tests that go with there were mundane and presented no technical challenges or difficulties, yet within a short period of time he seemed to have been caught out twice using shortcuts on essential safety checks. It seems to us that having this discovered only by the client's own audits would have put Mr Fisher in a difficult position, and we have previously found that Mr Fisher's view that "*Given David's experience and expertise, he should not have been failing PIs so I wanted to speak to him to understand what had happened*" was "*an entirely reasonable response*".

133. It is correct to say that the claimant was invited to an investigation meeting on 13 August 2021 and was not given any advance warning of that meeting. The reference to "*preparing an excuse*" appears to be a mistaken reference to a later meeting. The position in relation to not responding to requests for clarification of the meeting is unclear. The claimant says "*All attempts to find out the meeting objectives from JF prior to the meeting were fruitless. No response to calls or text messages.*" We accept in principle that the claimant did try to contact Mr Fisher but that he did not respond. Whether Mr Fisher knew that the claimant was trying to contact him or saw or received any of those messages prior to the meeting has not been established.

134. The claimant's description of the RLM problem as being "*a common technical issue*" seems disingenuous. Taking shortcuts in essential safety checks can hardly be described that way. In his closing submission Mr Foy concentrates on the second aspect of this allegation – "*for which no other employee has been invited to a formal meeting*". By the end of the hearing the position was that the respondent had produced evidence concerning a white employee who had been invited to a formal meeting about RLM failures, but not just about RLM failures. It is correct to say that there was no evidence of another employee having been invited to a formal meeting concerning only RLM failures but it is equally correct to say that no-one had identified any other employee who had

only RLM failures and so could be invited to a formal meeting to discuss them. An allegation that "*no other employee has been invited to a formal meeting*" somewhat falls away when there is no other identifiable employee who could have been invited to a formal meeting to discus only RLM failures.

135. There is also the question of Mr Lincoln as a comparator for this. The claimant says that he (Mr Lincoln) committed misconduct in his actions towards him (the claimant) on the day of the commissioning work, yet he was not subject to any formal investigation.

136. The circumstances that applied in Mr Lincoln's case were not the same as in the claimant's. Mr Lincoln had not been reported as taking short-cuts in RLM tests. We will come on to the question of how Mr Lincoln was treated, but he was not in materially the same circumstances as the claimant, and even if he were to be considered to be in materially the same circumstances there is not the "something more" from which we could conclude that the treatment of the claimant amounted to unlawful race discrimination or racial harassment.

137. The question of "inaccurate notes" of the meeting is not addressed by the claimant in his closing submissions. As Ms Hosking says for the respondent, notes were prepared and sent to the claimant by the HR advisor who accompanied Mr Fisher at the meeting. While the claimant subsequently complained they were inaccurate he has never made any corrections nor pointed out in what way he thought they were wrong.

138. The HR advisor who was present at the meeting prepared an outcome letter dated 16 September 2021 saying:

> *"Following the investigation meeting held on 13th August 2021, we are pleased to confirm that no further action is being taken and would like to thank you for your co-operation in bringing this issue to a close.*
>
> *Although we have taken no further action, we would like to remind you that any further breaches may lead to an investigation or disciplinary action."*

139. The claimant says that he never received this letter, and the respondent is not in any position to contradict it. Equally the claimant is in no position to say that the letter was not prepared and sent. What is clear is that the claimant was at least told over the telephone that the investigation was not continuing.

140. We have found the claimant's position in relation to this meeting somewhat difficult to understand. It is clearly the case that the claimant found being challenged on the RLM test failures difficult and stressful. It would not be easy for someone who prided themselves on their technical ability to be confronted with what appeared to be such a basic failure. Yet the respondent had to do something to follow up on the matter and as we have previously stated Mr Fisher went about this in what appears to be the least formal and least dramatic way possible. Much of the claimant's challenge to this was on the basis that it

had not been conducted in an appropriately formal manner, but it is difficult to see how enhanced formality would have limited the stress caused to the claimant or done anything to make the position any better. Our overall impression with this is that the claimant was treated sensibly and well in this process by Mr Fisher, and we do not see anything in this that suggests race discrimination or racial harassment.

3(j)-(l) – commissioning work (and 5(b) and (i))

141. If it is difficult to understand the claimant's objections to the meeting on 13 August 2021 it is not at all difficult to understand his case on the commissioning work. In particular, the central allegation that "*on 13 October 2021, Mr Lincoln made a number of derogatory and disparaging comments about the claimant in front of the client*" is true, and as Ms Hosking correctly accepts in her closing submissions "[the claimant] *would reasonably have found them hostile, offensive and humiliating*". It is also true that "*on or before 18 October 2021 the claimant was removed from all future commissioning works*".

142. Our findings of fact set out how matters came to a head on 13 October 2021. Mr Lincoln adopted a casual approach to inducting the claimant on the commissioning work, and for his part the claimant took no initiative in ensuring that he was prepared for the commissioning work. The inevitable outcome of those two approaches was that the claimant was not properly set up for the commissioning work and Mr Lincoln was embarrassed in front of the respondent's client. Mr Lincoln did not acknowledge his own contribution to the problem, and he took out his frustrations on the claimant, who was blamed for a failure that was, on our findings, as much due to fault on Mr Lincoln's part as it was the claimant's. Both the derogatory and disparaging comments on the day and the claimant's subsequent removal from the commissioning work have the same ostensible cause – Mr Lincoln blaming the claimant for matters which were as much Mr Lincoln's fault as they were the claimant's. The claimant put it correctly in his email of 18 October 2021: "*my work colleague found it convenient to find me to blame*".

143. What we have to consider is whether the claimant's race was part of the cause of his treatment by Mr Lincoln or whether (for the harassment claims) his treatment by Mr Lincoln was "*conduct related to a relevant protected characteristic*". Was this simply a case of Mr Lincoln treating a subordinate badly, or was part of the reason the claimant's race?

144. There is no actual comparator for this. There is no-one of a different race who found themselves in the same circumstances and was or was not treated equally badly by Mr Lincoln.

145. In his closing submissions Mr Foy says "*WL's abuse of the Claimant in front of the client in a public place is extreme. The motivation for the treatment is also demonstrated by the words used by WL. The Claimant is singled out. WL accepted that he might have said, "I enjoy slagging people off, especially you*.".

146. If this is relied upon as indicating race discrimination (or harassment) the problem is that it ends up being circular. Any such argument would be that the very fact of the incident relied upon (which has no ostensible connection with the claimant's race) is itself material from which we could conclude that there has been race discrimination (or harassment). That seems to be precluded by cases such as Madarassy. "Especially you" is clearly a reference to the claimant, but we do see any basis on which to read it as anything more than that. Mr Lincoln is referring to the claimant himself, and not to the claimant's race.

147. While not condoning Mr Lincoln's behaviour, we do not see anything in this incident from which we could conclude that Mr Lincoln's behaviour was an act of race discrimination or harassment, or that there was more to this than simply a falling out between two work colleagues.

3(m), (o) & (p) – the grievance of 18 October 2021 and the meeting of 9 November 2021 (and 5(c), (f)(ii), g(ii) & (iii) & (h))

148. Regarding the follow up to this incident, the claimant complains that "*the … grievance sent on 18 October 2021 was not progressed in accordance with the Respondent's Grievance Policy and Procedure*" and "*the respondent failed to investigate or deal with the claimant's grievance sent on 18 October 2021*".

149. The respondent's grievance policy says:

> *"The formal grievance procedure should not be invoked unless the employee has attempted to resolve the matter informally with his/her line manager unless:*
>
> *The issue relates to the line manager;*
>
> *The issue is of a sensitive nature; or*
>
> *The issue is extremely serious.*
>
> *Typically, at the informal step, the manager and employee should resolve the issue …*
>
> *When the grievance cannot be resolved informally, it should be dealt with under the formal Grievance Procedure."*

150. It appears has a separate grievance procedure, distinct from the "grievance policy" which is not in the tribunal bundle. Certainly the grievance policy itself is surprisingly brief.

151. Mr Foy says:

> *"The Respondent accepts that the "mediation meeting" was the only action taken in respect of the Claimant's grievance. The Respondent accepts that*

WL was not subjected to any disciplinary action. There was therefore no investigation and no effective action taken.

This is despite the Respondent's disciplinary policy stating that harassment, bullying, discrimination or rudeness will normally lead to disciplinary action being taken."

152. Ms Hosking says:

"C believed that the email he sent on 18 October 2021 was raising a formal grievance … However, he did not say so, and under the policy his managers had to make a decision about how to handle it. Ms Manning explained that they are a small unit and she was trying to encourage more working across teams, which meant that it was very important to try to mend the relationship between C and Mr Lincoln. She decided to attempt an informal resolution and arranged a meeting with them on 9 November 2021. She said that if the apology had not been accepted it would have led to the next stage.

That was consistent with the policy, which in these circumstances only requires the formal procedure to be invoked if the issue is of a sensitive nature or is extremely serious ..."

153. She is correct to say that at the time the claimant never identified this email as being a grievance raised under the grievance policy.

154. Insofar as the allegations here are of not dealing with the complaint under the grievance policy (or procedure) they cannot succeed. The claimant has not identified any element of the grievance policy (or procedure) that was not followed, except for a delay in the hearing, which was not part of his closing arguments. The grievance policy provides for "informal resolution", which was what the respondent was attempting.

155. The claimant's complaints in respect of this go further than simply matters of form. Whether this was or was not a meeting under the grievance procedure or policy the claimant's wider criticism is that (i) no disciplinary action was taken against Mr Lincoln – his "apology" alone appeared to be considered sufficient by the respondent, (ii) the focus of the meeting became failures or alleged failures on the part of the claimant, not Mr Lincoln, and (iii) there was never any formal outcome of the meeting recorded. In broader terms the claimant contrasts the "mediation meeting" with previous investigatory meetings involving him, noting the absence of any HR representation and that no notes were taken of the mediation meeting. We note that it is Ms Manning's behaviour in the meeting, rather than Mr Fisher's, that the claimant particularly objects to.

156. There is a dispute about whether the claimant was presented with a job description at this meeting or at a later meeting. We do not consider it necessary to resolve that dispute.

157. All parties agree that a form of apology was offered by Mr Lincoln, who accepted that he had behaved wrongly.

158. All parties also agree that on Mr Lincoln's departure, discussion moved on to the claimant's role in the commissioning debacle. It is also agreed that there was no formal outcome of the meeting, nor was there ever any formal disciplinary action taken against Mr Lincoln.

159. It is not surprising, then, that the claimant later objected to the meeting and process adopted by the respondent. What he thought had been a meeting to address his complaint against Mr Lincoln became, after Mr Lincoln's apology, an enquiry into his part in the commissioning problems, and involved criticism of his behaviour.

160. We will consider this as part of our overall conclusions on discrimination, but looking at this in isolation there remains, even accepting a difference in treatment of the claimant and Mr Lincoln, nothing more from which we could conclude that the reason for this was the claimant's race.

3(n) - Mr Fisher instructed Mr Miller, a more junior employee, to audit the Claimant's site on 2 November 2021 (and 5(j)).

161. It is accepted by the respondent that this happened – Mr Miller was asked to audit a site worked on by the claimant on 2 November 2021.

162. Ms Hosking says in her closing submissions:

> *"Mr Miller was on a phased return to work following back surgery and an extended absence, and was doing internal audits of randomly selected PIs as part of his alternative duties. He therefore audited the work of the whole team, and C accepted in oral evidence that that included PIs conducted by Mr Fisher.*
>
> *When it was put to C that Mr Miller was also auditing Mr Fisher's work, so C wasn't being singled out, he said "I was not on that particular incident. I was singled out as in made to do lower jobs … I've gone back to do PIs and he's gone to do audits, so I've been singled out."*
>
> *R assumes the allegation that Mr Miller was sent to audit C's work because C is black is therefore withdrawn."*

163. Ms Hosking is correct to say that the claimant accepted that Mr Miller was also auditing Mr Fisher's work, and also that on further exploration the claimant said that the difficulty he was complaining about was not that on the basis of race Mr Miller had been asked to audit the claimant's work, but that more generally Mr Miller was doing audits on his return whereas the claimant remained on PIs. While it is clear from the claimant's submissions that this allegation is not withdrawn, it is also clear that on his evidence the allegation cannot succeed.

The fact that Mr Miller was auditing the claimant's work on that day was not because of or for a reason relating to the claimant's race.

3(s) – Mr Fisher relaced the claimant with Mr Miller in relation to the MAG training opportunity in November 2021 (and 5(k))

164. It is correct to say that Mr Miller took the Mag training appointment that Mr Fisher had promised to the claimant.

165. Ms Hosking explains the situation in this way:

> *"It appears there was a miscommunication between Mr Fisher and Mr Johnson as to which Dave/David was supposed to be doing it, and when the miscommunication became clear Mr Fisher did not correct it but allowed Mr Miller to do the training instead of C. He arranged for C to do the training on another date, but he could not explain why he had not corrected the error when it arose."*

166. Mr Fisher did arrange substitute training for the claimant in January 2022.

167. There is nothing in this from which we could concluded that the treatment of the claimant in this respect was because of or related to his race.

3(q) & (r) – the new commissioning role (and 5(l))

168. The first allegation is "*the Claimant was not approached about taking over Mr Moore's commissioning role*". It is correct to say that the claimant was not approached about taking over the commission role, or at least not prior to 13 December 2021, which is the final date in respect of this allegation. The related allegation in respect of harassment is set out slightly differently: "*excluding the Claimant from the interview process for Mr Moore's commissioning role*". That form of allegation cannot succeed as the claimant was never "*excluded*" from the interview process.

169. On the question of whether this is race discrimination, the claimant faces the somewhat difficult problem that someone he acknowledges was black was approached about taking the commissioning role. The claimant describes this as being a "tick box" exercise involving someone who was never going to be suitable for the job. We think the argument is that this person was invited to an interview for a job they were completely unsuited to in order to provide a defence to any later race discrimination claim that the claimant may bring.

170. The difficulty with that is that as far as we can tell this occurred before the claimant had ever raised any allegation of race discrimination. It is unclear when the claimant did first raise an allegation of race discrimination, but it does not seem to have been before consulting lawyers in December 2021. On that basis we do not see how the respondent can be said to have thought that such a claim would have been brought, and we reject the claimant's position that the

invitation of another black employee to an interview was simply a cover to create a false defence to a later racial discrimination claim that may be brought by the claimant.

171. The other allegation is that "*Mr Lincoln engineered the interview process for the commissioning role so that he could recruit his friend by excluding the Claimant and only interviewing internally those employees with insufficient experience*".

172. The respondent says "*Nobody was appointed to the commissioning role, despite two rounds of interviews, so Mr Lincoln did not engineer the recruitment of his friend.*"

173. That is essentially true. Mr Lincoln did not engineer the interview process so that he could recruit his friend. His friend was never recruited to the job. Even if Mr Lincoln had favoured a friend in this process, that would be discriminating against the claimant on the basis that he was not a friend of Mr Lincoln's, not on the basis of his race.

3(t) – failing to consider any amendments to the claimant's role in the light of the Occupational Health report dated 23 July 2022 (and (g)(iv))

174. It is quite difficult to know what to make of this allegation. It presupposes that the occupational health letter required or recommended amendments to the claimant's role. In his closing submissions Mr Foy relies on the following extract from the occupational health letter:

> *"In principle, this gentleman is fit to return to work. However, it does appear that he perceives a problem with his current role and would like to be moved to a role that is more appropriate to his skills and level of experience. I would therefore recommend that Management plan to meet with him in order to discuss this, with a support person of his choice present. If agreement can be reached and an appropriate role identified, I would recommend a phased return to work, starting with 50% of his contracted hours and building up gradually over the first four weeks of his return to work."*

175. The recommendation, then, is that management "*plan to meet with him … to discuss* [a move to a role that is more appropriate to his skills and level of experience]." In principle this suggests a move to a new role, not "*amendments to the claimant's role*". Perhaps these are the same thing, but it is not straightforward to understand what occupational health were suggesting.

176. There was a meeting. It did not discuss a move to a new role. It did seem to suggest variations to the role the claimant had previously been undertaking, with Mr Fisher talking about being technical support for the team but "*you are not going to be physically asked to go out and do PIs and ask the 75 questions etc.*". The claimant would retain his old role but with a variation in his duties so that he would not be doing PIs.

177. So the respondent did consider amendments to the claimant's role in that meeting and this allegation is not made out. It did not consider an entirely new role for the claimant, but that goes beyond the scope of the allegation made.

Conclusions on discrimination

178. We have found that none of the individual allegations of discrimination involve circumstances from which would could, individually, conclude that the claimant's treatment was because of his race or related to his race, but that is not the end of the matter.

179. The claimant's case has always been broader than that. Mr Foy says in his closing submissions:

> *"This is a case of insidious treatment. The tribunal is urged to step back and consider the evidence as a whole. The discrimination and harassment are borne out by the evidence. It may be gradual. It may be subtle. But it is there.*
>
> *The claimant was pushed down by what he called the "institution" because he was "different". He was different because he was black. In short, the claimant's case is apparent from the duration of his complaints, the futility of his complaints and the absence of credible explanation for his treatment."*

180. And he reminds us of the claimant's oral evidence:

> *"As to race, sometimes it is not what is said but what is done, also not an individual but a collective, I see it as an institutional situation, where things that are done in terms of promotions and that filters down to what people do, things that are done compared to other engineers in the same category, we are systems engineers at the same level, we have two teams but I want to clarify that there is a crossing between the two sections, people from my team can move into the other team, Pamula Manning says we have to allocate jobs to different departments, it is unfortunate that the audio was not listened to as you could hear me begging that I was being kept in this position, Pamula Manning said that because of the workload I could not move out of PIs, why is it me who is doing that work? Why can't they move across? It is way below my expertise which they all agree, I have literally begged, I am not doing it for money, I am losing my experience, people are being recruited, I have been talking about this from even before 2020, the other engineers are white, we have got a black guy there who can still do the cleaning, very hard to fight an institution, it is hard to prove, they are well aware, everyone is trained on equality and diversity, respondent only put in 10/15% of the bundle, 80% of the documents here I supplied, but getting them wasn't easy."*

181. So we must step back and consider everything we have seen and heard to avoid an undue focus on individual matters of detail. Having done so, what is

the picture. Are there matters from which we could conclude that there has been unlawful racial discrimination or unlawful racial harassment? What is the position when we look at matters on a "collective" or "institutional" level?

182. The claimant's complaints are almost entirely in respect of the actions of three individuals – John Fisher, Wesley Lincoln and Pamula Manning.

183. As we have previously mentioned, while the claimant is not satisfied with his treatment by John Fisher it appears to us that in many ways John Fisher treated the claimant quite well. He took no action on absence or the RLM failures, when action would have been warranted. He did not escalate the claimant's sickness absence, when he would have been justified in doing so. We have seen later that he intervened on the claimant's behalf to extend the deadline for recruitment to the commissioning role the claimant wanted. When the claimant objected to having to do PIs or to them being audited by people he saw as junior, Mr Fisher pointed out that he also had to do PIs and be audited by the same people. We do not see in Mr Fisher's behaviour any mistreatment of the claimant or any mistreatment on racial grounds.

184. Wesley Lincoln clashed with the claimant, and we have criticised his behaviour towards the claimant. We have also criticised Ms Manning's handling of the subsequent "mediation meeting", but even looking that we find that there is nothing from which we could conclude that the treatment of the claimant was on racial grounds or because of his race, particularly in circumstances where we have found that Mr Lincoln subsequently seems to have made efforts to encourage a black employee to apply for the disputed role.

185. We have referred in our earlier conclusions to the claimant's comparison of himself to the other systems engineers and Mr Lincoln. The different treatment to Mr Miller appears to be in respect of the Mag training, and we have addressed that. Mr Lincoln's "*especially you*" comment appears to be something directed at the claimant as an individual, and not in relation to his race.

186. The final element is *"wholesale failure to follow internal policies and to spring meetings on the Claimant without notice and to fail to consider any adjustments to his role after a long sickness absence"*. This brings together various criticisms made by the claimant, but we do not think it is an accurate description of events. As we have found, adjustments to his role were considered after his sickness absence – that is, removal of a requirement to carry out PIs. The only meeting that could have been said to be sprung on the claimant without notice was the investigation meeting for the RLM failures. The "wholesale failure to following internal policies" seems to relate to the delayed absence meeting (ultimately resolved to the claimant's advantage) and the "mediation meeting". Two failures over a period of just over a year can hardly be regarded as "wholesale failure".

187. Taking all of that together, we do not find material from which we could conclude that the claimant's treatment was a matter of direct race discrimination or racial harassment. The claimant's discrimination claims are dismissed.

188. In view of our findings on whether these are acts of discrimination it is not necessary for us to consider any question of time limits.

Constructive dismissal

189. The claimant's constructive dismissal case concerns a series of matters that are said collectively to amount to a breach of the duty of trust and confidence (and/or the duty in respect of grievances), culminating in a "last straw".

190. The list of issues puts it this way:

> *"10. Did the following conduct happen?*
>
> *a) the factual allegations at paragraphs 3 and 5 above (whether or not motivated by the Claimant's race);*
>
> *b) the meeting on 8 August 22, in which the Claimant says there was a failure to consider any amendments to his role in light of the Occupational Health report dated 23 July 2022, and in which he says he was subjected to a dismissive attitude notwithstanding his lengthy sickness absence. This is relied on as the final straw.*
>
> *11. If so, did the conduct taken together or singly amount to a repudiatory breach of the contract of employment?*
>
> *12. If so, did the Claimant resign in response to any such breach?*
>
> *13. If so, did the Claimant resign sufficiently promptly so as not to have affirmed the continuation of the contract?"*

191. In closing submissions Mr Foy says that the "*last straw … can be considered a fundamental breach of contract in itself*".

192. We have previously found the incidents relied upon as constituting a fundamental breach of contract are not incidents of direct race discrimination or racial harassment, but, of course, that finding says nothing about whether they may amount to a repudiatory breach of contract.

The last straw

193. Giving our description of what occurred in that final meeting it is clear that there are some problems with regarding what was said or done there as a fundamental breach of contract or a last straw.

194. In the first place, encouragement to an employee to return to their job seems to be almost the opposite to a repudiatory breach of contract. The employer is encouraging the employee to return to work, rather than "*demonstrate*[ing] *objectively by its behaviour that it is abandoning and altogether refusing to perform the contract*" (Tullett Prebon plc v BGC Brokers LP [2011] IRLR 420).

195. No doubt there will be circumstances in which an apparent invitation to return to work could be considered a fundamental breach of contract, but those circumstances do not arise in this case. While the claimant has emphasised some of his medical difficulties there is no suggestion in his claim that he is disabled and requires another job or variations to his job as a reasonable adjustment.

196. The main point that emerges from the notes is that the claimant did not want to carry out PIs and the respondent told him that he would not be carrying out PIs on his return to work. As Ms Hosking says in her closing submissions "*However, C made clear in his oral evidence that he did not believe the reassurances from Ms Pankhania and Mr Fisher and described them as dismissive.*" Our notes of the claimant's oral evidence say that he was concerned not so much about what was said in that meeting as about its tone, although there was no description from him of what he objected to in the tone.

197. The claimant is in some difficulty on this point. The respondent was saying the right things, but (in his view) not in the right way and he did not believe them. This appears to bring us within the circumstances contemplated by the IDS Handbook: "*An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his or her trust and confidence in the employer.*"

198. This "last straw" is not only not itself a breach of contract, but it cannot contribute anything to a breach of the implied term of trust and confidence. It is "*entirely innocuous*".

199. That is not the end of the matter. The IDS Handbook reminds us that "*Where the act that tips the employee into resigning is entirely innocuous, a constructive dismissal claim will still succeed, provided that there was earlier conduct amounting to a fundamental breach, that breach has not been affirmed and the employee resigned at least partly in response to it.*"

200. We consider that on the facts of his case there is earlier conduct amounting to a fundamental breach of the duty of trust and confidence. This is the behaviour of Mr Lincoln towards the claimant on the day of the failed commissioning work, taken either on its own or together with the respondent's conduct of the "mediation meeting". We have described our findings above, and consider that this amounts to a breach of the implied duty of trust and confidence. In those circumstances it is not necessary to consider separately whether it is also a breach of an implied term in relation to grievances.

201. What remains is whether that earlier breach of contract has been affirmed, or waived.

202. The damage occasioned by Mr Lincoln's comments and the "mediation meeting" had occurred by mid-November 2023. In his witness statement, the claimant described the Mag training incident (rather than the return to work meeting) as being the "last straw". That occurred in late November and early December. The Mag training was due to take place on 2 December. We do not consider the Mag training to amount to or add to a breach of the duty of trust and confidence.

203. The claimant's witness evidence is instructive on this point. As cited above, in his witness statement the claimant describes the Mag training as being "*the last straw … I started to think I would never get anywhere so I had no choice but to leave*". He continues "*Yet I didn't want to go. I liked the work, if they would let me do it and progress. I had colleagues I got on with and most were my good friends.*" As we know, he did not ultimately resign until late August 2022, almost nine months later.

204. Although not using legal language, it seems to us that in that section of his witness statement the claimant has clearly demonstrated the legal doctrine of waiver or affirmation of a repudiatory breach of contract. He says that there was a last straw and "*I had no choice but to leave*". We place the "*last straw*" a little earlier than the claimant does, and frame the points somewhat differently. We find that the repudiatory breach of contract was the actions of Mr Lincoln on the day of the commission and the respondent's subsequent "mediation meeting", but the analysis on this point is the same if we take the claimant's point that the Mag training was the last straw.

205. However, despite considering that "*I had no choice but to leave*" the claimant says "*I didn't want to go*". He explains why. There were clearly reasons why he wanted to stay. This is a classical expression of the dilemma that arises on a fundamental breach of contract. Does the employee resign and thereby accept the fundamental breach of contract, or do they continue to remain employed and thereby either waive the breach or affirm the contract? It is clear that in this situation the claimant took the latter choice. He remained at work for another eight or nine months. That is a clear waiver or affirmation of the breach of contract.

206. In this case there was no subsequent further breach or last straw that the claimant could rely on for the purposes of his constructive dismissal claim. He waived or affirmed the fundamental breach of contract, and nothing occurred in the subsequent eight or nine months that was itself a fundamental breach of contract or revived the previous breach of contract. In those circumstances his resignation did not amount to a constructive dismissal, and his claim of unfair constructive dismissal is dismissed.

FINAL MATTERS

207. At the conclusion of this hearing we listed a provisional remedy hearing for 24 October 2024. Given our findings this will not proceed as a remedy hearing, but there remains an outstanding application for costs that may be considered then, and we will prepare a separate order to address that.

Employment Judge Anstis
Date: 6 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 12 August 2024

FOR EMPLOYMENT TRIBUNALS

APPENDIX – LIST OF ISSUES

Direct race discrimination

1. The Claimant identifies as black.

2. The Claimant relies on Mr Paul Duffy, Mr Andy Dancer, Mr Wesley Lincoln and Mr Dave Miller as comparators and/or on a hypothetical comparator.

3. Did the Respondent treat the Claimant less favourably than a relevant comparator?

   The Claimant relies on the following alleged treatment:

   a) the Claimant was not given the level of responsibility or variety of higher-level technical work compared to Mr Duffy and Mr Dancer throughout his employment. In particular, the Claimant was made to do an excessive number of periodic inspections;

   b) the Claimant's absence investigation arising from his absence from 6 July 2021 to 13 July 2021 was not progressed in a timely manner, as required by the Respondent's internal policy;

   c) the Claimant was required to attend an "investigation meeting" on 13 August 2021;

   d) the Claimant was not given any advance warning of the "investigation meeting" on 13 August 2021;

   e) Mr Fisher did not respond to the Claimant's requests for clarification of the meeting on 13 August 2021;

   f) Mr Fisher told the Claimant that he was not given any advance warning because he did not want the Claimant to "prepare an excuse", at the meeting on 13 August 2021;

   g) the subject of the "investigation meeting" on 13 August 2021 was merely a common technical issue, for which no other employee has been invited to a formal meeting;

   h) the Claimant was sent inaccurate notes of the "investigation meeting" on 13 August 2021 and no reply was made in response to his comments;

   i) the Claimant has not received any formal confirmation that the investigation relating to the meeting on 13 August 2021 has been discontinued, despite Mr Fisher stating that he would receive an outcome letter;

   j) on 13 October 2021, Mr Lincoln made a number of derogatory and disparaging comments about the Claimant in front of the client;

   k) on or before 18 October 2021 the Claimant was removed from all future commissioning works;

   l) the Claimant was not given any explanation for his removal until 1 November 2021;

m) the Claimant's grievance sent on 18 October 2021 was not progressed in accordance with the Respondent's Grievance Policy and Procedure;

n) Mr Fisher instructed Mr Miller, a more junior employee, to audit the Claimant's site on 2 November 2021;

o) the Respondent failed to investigate or deal with the Claimant's grievance sent on 18 October 2021;

p) the Claimant was unfairly interrogated and criticised during the meeting on 9 November 2021;

q) the Claimant was not approached about taking over Mr Moore's commissioning role, this should have happened between October 2021 (when the role was advertised) and 13 December 2021 (when HR confirmed that the Respondent was no longer interviewing);

r) Mr Lincoln engineered the interview process for the commissioning role so that he could recruit his friend by excluding the Claimant and only interviewing internally those employees with insufficient experience; and

s) Mr Fisher replaced the Claimant with Mr Miller in relation to the MAG training opportunity in November 2021.

t) failing to consider any amendments to the Claimant's role in light of the Occupational Health report dated 23 July 2022.

4. If so, was the treatment because of the Claimant's race?

Harassment

5. Did the Respondent engage in the following conduct?

a) Mr Fisher told the Claimant that he was given no advance warning of the "investigation meeting" on 13 August 2021 because he did not want the Claimant to "prepare an excuse", at the meeting on 13 August 2021;

b) the derogatory comments made by Mr Lincoln in front of the client on 13 October 2021;

c) the unfair criticisms made of the Claimant during the meeting on 9 November 2021;

d) allocating a greater level of responsibility and variety of higher-level technical work to Mr Duffy and Mr Dancer throughout his employment. In particular, the Claimant was made to do an excessive number of periodic inspections];

e) inviting the Claimant to an "investigation meeting" on 13 August 2021 over a minor technical issue;

f) failing to deal with his concerns in a timely manner, including:

i) his request for a formal outcome letter in relation to the investigation meeting on 13 August 2021; and

ii) his grievance submitted on 18 October 2021;

g) failing to adhere to internal policies, including:

i) failing to follow the informal or formal disciplinary procedure for the investigation meeting on 13 August 2021;

ii) failing to follow the grievance policy and procedure for the Claimant's grievance made on 18 October 2021;

iii) failing to follow the disciplinary policy by not investigating or sanctioning Wesley Lincoln after the incident on 13 October 2021; and

iv) failing to follow the absence policy by failing to consider any amendments to the Claimant's role in light of the Occupational Health report dated 23 July 2022.

h) failing to investigate or otherwise deal with his grievance sent on 18 October 2021;

i) on or before 18 October 2021, removing the Claimant from future commissioning works;

j) instructing Mr Miller to audit the Claimant's site on 2 November 2021;

k) instructing Mr Miller to attend MAG training in place of the Claimant in November 2021; and

l) excluding the Claimant from the interview process for Mr Moore's commissioning role, this should have happened between October 2021 (when the role was advertised) and 13 December 2021 (when HR confirmed that the Respondent was no longer interviewing)..

6. Was it unwanted conduct?

7. Was it related to the Claimant's race?

8. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

9. If not, did it have that effect?

The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Constructive unfair dismissal

10. Did the following conduct happen?

a) the factual allegations at paragraphs 3 and 5 above (whether or not motivated by the Claimant's race);

b) the meeting on 8 August 22, in which the Claimant says there was a failure to consider any amendments to his role in light of the Occupational Health report dated 23 July 2022, and in which he says he was subjected to a dismissive attitude notwithstanding his lengthy sickness absence. This is relied on as the final straw.

11. If so, did the conduct taken together or singly amount to a repudiatory breach of the contract of employment?

12. If so, did the Claimant resign in response to any such breach?

13. If so, did the Claimant resign sufficiently promptly so as not to have affirmed the continuation of the contract?

14. If there was a constructive dismissal, was it in response to discriminatory acts so as to render the dismissal discriminatory?

Time limits

The Claimant contacted Acas on 15 December 2021. The Acas certificate was issued on 25 January 2022. The claim was issued on 12 April 2022.

15. Is the Claimant's discrimination and harassment claim within the 3-month time limit? The Claimant relies on a course of conduct extending to at least 13 December 2021.

16. If not, should there be a just and equitable extension of the time limit?