EMPLOYMENT TRIBUNALS

Claimant: Mr C Gill

Respondent: Mr K Priddle, Mr M Sheen, Mr A Taylor, Mr N Thomas, Mr J Knight, Mr Z Rahman and Mr J Rogers (as Trustees of YMCA Port Talbot)

Heard at: Cardiff, by video 8, 9, 10 and 11 April 2024 and the Tribunal panel in chambers on 2 July 2024

Before: Employment Judge R Harfield
Mr P Collier
Mrs J Beard

Representation
Claimant: Mr Gill represented himself as a litigant in person
Respondent: Mr Rogers (8 and 9 April), Mr Bennison (10 and 11 April)

RESERVED JUDGMENT

The Claimant's complaints of direct race discrimination, harassment related to race and victimisation are not well founded and are dismissed.

REASONS

Introduction

1. The Claimant presented his ET1 claim form on 26 July 2023. There were appended particulars of claim, drafted by the Claimant's then solicitors. The Respondent filed an ET3 response form denying the claims. A case management hearing took place before Employment Judge Jenkins on 29 November 2023, where he clarified the complaints and produced a list of issues for the Tribunal to decide at the final hearing. EJ Jenkins listed the final hearing and made case management orders in preparation for that hearing.

2. We were given a hearing file extending to 199 pages, a witness statement from the Claimant, four witness statements from the Respondent (Mr Brown, Mr Bergamo, Ms Rees and Mr Rogers) and an audio file. Mr Rogers was without the audio file and therefore arrangements were made for it to be sent to him. Mr Rogers also told us at the start of the hearing that Mr Brown could not attend for medical reasons, and the Respondent was not seeking a postponement to a future date that might allow Mr Brown to attend. The Claimant questioned the absence of a witness statement/attendance from Ms Burnett who he makes allegations about in his claim. Mr Rogers said a statement was taken, but that Ms Burnett had resigned to move overseas, and they had not been able to make arrangements with her to attend by video to give evidence. Mr Rogers said that as they had not been able to reach Ms Burnett the Respondent considered they could not rely on the draft statement. Employment Judge Harfield explained it was a matter for the Respondent. No party to litigation is required to disclose witness statements if they are not calling the

witness (or drafts of witness statements); it is a matter for a party as to what witnesses they ultimately call. It was explained, however, that if the Respondent wished to disclose the draft statement and rely on it, they could potentially do so. It would then a matter for the Tribunal as to what weight, if any, could be given to the statement without the witness being called to give oral evidence under oath. Mr Rogers said they did wish to rely on Ms Burnett's statement and would get it scanned in and sent over. Mr Rogers did then email over Ms Burnett's draft statement, saying that it had been drafted by her prior to her leaving the UK and in the initial stages of the case being compiled. Mr Rogers said it was not submitted due to the loss of contact with Ms Burnett, the lack of signature and incomplete parts of the statement because Ms Burnett had left the country before the statements were all completed. Mr Rogers asked that her points be taken into account due to the serious nature of the allegations made. We could not ultimately give any weight to Ms Burnett's statement as it was in a generic form, and appeared to almost entirely duplicate Ms Rees' statement. It therefore gave us no indication that it was actually Ms Burnett's approved evidence. It maybe it was a template statement, which representatives do sometimes prepare for the witness's further input. But it gave us no comfort in the circumstances that it was Ms Burnett's considered evidence, in the absence of her actually attending the hearing.

3. The Claimant also questioned why there was no witness statement/attendance from Louise Babcock who the Respondent had indicated at the case management hearing they were intending to call as a witness. Mr Rogers said that the company was called Babcock and that he understood the individual who it was said to have raised concerns about the Claimant's qualifications was called Rebecca (surname unknown). Mr Rogers said there had been attempts to contact "Rebecca" by email, but she had left the business, and they could not get hold of her. He said his access to records was limited because the emails were held by Mr Brown. Mr Gill said that the person he spoke to was called Louise (not Rebecca) and she said she owned the business. The ultimate position was therefore that this individual (whatever her actual name) was not being called as a witness.

4. The Claimant started his evidence on the afternoon of day 1, but there were difficulties because Mr Rogers appeared to have a different version of the hearing file, and a particular issue arose about differing versions of the Claimant's contract. We adjourned to the next morning so that Respondent could send the contractual document in.

5. On the morning of day 2 the Respondent had significant IT problems and could not access documents or emails and at one point had to join by telephone. We were able to start by 11am. In the lunch break Mr Rogers was able to email over the further draft version of the Claimant's contract, but Mr Rogers said that he had been unwell over the past two days, was getting worse, and was unable to continue. We accept he was unwell; we could see that ourselves. We asked Mr Rogers to attend for case management purposes, so that we could discuss options with him. These included the possibility of applying for a postponement or seeing whether someone else (who would be sufficiently prepared) could take over representation. We adjourned to see if Mr Bergamo could attend and take over representation given he knew the case. Mr Bergamo had been away with his family but was due to return to give evidence. When we rejoined Mr Bennison attended on behalf of the Respondent as Mr Rogers remained too unwell to continue. Mr Bennison said he would be able to get up to date overnight and continue representing the Respondent the next day.

6. The Claimant therefore completed his evidence on day 3, with Mr Bennison taking over cross examination. Mr Bergamo then gave evidence followed by Ms Rees. Ms Rees continued her evidence on day 4. Mr Rogers had been due to give evidence, and we kept the situation under review, but he ultimately remained too unwell to attend. Mr Bennison agreed to give evidence so that the Claimant could ask him

some of the questions he would have wished to ask Mr Rogers. We then had closing comments from the parties. We were not able to complete our deliberations on 11 April and told the parties the decision would be reserved to be delivered in writing. The earliest the Tribunal could reconvene was 8 May, but the date had to be cancelled due to the ill health of EJ Harfield. Regrettably it was then not possible to reconvene until 2 July 2024 when we were able to complete our deliberations. We apologise for the delay in providing this Judgment which, as stated, was due to EJ Harfield's ill health and the limited availability of the Tribunal to reconvene and complete deliberations.

The Issues to be Decided

7. The issues to be decided are set out in the case management order of EJ Jenkins found at pages [50 to 52] in the hearing file. We return to these in our conclusions below.

The legal framework

8. The Claimant's complaints are Equality Act 2010 complaints of direct race discrimination, harassment related to race and victimisation.

Direct race discrimination

9. Section 13(1) of the Equality Act provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

10. Race is a protected characteristic. Section 23(1) says that when comparing cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

11. Section 13 requires that two matters be established. The first is that there has been treatment of the particular claimant which is less favourable than the treatment that was meted out, or would have been meted out, to a comparator. The second is that the less favourable treatment was because of race.

12. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, the House of Lords said it is often helpful to concentrate on the "reason why" question when considering a complaint of direct discrimination. Why did the alleged discriminator act as he did? What, consciously or unconsciously, was the alleged discriminator's reason? This question is sometimes less legally complex than the task of identifying a comparator whose circumstances are materially the same, for the purposes of section 23, and the answer to it will often determine the claim.

13. In other cases it can be helpful to consider the "comparator" question. An actual comparator exists when there is a known, identified individual who does not have the protected characteristic, and there is no material difference between the circumstances relating to the claimant's case and the comparator's case. A tribunal may also consider how a hypothetical comparator in a similar (i.e. not materially different) position to the claimant, but who does not have the protected characteristic, would have been treated. A tribunal may also take account of the way in which the respondent treated other individuals who may be in more different situations but still have some similarities; often referred to as evidential (rather than statutory) comparators. The purpose is to use such comparators as an evidential tool to see whether an inference of discrimination is justified.

14. In order to satisfy the "because of" test, it is not necessary for the protected characteristic to be the whole of the reason, or even the principal reason, for the treatment. In Nagarajan v London Regional Transport [1999] ICR 877 Lord Nicholls said:

> "*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others…If racial grounds…had a significant influence on the outcome, discrimination was made out."*

Harassment related to race

15. Section 26 of the Equality Act defines harassment as:

> *(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 circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect.*

16. Conduct cannot be both harassment and direct discrimination by way of subjecting a person to detriment; see Section 212 Equality Act.

17. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal ("EAT")set out a three-step test for establishing whether harassment has occurred:

- was there unwanted conduct;
- did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
- was it related to a protected characteristic.

18. In that case it was also said that the tribunal must consider both whether the claimant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

19. In Grant v HM Land Registry [2011] IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly

material. A tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment. The Court of Appeal also said: "*It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable."* In Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13 it was also said by the EAT: "*The word violating is a strong word. Offending against dignity; hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."*

20. The phrase "related to" a protected characteristic in a harassment complaint is a different, broader test from whether the conduct is "because of" a protected characteristic in a direct discrimination complaint. But it does have its limits. The conduct complained about must still relate to the protected characteristic, which is a matter for the tribunal to determine based on all the facts as found. It was said in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and Heads UKEAT/0039/19 the "related to" test may be satisfied by looking at the motivation of the individuals concerned but it is not the necessary or only possible route. It was also said:

"Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Victimisation

21. Section 27 of the Equality Act 2010 provides:

"27 Victimisation (1) A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act."

22. A protected act involves bringing proceedings under the Equality Act, or giving evidence or information in connection with such proceedings, or doing any other thing for the purposes of or in connection with the Equality Act, or making an allegation (whether or not express) that a person has contravened the Equality Act.

23. Whether treatment is a "detriment" is established by asking whether the treatment is of a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment. It is not necessary to establish any physical or economic consequence. The assessment by reference to a reasonable worker means that an *unjustified* sense of grievance will not pass the test.

24. There must be a link between the protected act and the detriment; the claimant must be subjected to a detriment *because* the claimant did the protected act.

Here the tribunal has to ask itself whether the protected act had a significant influence on the outcome. This does not mean it necessarily has to be the main or principal cause. Again this "reason why" analysis involves an examination of the mental processes, conscious or unconscious of the decision maker in question. It is not a "but for" test.

Burden of Proof under the Equality Act 2010

25. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

"(2) if there are facts from which the Court (which includes a Tribunal) 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."

26. Consequently, it is for a claimant to prove facts from which the tribunal could infer (absent explanation from the respondent) that discrimination has taken place. If such facts have been made out to the tribunal's satisfaction, applying the balance of probabilities, the second stage is engaged. At the second stage the burden shifts to the respondent to prove, again on the balance of probabilities, that the treatment in question was "in *no sense whatsoever"* because of the prohibited reason / that the protected characteristic was not a ground for the treatment in question. A tribunal would normally expect cogent evidence to discharge that burden of proof.

27. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931, as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Here it is important to note that although the concept of the shifting burden of proof involves that two-stage process, the analysis should only be conducted once the tribunal has heard all the evidence.

28. Further, as to what is required to discharge the burden at the first stage; it must be something more than a difference in protected characteristic and a difference in treatment. It was said that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

29. A finding that an employer has behaved unreasonably, or treated an employee badly, will also not be sufficient, of itself, to cause the burden of proof to shift. It was said in Glasgow City Council v Zafar [1998] ICR 120:

"*the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably"*.

Whether that is the case is a matter of evidence, and it is important to note that this passage refers to circumstances where the only evidence is of unfair treatment. It is not referring to circumstances where there is unfair treatment of a person with one protected characteristic but not of a person with a different protected characteristic (so an actual comparator) or there is evidence suggesting the employer would normally act reasonably.

30. It has also been held to be an error of law to draw an automatic inference from the failure by a respondent to provide information or documents; D'Silva v NATFHE [2008] IRLR 412. It is necessary in each case to consider whether in the particular circumstances of the case the failure is capable of constituting evidence supporting the inference that the respondent acted discriminatorily in the manner alleged.

31. It is also an error to draw an inference without having regard to the totality of the relevant circumstances; Talbot v Costain Oil UKEAT/0283/16. For example, if there are multiple examples of different treatment between those of different status it is unlikely to be a case where it can be said that there is mere difference of status and treatment.

32. It is not necessarily an error of law for a tribunal to effectively assume the burden has shifted and look to the respondent to provide an explanation for the treatment in question. It was said in Hewage that the burden of proof provision may have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. But the burden of proof provisions do require careful attention where there is room for doubt as to the facts necessary to establish discrimination; see Field v Steve Pye &Co [2022] EAT 68 and the important guidance there at paragraph 41 onwards.

33. In Raj v Capita Business Services Ltd [2019] UKEAT 74 19 2006 the EAT confirmed that the burden of proof provisions in a harassment claim mean that it is for the claimant to establish facts such that, absent any other explanation for it, the tribunal could conclude that the conduct was related to the protected characteristic. The burden then shifts to the respondent to show that it was not in fact so related. It was also said: "*I am doubtful that establishing unwanted conduct that had a prohibited effect could ever of itself give rise to a prima facie case that the conduct was related to a protected characteristic and in any event, I am quite satisfied that it did not do so in these circumstances."*

Findings of Fact

34. We reach our findings applying the balance of probabilities. The Claimant was employed by the Respondent as Fitness/Gym Manger from 20 February 2023 until his dismissal on 16 March 2023.

35. The Claimant has a certificate in Fitness Instruction & Personal Training dated 28 May 1999 from Premier Training and Development Ltd. He has a diploma in Fitness Training and Sports Therapy from the same company dated 23 July 1999. He has a Master of Science from the University of Bristol in Exercise and Health Science dated 12 January 2005. He has a CIMPSA endorsed certificate in Health and Safety Management in Leisure and Culture Facilities issued by Quality Leisure Management Ltd dated 30 June 2016 and said to be valid for 3 years.

36. The Claimant's CV shows his experience in working in various community initiatives including in 2022 supporting service users with autism, in 2020 and 2021 working as a support worker in Swansea to support people in the community from various ethnic groups with activities such as mental wellbeing walks, and working in a project in Jersey to develop participation in women's basketball. In 2016 to 2019 the Claimant had also worked as shift supervisor at the Centre for Sport, Exercise and Health at the University of Bristol. That job involved training and supervising Reception, centre assistants, gym instructors, lifeguards and therapy staff.

37. The Claimant describes himself as Black/Back British/ Caribbean. He says that to his knowledge he was the only non-white member of staff. The Respondent disputed

this in cross examination, suggesting there were other staff members the Claimant may not have met, albeit the Respondent did not positively put evidence before us (in the sense of documents, or within a witness statement or witness evidence under oath) of the racial make-up of their staff at the time. We do accept, however, that given the Claimant's short period of employment it is possible he may not have met everybody who worked there.

38. The Claimant attended for interview on 31 January 2023. The Respondent was getting ready to open a brand new plaza building. The building had a new gym and other facilities such as studios (used for classes but also for other bookings), a café, and meeting rooms and office space. There is one Reception team that provides services for all the plaza facilities. The Reception team included two individuals about whom the Claimant complains: Ms Burnett and Ms Rees. There were other Receptionists too including Chelsea and Emily. The Receptionists were not all on shift at the same time, as the building was open all week.

39. There were 6 candidates interviewed for the role of Gym Manager. Mr Bergamo (Operations Manager) told us that there was one other candidate who was close to being appointed, but that Mr Brown (Chief Executive Officer) ultimately preferred the Claimant. The Claimant's race would have been known to Mr Brown and Mr Bergamo at least from interview onwards.

40. Mr Brown told the Claimant that he wanted the Claimant to take the role, but for Mr Brown's peace of mind he wanted to confirm the Claimant's qualifications were ok. The Claimant said he could put Mr Brown in touch with the governing body; the Chartered Institute for the Management of Sport and Physical Activity (CIMPSA). The Claimant told us in evidence that Mr Brown's concerns related to the fact the Claimant's Fitness Instruction and Personal Training qualification from Premier Training and Development Ltd dated back to 1999. He said Mr Brown's query was whether the Claimant was suitably qualified and insured.

41. On 1 February 2023 the Claimant emailed Mr Leker, the membership services officer at CIMPSA [56]. The Claimant copied in Mr Brown. The Claimant attached his CV and certificates for Mr Leker to review, saying his potential new role was as Gym Manager with an expectation to cover the gym floor undertaking inductions and supervising/coaching gym users. The Claimant said: "*Please let us know if you/ CIMPSA (charted professional body for the sector) would acknowledge my qualifications and job experiences as this would reassure my potential new employer of my suitability for the role."* The Claimant also asked for Mr Leker's opinion on registering as an "Aspiring Manager membership" as he said he felt it would help him deliver his duties more effectively.

42. On 3 February 2023 the Claimant chased up Mr Leker, saying his potential new employer was waiting to offer the Claimant a job off the back of the response.

43. On 6 February 2023 the Claimant attended some training with TechoGym (who as we understand it were providing technical gym services to the Respondent such as an App for customers) and Reception staff. The Claimant also started to do some preparatory work. For example, he sent Mr Brown and Reception an email with two QR Codes saying it would link customers directly to the MyWellnessApp to book, and his thoughts currently were to print them off and have them on the Reception desk.

44. Also on 6 February 2023 Mr Leker replied but (as far as we can see from the email) only to the Claimant. Mr Leker said: "*I have reviewed the information provided and as we have not received the qualification you hold; we would need to send this through to our Education team to query the suitability of this qualification for entry against our practitioner membership categories. This process will take around 5 – 10 working days and we will notify you once this has been confirmed either way."* Mr Leker said

that based on the information provided in the Claimant's CV the Claimant was eligible for the Aspiring Manager and Entry Manager Membership, which he could process at the Claimant's request.

45. On 9 February the Reception team received a customer query about the minimum age to use gym facilities. On 11 February the Claimant sent Mr Brown some proposals for activities and classes, and a draft timetable. One class proposed was a parent and child session. On 16 February Reception received a different customer query about junior gym membership. Chelsea in Reception responded to say they were waiting for confirmation from the gym manager about the minimum age.

46. On 17 February Mr Brown emailed the Claimant thanking the Claimant for coming in. The email referred to a draft contract and said they could fill in the detail on Monday and get it all set up. Mr Brown said that they needed to tie it up with the job offer letter and get the job description agreed. The Claimant was therefore formally due to start employment on Monday 20 February; although he had been doing preparatory work/attending training.

47. On 21 February the Respondent published a Facebook post seeking feedback on what classes the public would like to see run in addition to the current proposals; one option being the parent and child session. There is a handwritten note in the hearing file which we understand was written by Ms Rees where she says the Facebook post had been discussed and agreed with the Claimant. On 21 February the Reception team had a query from a potential yoga instructor, who was told her details would be passed on to the Claimant.

48. The Claimant asserts in his witness statement that from the time he started Ms Burnett and Ms Rees were being deliberately difficult and obstructive and stopped him from doing his role effectively. He says Mr Bergamo was constantly going between him and the Receptionists as a go between. The Claimant said in oral evidence he had a position of authority, and he considers the Receptionists did not feel comfortable with that and were constantly challenging his decisions on a daily basis and the processes he put in place. He said the Receptionists would question with Mr Brown and Mr Bergamo what the Claimant was doing, and Mr Brown and Mr Bergamo in turn would ask the Claimant what something meant because the Receptionists wanted to know. The Claimant says he would explain with reasons, but the situation persisted and that this undermining and questioning of his decisions would not have happened to a white comparator. This is the crux of his direct discrimination/harassment related to race complaints. In particular, during the course of the hearing the Claimant said that in particular he considered Ms Burnett was behind such conduct and who was the senior Receptionist. Mr Bergamo said in evidence that he was bothered by Reception about the gym, but they were also bothering him about every aspect of the building. He said he was being called here, there and everywhere. He said it was his job to do that; particularly so given they were opening a new building with new facilities. We return in our findings below to the specific complaints made about the Receptionists/Ms Burnett. But we do accept Mr Bergamo's evidence that he was not just being contacted about the gym, but every aspect of the new building/its services.

49. On 22 February Ms Rees emailed the Claimant asking for him to confirm the class times/days to be published out to the community for him. She also asked about gym inductions, saying there did not appear to be a means to book a slot on the MyWellness App. She asked about the annual cost of subscriptions. The Claimant replied attaching a timetable of activities for social media and saying Ms Rees could feel free to adjust her Excel document to reflect the draft and any changes Mr Brown may wish. The Claimant said he had put a tab on the App for booking inductions, which would be on a Tuesday and Thursday morning. He also responded about the annual membership question. The Reception team sent an email saying: "*Thank you*

for sending this through, unfortunately it is illegible. Can you please send this over to us in excel or word in order that we can use and get this promoted for you ASAP?" Reception also sent some other questions about induction booking timings and pricings to the Claimant and Mr Bergamo. The Claimant was also due to meet with TechnoGym that afternoon.

50. The Claimant alleges that Ms Burnett insisted he produce a timetable for her manually despite there being one on the TechnoGym software. He says that when he did so Ms Burnett then objected to the choice of calendar used and raised concerns with Mr Bergamo. The Claimant said when he first started, he had to use his own laptop and personal email, and he had used google calendar for the timetable and had screen grabbed it and sent it to Reception. He said the timetable could also be seen on the MyWellness App. The Claimant said Ms Burnett was not familiar with google calendar, and wanted it done on outlook, but the Claimant did not have access to outlook. The Claimant stated Mr Bergamo told him Reception could not read it or access it and could the Claimant do it their way on outlook or excel. The Claimant stated he told Mr Bergamo he could do that, but it was triplicating work when he did not have access to outlook, and it was on the App. The Claimant said he thought in the end Reception used the App data.

51. Mr Bergamo said in evidence that the calendar sent through was a screen shot that could not be edited and he thought in the end Reception set up a google account to access it. Mr Bergamo said ideally Reception wanted the timetable in outlook to make sure there were no room clashes; which was easier to prevent if the calendars were not on multiple platforms. Mr Bergamo accepted Ms Burnett had spoken to him about it; and at the time he had explained it was an interim thing as the Claimant did not have outlook activated. Mr Bergamo said the Claimant had also had problems with his laptop that had to go back. Mr Bergamo could not recall if he spoke to the Claimant about it.

52. Ms Rees said that the Reception team information was not showing on the TechnoGym MyWellness App system, so it would not show the time slots for the class, for example, or where the class was. Ms Rees said there were also problems with classes being booked without checking the rooms were free. She said Reception were working on an outlook system that was pre-populated with bookings for each area of the business. She said the Claimant was using a google calendar and so the Claimant could not see what Reception already had booked out. She said it did cause a few issues, and they did ask on a number of occasions about it because they were not able to snatch text from the screen shots of the timetables they had been given, when they did come through legibly. She said they had to manually type everything up. She said it was resolved in the end by Reception constructing a gmail account for the plaza, and they created new calendars for each of their rooms and then updated those calendars for existing bookings from the outlook system. She said they then had access provided by the Claimant to view his google calendar which was then visible to them; but that all of this took quite a bit of work. We accept her evidence as to what the difficulties were, and the steps taken to produce a work around; Ms Rees was there on the Reception frontline and therefore able to give us this firsthand evidence.

53. The Claimant says that there was constant questioning of the timing of classes on the timetable, particularly yoga and the choice of instructor and the Receptionists were trying to get their preferred choice of instructor and timings. He said in evidence these were mostly verbal exchanges and he could not remember any specific emails about it. He said the same questions kept being asked and if Reception did some FAQs they could read it and give the answers to members. Mr Bergamo said he had no involvement in this, and the Claimant had been talking to the yoga instructors about arrangements. Ms Rees said there were some communication issues about how information passed to one Receptionist was not shared, and they set up a

handover process in Reception. She said it was brand new to all of them and they were finding out the best ways of working smoothly. Ms Rees said in relation to yoga instructors that they were getting lots of enquiries from potential yoga instructors and they passed them on to the Claimant and she was not aware of any instances where Ms Burnett had blocked a class because someone else was lined up for it. She said they were just providing information and forwarding it on to the Claimant to respond.

54. That same morning of 22 February 2023, the Claimant also sent Reception some induction documents to print out and asked them to print out a previously sent PARq. Ms Rees replied, in a friendly way, to say she had done the printing but asking what the Claimant meant by PARq. The Claimant replied with a copy of the PARq form (Physical Activity Readiness Questionnaire) explaining it is what he would work with when doing gym inductions.

55. On 23 February 2023 the Claimant sent through a draft timetable of activities for the launch day on 1 March 2023.

56. On 24 February 2023 the Reception team responded to a customer query saying the minimum age for the gym was 16. The Claimant says that he did some initial decision making with Mr Brown and Mr Bergamo about the gym and classes and membership pricing, which included setting the lower age limit for the gym. So we infer that decision making conversation must have happened by 24 February 2023.

57. On Monday 27 February 2023 the Claimant emailed Mr Brown and Mr Bergamo with a document called gym managers logs, saying he would be working from it for managing the gym affairs.

58. On 28 February 2023 Chelsea forwarded on to the Claimant another query from a potential yoga instructor about running classes and the Claimant made contact with the candidate. Chelsea also forwarded to the Claimant a social media message asking what the acro class was about and if it was for children or adults. The Claimant responded to explain about the class, and to say he did not have an email address to reply to the customer directly. The Claimant also said to Reception that if they got queries about classes they could read off the descriptions he had put on the MyWellness App, and after launch day the public would also be able to read them for themselves. The Reception team replied to say they had been advised to forward emails about classes to the Claimant, and that they were not in a position to answer all the queries regarding classes. It was suggested by Reception that the Claimant could be given login details for Messenger and Facebook.

59. Wednesday 1 March 2023 was launch day for the Respondent's new plaza building. The Claimant in evidence described what he termed a debacle with the QR codes that day. He says that the Reception team (particularly Ms Rees and Ms Burnett) had been difficult and obstructive from the start and did not seem to be comfortable with his position of authority. He said he had emailed both QR codes, but because the Receptionists did not acknowledge his understanding and authority in putting forward what he did, they only printed out and put around the building one QR code. He said it meant that on launch day people could not sign in, and it was then said the Claimant had sent the wrong thing when he had not. The Claimant said that Reception had ignored what he had sent and were dismissive of his decision making and ability, and held prejudicial views towards him. He alleged in evidence that Ms Rees had put one code up around the building, and that Ms Burnett had instructed Ms Rees to print out that one code. He said that when the code did not work, they then said the Claimant had caused the problem. He said Mr Bergamo had come out to find out what was wrong. The Claimant also said in oral evidence he was not saying that Ms Rees putting up the one QR code was a racially motivated action, and his complaint was against who made the decision to only print off one QR code and that person thinking that they knew better than he did. He said if a white comparator

had sent through the instruction, both QR codes would have been printed off.

60. Ms Rees said in evidence that she had only been given one QR code, and was not given other written information on processes to follow with new customers joining the gym. She said she tried the QR code on her own iphone and it had worked, and she subsequently understood the issue was with android phones. Ms Rees said she could not recall who sent the QR code, there was only one QR Code saved on the Reception PC, and she did not know why as she had not worked the shift prior to that. She said she did not see the email the Claimant sent with two QR codes. She said she would not deliberately just put one code up as it would create more work for herself. She said the Claimant had also seen her putting the one QR code up around the building and had not told her that there was an error. She said that she did not know why only one QR code was saved on the gym file or whether it lay with Mr Bergamo or why the document had been signed off, as she accepted there should have been two QR Codes. She said the situation did result in her having to do the posters again, and them having additional queries but that it was an administrative mistake. She said the QR Code was working for those with an iPhone, but not for those with android, and at the time it baffled them, and they could not understand why it was working for some customers and not others. She said it was a very busy day as there were launch events and bands playing throughout the day, and it was also the first date that people could sign up for gym memberships. She said the error was possibly down to the passage of time since the TechnoGym training on 6 February, and that they did not keep all emails in the active Reception inbox due to the volume they were getting. We return to the dispute about this in our Discussions and Conclusions below but we accept Ms Rees' evidence about her experiences that day.

61. On 4 March a customer chased up a query about the age for the parent and child session which Ms Rees replied to. Ms Rees apologised for the delay and said she had sent it on to the Claimant about the minimum age. Ms Rees answered the customer's other queries about how to book and the cost. The Claimant emailed the customer, copying in Mr Bergamo and Reception with a description of the session and confirming children must be over the age of 6.

62. On 7 March Chelsea replied to another potential yoga instructor saying she had passed the information on to the gym manager and manager and that one of them would be in touch.

63. On 7 March Ms Burnett sent Mr Bergamo the description of the parent and child session. Mr Bergamo then emailed the Claimant saying that the description did not tell the customer what to expect and Mr Bergamo asked for more information about what to expect in the class, the age of the children it was meant for, and if the class was suitable for people with movement issues. He said: "*Can I have this information back asap as its causing confusion with customers and may result in us losing custom."*

64. Ms Rees said in evidence she did take to Mr Bergamo situations where they were requesting information from the Claimant and felt it was not coming through, which was to do with pricing and lack of clarity about what the classes actually entailed. Ms Rees said they were not in an affluent area and people wanted to know what they were paying for. She said Reception had a log of all customer enquiries in categories and a lot were shelved as they were trying to get the information. She said that most of the time the Claimant was helpful, but they had quite a few instances where they needed a yes or no answer and were not getting that. She said she could remember Ms Burnett being unhappy about the room bookings and also again with the information coming through. She said that at one point they were advised to pass the enquiries to the Claimant because the Reception team had so many other tasks to fulfill and spent too much time answering gym enquiries. She said that direction

came from Mr Bergamo and Ms Burnett. We accept her evidence.

65. On 8 March Chelsea forwarded on to the Claimant a Facebook message about yoga classes. The Claimant replied to the Reception team and Mr Bergamo thanking Chelsea for sending it to his private email address, and notifying Reception that his work email did not currently appear to be working. He said he was waiting for a replacement laptop. Ms Rees replied to check when it had become an issue in case there were previous queries that had been sent over which would have gone unanswered. The Claimant replied to explain that on Tuesday morning (so 7 March) he had reported the problem to Mr Bergamo. The Claimant said it could not be fixed so a new laptop was being readied for his use.

66. On 9 March the Claimant replied to Mr Bergamo's email of 7 March saying: "*Hi Adam, I have copied in Andy so we are all on the same page, it would be great if Reception would be in the loop. I have sent them a descriptor of the classes as and when queries have come through. Hopefully they are compiling a FAQ on classes so they can answer queries as and when they come through."* The Claimant also said to Mr Bergamo he thought the class description did describe what to expect. The Claimant said he agreed there could be an indication about age, and that it was 6 plus because that was what the three of them had mentioned in a previous meeting. The Claimant responded to the question about customers with mobility issues. The Claimant said in evidence that it was an example of Reception, and in particular Ms Burnett, giving Mr Bergamo an earful when the Claimant wanted to work effectively and stop the constant undermining questions. We return to this point in our Discussions and Conclusions below.

67. The Claimant says that on 8 or 9 March he sat down with Mr Bergamo and Mr Brown and they told the Claimant that he needed to change his behaviour towards the Receptionists. He states that he told Mr Brown and Mr Bergamo that he was not the one with the issues, and that the Receptionists had issues with him in his position of authority. He says he told them that the Receptionists were being deliberately obstructive, were undermining his efforts to do his job, and making it look like he could not do his job properly. The Claimant said in oral evidence that he said to Mr Brown and Mr Bergamo that the Receptionists "*did not appear to want to work with someone like him."* The Claimant says he suggested a resolution would be to have a weekly meeting with Ms Burnett, Mr Bergamo and Mr Brown so that Ms Burnett could then disseminate information to the Reception team, rather than the constant undermining and questions. The Claimant says that he then followed that up in an email to Mr Brown and Mr Bergamo with no response. He says that email also did not form part of his subject access request response.

68. Mr Bergamo said in evidence that he had no recollection of receiving such an email from the Claimant, and has not been able to find such an email. Mr Bergamo accepted the Claimant had been called to a meeting but could not remember the date. Mr Bergamo accepted that the Claimant had been asked in the meeting to change the Claimant's behaviour towards the Reception staff. Mr Bergamo said the Reception staff were saying that they were asking for information for the gym and putting up adverts and pushing sales, and they were asking the Claimant about classes or induction but were met with a wall. He says that Reception were saying they were being given information that was not ways correct and things like that. Mr Bergamo said that he and Mr Brown said to the Claimant that for Reception to push the business forward they needed information from the Claimant, but the Claimant would give blunt answers. Mr Bergamo gave an example of the Claimant making up posts but sending them to Reception in the wrong format for Facebook and Instagram so they had to be redone. He gave another example of the Claimant booking classes without checking with Reception, and the room then being double booked. Mr Bergamo said that in essence he and Mr Brown talked with the Claimant about communication between the Claimant and Reception not being the best. Mr

Bergamo said that concerns were coming from all the Receptionists and not just Ms Burnett. Mr Bergamo said he had talked about the situation with Mr Brown who said they should have a chat with the Claimant and bring the Claimant up on the issue and drive forward with it rather than there being miscommunication. He said they said to the Claimant that he was sending information that seemed a bit blunt and it was not helpful to do that, and that Reception were looking after the rest of the building too. Mr Bergamo said he recalled the Claimant saying that the Claimant was not being blunt or trying to come across that way and was just giving the information needed.

69. Mr Bergamo said he thought that after the meeting he had spoken to Reception to see if they could make things a bit easier, as the Claimant was trying to get the gym up and running. He said he thought he asked Ms Rees to help take some of the work on Facebook and Instagram and assist more with admin. Mr Bergamo said he thought it died down after that and there was not as much coming in; although there was still some confusion with gym classes and whether they were on or not. Mr Bergamo said that after the meeting there were still little bits dripping through, but it was not as bad as before. He said the main thing was the promoting of the classes and Reception did not have the right information and could not promote them properly. He said they were asking for information and what they were getting back was not correct, or did not explain things properly, like the parent and child class. Mr Bergamo said that after the meeting Ms Rees did a bit more of the advertising and it flowed better. Mr Bergamo said he did recall the Claimant saying he did not have a problem and they had a problem with him, but Mr Bergamo saw it as swings and roundabouts.

70. Mr Bergamo said that Ms Burnett was not an easy person to work with, and he himself sometimes had confrontations with her about the way she spoke and acted sometimes. Mr Bennison said something similar. Mr Bergamo said he could not recall the Claimant saying he thought Ms Burnett/the Receptionists had a problem working *with someone like him*. Ms Rees said that Ms Burnett could be challenging and could be quite emotive, but it was that Ms Burnett wanted the business to succeed and Ms Rees personally found her to be approachable and willing to listen.

71. The Claimant said in evidence he could not be specific as to the date of the meeting, but he thought it was around then because it was on 9 March he sent an email chasing up his contract, and he had done that because he thought all was not well. On 9 March the Claimant did email Mr Brown saying he was unsure of a couple of points on the contract and wondered if they could have 5 minutes that day or the next to discuss it and get the admin completed. We have a copy of the draft contract which says: "*During the Probationary Period the Employer may dispense in whole or in part with its recognised Disciplinary Procedure*". The Claimant had written a query on it saying it would mean someone could be out of a job without pay on walking into work on a given day during the probation period without the opportunity to discuss matters through a disciplinary meeting. He asked if it was possible to include there 2 weeks' notice or 2 weeks' pay to give someone time to find a new job without ending up out of pocket. There was also a query about a reference to collective agreements. The Claimant said in evidence he wrote his queries because Mr Bergamo and Mr Brown had just told him to modify his behaviour with Reception staff and alarm bells were ringing for him that his contract was not finalised.

72. Paragraph 4.9 of the particulars of claim alleges that after a discussion with the Directors that it would ease the working relationships with the Receptionists for the Claimant and senior management to be seen as a "united front", the Claimant then emailed Mr Brown and Mr Bergamo on or around 9 March suggesting that to avoid miscommunication or misunderstandings it may be useful to hold a team meeting to discuss roles and responsibilities. It is alleged the Claimant's understanding was the meeting would be organised with a view to resolving issues particularly regarding

roles and responsibilities. It is alleged that, however, on 12 March Mr Brown and Mr Bergamo told the Claimant that they did not know what the friction between him and Ms Burnett and Ms Rees was, but that the Claimant was required to work with them. It is said in the particulars of claim that while the Claimant refuted he had created any issue and said the hostility was generated from them and they were not acting reasonably, he also perceived the comments as a veiled threat that unless he modified his behaviour his future employment was in jeopardy. Paragraph 7 of the particulars of claim asserts that on 12 March the Claimant complained to Mr Brown that Ms Burnett and Ms Rees had harassed him in the course of employment and that the Respondent failed to take adequate steps to investigate, address or prevent the harassment and that instead Mr Brown dismissed the Claimant on 16 March 2023. The Claimant in his witness statement asserts that he had growing concerns over the behaviours of the Reception staff and sought to raise these with Mr Brown and Mr Bergamo by email, and that he proposed weekly group meetings to include a representative from the Reception team. The Claimant in his witness statement does not mention the alleged meeting or meetings on 8/9 March or 12 March.

73. Mr Brown in his statement denies receiving an email from the Claimant asking for a meeting to arrange roles and responsibilities, or that there was a discussion between the Claimant and the directors or that he told the Claimant: "*I did not know what the friction between him and Julie Burnett and Joanna Rees was*." He also says he cannot recall any discussion with the Claimant on 12 March about the Claimant complaining about Ms Burnett and Ms Rees

74. As summarised above, Mr Bergamo accepted that there was a meeting with the Claimant. It seems likely to us, and we find, that there was one meeting (and not two as paragraphs 4.9 and 7 of the particulars of claim suggest.) We also accept it is likely it happened around 9 March because, it is likely it led to the Claimant subjectively feeling somewhat vulnerable and emailing Mr Brown about the contract and raising the question of a notice period in the probationary period. It does not seem likely to us, on the balance of probabilities (and we therefore do not find) that there was an earlier discussion about the Claimant and senior management putting on a "united front". We consider it more likely that the Claimant has misremembered his email of 9 March 2023 where he said in response to Mr Bergamo's email about the parent and child class: "*I have copied in Andy so we are all on the same page, it would be great if Reception were in the loop…"*

75. We also do not find it established on the balance of probabilities that there is a missing, non-disclosed email from around 9 March about a suggestion to hold a team meeting to discuss roles and responsibilities. Mr Bergamo said he could not recall or find such an email. We can see no reason why the Respondent would not disclose it if they had it. It seems more likely to us that when drafting the particulars of claim the Claimant was misremembering his email of 9 March; which he would not have had a copy of at that time. That email of 9 March did not directly suggest that there should be team meetings.

76. On the balance of probabilities we do not find that the Claimant said the words that the Receptionist had a problem working with *someone like him* [our emphasis]. We consider that if the Claimant had said that he would have referred to it in the email he sent following his dismissal where he does speak of having previously raised unreasonable behaviour by Reception staff. Further the Claimant would have put it in his witness statement for these proceedings.

77. We find (and Mr Bergamo accepted), that the Claimant was told words to the effect that he needed to change his approach to the Reception staff. We find it was borne from feedback from the Receptionists that they were asking for information (such as social media adverts) to push the business forward and that felt that they were not always getting the correct information/ or were sometimes getting blunt answers,

which was not helpful to Reception and who were busy looking after the whole building. This is supported by Mr Bergamo and Ms Rees' evidence and also accords with the email exchange about the parent and child class. Mr Bergamo accepted, and we find, that the Claimant had said words to the effect that he was not trying to be blunt and was giving the information he thought he was needed, and that the Claimant did not have a problem and that the Claimant thought Reception had a problem with him. We accept Mr Bergamo's evidence that he thought this was swings and roundabouts with both sides complaining about the other. We do not find it was said that Mr Bergamo and Mr Brown did not know what the friction between the Claimant and the Receptionists was and that the Claimant was required to work with them. We do accept that words to the effect that everyone needed to work together may well have been said; but we do not find it was said in the way that the Claimant alleges.

78. We find that Mr Bergamo and Mr Brown simply wanted to sort things out early on and find a way for everyone to move forward. These were the early days in the new business; everybody was busy and finding their feet, finding ways of working, and figuring out where the balance of responsibilities should lie. We find it likely Mr Brown and Mr Bergamo wanted to get things on track early on and move forward. It seems likely to us that they then took steps to facilitate that, such as asking Ms Rees to help the Claimant more with the social media side of things, and allocating the Claimant to be the lead on dealing with TechnoGym over glitches and queries. We do not find that Mr Bergamo and Mr Brown were making a veiled threat to the Claimant that unless he modified his behaviour his future employment was in jeopardy. We accept that the potential for team meetings may well have been discussed as the Claimant mentions it in a subsequent email but again that tends to suggest Mr Bergamo and Mr Brown were trying to sort out a pathway forward.

79. On 10 March there were emails between the Claimant and Reception, copied to Mr Bergamo and Mr Brown, about outstanding queries with TechnoGym that the Claimant was to liaise with the TechnoGym contact about going forward.

80. Also on 10 March the Claimant emailed Reception about marketing, asking if story posts for classes could be put on the Instagram and Facebook pages on the evening shift for the classes the day after. The Claimant said it was better done daily rather than in one big post. The Claimant also made some suggestions about targeted marketing and said it could be discussed at the first team meeting the following week. Ms Rees replied to say she had shared the class post as requested. She asked the Claimant to ensure the posts being sent over were Facebook/Instagram format because it had taken some time to adjust the posts for the Claimant that evening. She also asked if the Claimant could let them know any additional post information the Claimant wanted attached to each post and any taglines/hashtags as they could do that for him. The Claimant said they could use their discretion.

81. The Claimant said in evidence that his directions as to how to use social media were ignored repeatedly with Reception staff following their own way. He said he had sent this email to explain his rationale and encourage Reception to follow his direction. The Claimant said in oral evidence that this was mainly Ms Rees, as Ms Burnett was not up to speed on the technology. He said Ms Rees had been using Facebook in a different way, and he was suggesting a more targeted approach. He said that Chelsea on the other hand was doing what he asked, and he had given her praise for that. The Claimant suggested that Ms Rees may have been following instructions in doing it the way that she was, and that he had been down to Reception to show them how he would like them to do it, but they had chosen not to do it that way.

82. Ms Rees said they had issues setting up the social media accounts and had an issue with the format of documents the Claimant was sending because they did not have the software to go into a PDF, flip it to text, extract the text from the document,

and move it across or transpose screenshots. Ms Rees said that some of the documents also did not show the information needed. She said that she had approached the Claimant at the start on 20 or 21 February to arrange a sit down meeting in the café about how he wanted things to look, plans for service offerings, and had told the Claimant was they needed from him to assist him. She said that ideally the Claimant would have constructed his own posts for them to share, as that had been her understanding that it was part of the role of the gym manager. Ms Rees said that this did not happen, and she offered then to assist the Claimant with shifting the workload from the Claimant to Reception. Ms Rees was asked in evidence if she recalled the Claimant coming and showing her and Chelsea how to upload on the tablet through to stories. Ms Rees disputed this saying that they did not get the tablet until the 15 March when she was on an afternoon shift, and the Claimant had already spoken to Chelsea in the morning. The Claimant did not agree with that account. Ms Rees said initially Reception only had a PC, then got a laptop a couple of days after the launch to check in gym members, followed by the tablet on the 15 March. Ms Rees said they were going back and forth about uploads to Instagram because they did try lots of times on the PC, but the format was going awry and was only resolved when they used the tablet. She said she could remember Chelsea saying there was good news, and the issues were no longer a problem. Ms Rees said she thought they had discussed reminder posts going up on the day or day before, as they were struggling to get people through the door. Ms Rees said that after they got the tablet things really improved. She said all social media posts were signed off by Mr Bergamo or the Claimant. She denied being instructed by anyone else to do things a certain way (for example Ms Burnett) and said they were only ever trying to do their best. We return to this issue below.

83. On 12 March Ms Burnett replied to the Claimant's email about TechnoGym queries and said, amongst other things, she understood that going forward queries relating to TechnoGym equipment and the MyWellness App would be sent to the Claimant to liaise directly with TechnoGym for control purposes, as advised by Adam and Dale. Ms Burnett finished the email by saying she could not think of anything else that was outstanding and thanked the Claimant for checking. On 13 March the Reception team sent through another query for TechnoGym.

84. On 13 March the Claimant replied to Reception about marketing to say his format had worked ok for him on Instagram and it may be different for Reception when working from a desktop computer. The Claimant said they may have to find a different way of working.

85. On 14 March Ms Burnett emailed the Claimant with a query about a customer's subscription not showing on the App. The Claimant replied asking her to double check with Emily and Ms Rees because they had resolved a similar matter the other day. He suggested that Reception could put together a troubleshooting document with problems and solutions that everyone could refer to. He said that if after speaking with Emily/ Ms Rees the problem persisted he would add it to the list for TechnoGym. Reception replied to say that Emily did not know how to resolve it, and that currently they did not have all the answers to create a troubleshoot document, but that when they answers came back they could create one.

86. On 14 March Emily on Reception emailed the Claimant about images for the social media marketing posts and some other customer queries received. The Claimant replied to Reception and Mr Bergamo thanking Emily and providing the flyers. He asked that the posts go on Instagram and Facebook stories as well as the feed and said Chelsea had worked out how to do that via the tablet and it seemed to work well because you can adjust the size to fit the screen using the tablet not the desktop. The Claimant answered the queries and also said: "*In response to an earlier message, usage of our gym is for 16 years and over. So the young man who isn't 16 until May cannot use the facility and cannot be entered on the system. The Parent &*

Child session is designed to enable the under 16 to be active in a class setting doing body weight exercises since they cannot use the gym. Please promote this as an alternative to such members." The Claimant also sent through other emails with images for class promotions.

87. The Claimant says that he faced constant questioning about the minimum age for using the gym when it had been decided it was 16. He says Reception repeatedly asked Mr Brown and Mr Bergamo to let children use the gym and Mr Bergamo was constantly shuttling upstairs and downstairs to clarity the queries. The Claimant said that to address this he sent an email to Mr Bergamo copying in Reception. The Claimant said he asked the Receptionists to do a joint document they could all read when they had a query because he had repeatedly said it was for 16 and over. The Claimant said he felt the public wanted under 16s to come in and the Receptionists felt the same and were trying to get Mr Bergamo to change the policy. He said the Receptionists did not value the decision that had been made by him and so kept asking the question rather than accepting it and moving on. He said they would not have done that to a white comparator. He said in evidenced he could not recall there being other emails specifically on the point other than those in the hearing file but that he had not been provided with the initial decision making document between him, Mr Brown and Mr Bergamo about various matters such as membership pricing, which included setting the minimum age limit for the gym.

88. Mr Bergamo said the minimum age was decided on advice from the Claimant and was passed on to Reception. He said he did not believe Reception kept raising it once they were told, and that the question that came up was what the age was for the parent and child class. Ms Rees said in evidence that they had been getting contradictory information because they were told the target audience was adults, and then they were told that it was 16 years plus. She said they were querying if it was adults or children from 16 years upwards. She said there was quite a lot of back and forth in relation to that, and Mr Bergamo discussed with them that the minimum was age 16, but the target was for older customers. Ms Rees said they then updated the documents they had to reflect this, and so that they could get back to the enquiries they had received from customers. Ms Rees said that the queries went initially to the Claimant, and they also checked with Mr Bergamo because they were preparing information ready to pass to the public. She said it was all the Receptionists querying the minimum age. We accept Ms Rees' evidence in that regard, and in particular as to the initial confusion as to whether the minimum age/target age was for adults or 16 plus. Ms Rees said from her perspective after that the queries were about minimum ages for the parent and child class because they were getting queries from parents with toddlers and parents with early teens and the parents wanted to know the activities and the age ranges.

89. The Claimant said in evidence that Ms Burnett had been repeatedly querying induction slots and trying to force block people in. He said he had created slots on the timetable and there was lots of backwards and forwards from Ms Burnett about why there were so few slots, and he had explained it was just him doing them and there needed to be one or two customers a time in an induction. On 14 March Ms Burnett emailed the Claimant copying Mr Bergamo apologising, and saying she had to manually book a gym induction for a mother and son together on 17 March. She said there were no other slots available around that time and the customers could not come earlier or later. The Claimant replied to say it was fine as long as the son was over 16. He said he could induct up to four per slot, but it was not ideal if anything sensitive has to be discussed in the medical questions, but as the customers were related it was not as much of an issue. He said: "*If you guys would like to book extra booking slots please double check first. I utilise non contact time to do gym admin and planning/management stuff."* The reply from Reception was: "*Thank you Colin, I did speak to you regarding booking a double induction slot, I am unsure why you are bringing this up, it is for a mum and son and they requested the*

induction slot together, they did not want an induction slot separately. I do understand you will have admin to complete as we do, if you would like to notify us when this is as we will not disturb you." The Claimant replied to say: "*Dear Julie, Please see the wording of my email. There is nothing in there to react to. Its fine for a Receptionist to do as you have done. I go on to explain why the reasoning behind why ordinarily group bookings aren't ideal so we are all on the same page. I then simply point out the reasoning for asking everyone to double check first*." The Claimant said in evidence that Ms Burnett's email was very abrupt and typical of her behaviour towards him, and he had just been explaining to the wider Reception team in his email what he had explained to Ms Burnett in person.

90. Mr Bergamo said he was only aware of the above after it was sorted between the Claimant and Ms Burnett, and he believed Ms Burnett made him aware of it. He said he was told there was an issue but there was now not an issue as it was all sorted and from his perspective there was nothing to it really.

91. On 15 March Chelsea emailed the Claimant asking for a flyer for that day's class. The Claimant responded to thank her and sent the flyer through. He also said he was sending through a video promo clip and asked Reception to save it and post it on a Sunday. Chelsea replied to say it was no problem. The Claimant also sent a new flyer for the parent and child class.

92. On 15 March Ms Rees also replied about the customer's subscription issue saying there appeared to be some confusion, and it was not the same issue that she and Emily had dealt with the other day. She asked for the Claimant to raise it with TechnoGym for a fix as they had been told the Claimant was to be the sole point of contact with TechnoGym. She said if in due course the Claimant sent through the reply, they could refer to it if it came up again with another customer. The Claimant replied to say he would do so and asking for a summary of the other issue dealt with so that he could also feed that back to TechnoGym.

93. On 15 March the Claimant was leaving work and was in Reception when a female came over and introduced herself. He recalls her name being Louise Babcock. Mr Brown then came over and asked if they could meet in the café. The Claimant says Louise Babcock stated she was the owner of an industry training provider and Mr Brown had asked her to look into the Claimant's qualifications. She said she was also training up other members of staff to be able to supervise in the gym. Ms Babcock asked the Claimant if he had his certificates and the Claimant told her he had emailed them to Mr Brown and to CIMPSA. He showed her the documents and she took photographs of them. The Claimant says Louise Babcock said they looked impressive, she would look through it all more thoroughly but if there was any need to upskill or refresh through one of their courses then her company could easily do that for the Respondent. The Claimant said he understood at the time there were plans to train up two other individuals to assist with supervising the gym so there could be someone there at all operational times.

94. Mr Bergamo said in evidence that Mr Brown had told him Mr Brown had asked someone from the training company to look at the Claimant's qualifications for the duties of a gym manager, and Mr Brown had spoken to her afterwards to catch up. Mr Bergamo said Mr Brown was worried because Ms Babcock (or the female in question) had said the Claimant's qualifications were not up to scratch. She had said a gym manager role was a Level 3 NVQ in gym running and the Claimant did not have that. Mr Bergamo said Mr Brown was worried about public liability and things like that. Mr Bergamo said Mr Brown himself was level 2 trained in the gym and was working towards level 3 with that training company. Mr Bergamo said Mr Brown panicked because on the practical side of things, it was thought the Claimant could not carry that out, and if something happened in the gym or in an induction then the Respondent was in jeopardy. Mr Bergamo again described Mr Brown as panicking

and saying Mr Brown did not want anything to happen to put the Respondent in jeopardy and Mr Brown wanted to call it now and escort the Claimant out.

95. On 16 March at about 2:45pm the Claimant was called into a meeting with Mr Brown and Mr Bergamo where he was told his contract was being terminated. When the Claimant realised what was happening he asked to record the meeting and permission was given. We were given the audio file. The parties had not prepared a transcript, but we listened to the audio file. It records Mr Brown saying they had to end the Claimant's employment because of the qualification issues. It was said that they had been advised by a national training company that the gap within the Claimant's skills was putting them at the risk of action by the public if something were to happen and so they had to protect themselves and the organisation and the public. It was said words to the effect (appreciating we are without a transcript): "*We did at the beginning try to rationalise your qualifications and we were seeking the guidance on that. Unfortunately the company we spoke to were not willing to commit to that. We thought your qualification outweighed that but on discussions with the national training body is being made aware to us that we need, you know, we cant have you running classes or running the gym for us, unfortunately, sorry."*

96. The Claimant said (according to the audio file), he disputed the facts being used to terminate his employment saying that at the time of taking him on he realised they were concerned about qualifications and so had sought the three way conversation with CIMPSA to reassure them that his qualifications were appropriate. He said that neither the Respondent or he had anything back definitive from them to say at all that he was not suitable for the post, and it was why they had taken him on to do the role and he had been doing the role since 20 February. The Claimant said his qualifications allowed him to do the role and that if there was a national training body saying something different to CIMPSA then he needed to know who that was. He said he would dispute that with them directly, or if it came to it, bring them up as a later date in court. He said he felt the way things had gone, especially in the last week, despite what he had professionally put together in the gym was underhand and unfair. The Claimant said he had asked them to provide the name of the national training organisation but that the Respondent was not going to provide it. Mr Brown then said they would be writing to the Claimant. The Claimant asked that this include the reason why they were terminating his contract and the name of the national training company.

97. On the audio file the Claimant said that last week he had raised the issue of the contract still not being signed, and that had not been addressed and yet they were asking him to terminate his employment. He said that was underhand. He also said that if it was the Babcock people Mr Brown was referring to, then they had taken photos of his certificates, and that even if the qualifications did not match up to current standards the option was there to upskill and refresh modules to a more recent qualification. The Claimant said the decision to terminate was unprofessional and underhand because if Babcock were able to refresh his qualifications, then the decision simply came down to them not wanting the Claimant to do the role any more which was unfair dismissal.

98. The audio file then records it being said that they had employed the Claimant from day one as the general manager and so the expectation was the Claimant would be employed as that, and so the decision had been made to terminate because right now they could not fulfill the duties that were needed to do. The Claimant again disputed this saying they had not had a definitive response from the governing body CIMPSA that he was not capable of doing the role. The Respondent referred again to the company they had been speaking to, and that the Claimant could dispute it with them afterwards.

99. Mr Brown also said on the audio file that they did approach CIMPSA as the Claimant

said in a three way approach. He said they were not willing to commit to the qualification levels and they stated that the Claimant's higher qualifications were great for what the Respondent was looking to achieve but on a practical level it had become clear that they had put themselves at risk as an organisation by the Claimant not having the qualifications to deliver classes and the gym. The Claimant said if that was the case they should not have employed him in the first place. But they had employed him and had not provided him with a contract he could sign and and they were now pulling the rug from under him which was unfair practice, unprofessional and unfair dismissal.

100. Mr Brown apologised for the delay with the contract and said that the terms and conditions had been explained at the beginning of employment. The Claimant disputed this saying he had not seen a contract until it was emailed, and it was then a generic document. Mr Brown said it covered the main areas of employment. The Claimant said it was generic and he would provide the evidence of that in any court case. Mr Brown said he was sorry that it had come to this, but he had to protect the organisation and the community.

101. The Claimant was escorted to collect his belongings and then to his car. The Claimant alleges he was frog marched out the building and manhandled and pushed out figuratively and literally. He said he tried to use the normal exit out the front of the building but was shunted out of a fire exit into the carpark. Mr Bergamo said the Claimant went out the fire exit as the Claimant had equipment and it was the quickest way to the carpark and the Claimant's car. We prefer Mr Bergamo's evidence in this regard and that the Claimant was escorted rather than frog marched or manhandled. It is relatively common practice for employers to escort or supervise employees on exist for reasons such as the protection of information and we consider that was the more likely scenario (albeit one the Claimant found humiliating). We accept Mr Bergamo's evidence that the fire exit door was used because it exited on to the carpark with the Claimant having equipment to carry.

102. Later that afternoon at 5:14pm the Claimant emailed Mr Brown saying he was giving notification of his intention to seek legal action against the Respondent for unfair dismissal, deliberate misfeasance and breach of contract. The Claimant said the reason given for termination he would argue in court was an unjust reason for termination and he was sufficiently qualified to deliver all activities in the role. The Claimant said under a Data Subject Access Request he was seeking all email correspondence sent to and from his work email address and he set out a list of other things he was seeking. This included: "*The correspondences from the [Reception email address] and myself which will outline the unreasonable behaviours of certain Reception staff toward me in the workplace. When discussed with yourself and Adam B, you as the employer failed to act on this. Instead you have opted to dismiss me for a fabricated reason. This email thread should include the most recent email from Julie B and my response to which Andy B was copied into*."

103. Mr Brown forwarded the email on seeking some HR advice from Mr Williams (who has also at times assisted the Respondent with this litigation). On 21 March Mr Brown emailed the Claimant offering the opportunity to meet with an independent person to discuss the content of the email and said that Mr Williams was available to meet informally to listen to a respond to whatever grievances the Claimant had. The Claimant responded to say that the matter was now with his solicitor and any mediation would be through Acas. He said in evidence that his legal advice was to limit further engagement with the Respondent. Since that time the Claimant also questions Mr Williams' independence as Mr Williams has at times represented the Respondent in this litigation.

104. Ms Rees said that she was surprised when she came in for her next shift and was told that the Claimant no longer worked for the business. She said they had to put a pause on all the inductions that were booked in and later on qualified personnel came in to carry out the inductions and they moved to having an independent PT to do them, similar to using external instructors for fitness classes (other than the parent and toddler class run by Emily). Mr Bennison confirmed there was a pause on inductions for a few weeks as he was personally affected and had his induction cancelled. Mr Bergamo said he was currently managing the gym.

105. On 27 March the Claimant commenced Acas early conciliation.

106. On 31 March Mr Brown sent the Claimant a letter. The version we have looks like a draft as it has written at the top "YMCA Headed Paper." It says:

> "*We write to confirm your recent dismissal from the employment of the YMCA Port Talbot.*
>
> *When we met on the 16th of March, it was explained to you that we were very dissatisfied with your performance during your probationary period and as a result we felt we had no option other than to terminate your employment with immediate effect.*
>
> *We did discuss certain issues that led us to this decision and explained that this was a decision we felt was required. Following our meeting, we then received a very demanding e-mail from yourself highlighting your grievance and disappointment that you had been dismissed. Although your dismissal was well within the agreed probationary period, we have offered you the opportunity to meet with someone independent of the YMCA to discuss any grievances you may have had during your employment. This offer you have refused.*
>
> *Note that we will respond to your SAR request within the given timescales, however, we may not be able to provide you with all the information you have requested if we believe we have a justifiable reason not to do so.*
>
> *I confirm therefore that your last day of employment was the 16th of March 2023."*

107. Mr Bergamo said he was not involved in the drafting of this letter, and when it came up some time later Mr Brown had said the drafting was down to an admin issue. Mr Bergamo said he did not know what Mr Brown meant by that saying it was an admin issue. Mr Bergamo posited whether Mr Brown may have copy and pasted an old letter, but he accepted he did not know as Mr Brown had just stated it was an admin issue.

108. Mr Brown in his statement (which is not signed and was not approved under oath as he did not attend the hearing) says: "*The reasons for his dismissal was as a result of being informed he did not have the required qualifications and as he was still in his probationary period the view was that he had failed this period."* Mr Brown says he was not aware of any victimisation or discrimination, and he felt the working environment at the time was fine.

109. On 31 March 2023 the Claimant chased up the DSAR response and sent a further document setting out what he was seeking. It included a request for notes taken relating to his discussions with Mr Brown and Mr Bergamo between 8 to 16 March regarding an instruction to change his behaviour towards the Receptionists. He also asked for cctv footage of the gym on 8-9th March where the discussion took place. We do not have copies, but the Claimant says that

correspondence from his solicitors to the Respondent went unanswered such that they contacted the YMCA in London.

110. According to Mr Brown's witness statement his employment ended on 12 June 2023. Mr Bennison said he thought Mr Brown had been on sick leave for about 2 months prior to Mr Brown's departure. In closing comments he clarified it was from the end of April.

111. The ET1 was presented on 26 July 2023.

Discussion and Conclusions

112. The List of Issues defines the things said to be unwanted conduct for the harassment related to race complaints and the things said to be less favourable treatment for the direct discrimination complaints by reference to paragraphs 4.1 to 4.15 of the particulars of claim. It is to these we therefore turn.

Paragraph 4.1 particulars of claim - Non provision of a written contract of employment or a statement of particulars of employment on commencement of employment or at any time (despite his request for the same), in breach of his statutory rights under s1 Employment Rights Act 1996

113. The Claimant confirmed at the hearing that he was not in fact arguing this was a specific act of direct race discrimination or harassment related to race. This complaint of harassment related to race/ direct race discrimination is therefore dismissed.

Paragraphs 4.2, 4.3 and 4.7 particulars of claim

114. Paragraphs 4.2 and 4.3 of the particulars of claim are umbrella allegations rather than making specific, particularised allegations of direct race discrimination or harassment related to race. They also give context as to how the Claimant's pursues his complaints. Paragraph 4.2 alleges that from the commencement of the Claimant's employment Ms Burnett and Ms Rees displayed unreasonable and hostile behaviour towards the Claimant in the form of repeated attempts to undermine his position and putting up unnecessary barriers. It is said these included issues such as the acceptable age for gym usage, timings of the classes, the choice of instructors, the format (Google Calendar vs Excel) chosen to visually display the timetable, and paragraphs 4.4 to 4.8 of the particulars of claim are then referred to for examples. Paragraph 4.3 asserts that Ms Burnett and Ms Rees emailed the Claimant challenging numerous decisions about what was done and how it was done.

115. Paragraph 4.7 of the particulars of claim asserts that there were other email exchanges between the Claimant and Ms Burnett and Ms Rees and that the Claimant had requested copies under a Subject Access Request but had not received a response. It is said the Claimant was reserving his position to apply to amend his claim on receipt of such emails. There has been no application to amend. During the course of the hearing we did, however, hear evidence about one additional matter relating to difficulties with QR Codes on the opening day of the plaza building Despite it not being a specifically pleaded allegation of less favourable treatment or unwanted conduct because of/related to race we have also addressed it below. In particular, we acknowledged in our decision making that it was possible our findings on such a matter could affect findings on other pleaded matters. Moreover, we had heard the evidence.

116. Paragraph 5 of the particulars of claim asserts that because of his colour and/or race the Claimant was treated less favourably than a hypothetical comparator

and that the Claimant asserts he was treated less favourably because of racial prejudice. It is said the conduct of Ms Burnett, Ms Rees and Mr Brown was related to/motivated by race/racial prejudice. Within that pleaded context we therefore turn to the specific allegations in the list of issues/particulars of claim.

Paragraph 4.4 particulars of claim - Minimum age for gym

The complaint is that: *the Claimant agreed with directors that the target membership for the gym would be adults but there would be a studio class available as a parent/child option. It is alleged that despite this the Claimant was challenged on multiple occasions by the Receptionists, querying child memberships despite knowing that the gym policy was adult only.*

117. We do not find that this allegation is made out as a matter of fact. The Claimant did agree with the directors that the target membership for the gym would be adults with a parent/child option. However, we do not find that despite this the Claimant was challenged on multiple occasions by Reception querying child memberships despite knowing the gym policy was adult only. We accept Ms Rees' evidence that there was some initial confusion about whether the gym was for adults only (which the Receptionists understood to mean age 18+) or age 16 and above (which they understood to be an older child/young person). We accept there were initially probably multiple questions about this, but the questions were not done despite knowing the gym policy was adult only (as the allegation asserts), but done, as Ms Rees explained, due to confusion over what they felt to be conflicting or confusion information and it being a topic on which they were being asked questions by customers. Such customer queries can be seen, for example, at [pages 130, 131 and 132] in the hearing file and where for example, on 16 February 2023 the customer is told they were waiting on minimum age confirmation from the gym manager. It can be seen from the emails with customers that by 24 February 2023 [page 128] at the latest it was known that it was age 16 plus. Thereafter there is one (not multiple) further documented querying of the minimum age limit, which took place on 15 March 2023. It is not entirely clear who asked the question (the reply is addressed to Emily on behalf of the Reception team but it is referring to a separate email). But it can be seen from the Claimant's response that it was a specific query about a potential customer who was soon to turn 16.

118. We would not in any event find that the Claimant has established a prima facie case that the conduct in question was related to race/because of race. The Claimant's belief is that Ms Burnett lay behind the questioning. The Claimant asserts she did not respect, and was seeking to undermine, his decision making. The Claimant says Ms Burnett would not have done the same to a white comparator. Whilst appreciating that Ms Burnett did not attend to give evidence, the initial burden does lie on the Claimant to show facts from which the Tribunal could decide that the conduct was because of race or related to race. We do not consider that the absence of Ms Burnett as a witness is sufficient to establish that. Ms Burnett no longer works for the Respondent and has moved abroad. The Claimant takes issue with the fact that the Respondent has not disclosed documents relating to their attempts to secure Ms Burnett's attendance as a witness; but as explained to the parties when the Claimant was seeking Ms Burnett's draft witness statement, the Respondent is not under a duty to disclose draft statements or correspondence with witnesses because it is privileged information.

119. The appellate authorities establish that a different in race and a different in treatment is ordinarily not enough to shift the burden of proof. Here it is understandably difficult for the Claimant to establish a difference in treatment with an actual comparator of a different race because he had not worked for the

Respondent for very long, and was doing a brand new job no one else had done before or was doing along side him. The Claimant can of course ask us to infer a discriminatory motivation from other facts; but again we do not consider that has been made out to us.

120. What we do know about the situation and context at the time tends to point in the other direction and away from an inference of discrimination: namely that there was a busy Reception team who were themselves new and finding their feet and did not have streamlined systems in place. They were Receptionists who were not from a gym background. It was a Reception team made up of multiple staff dealing with multiple matters and not just the gym. They were facing queries from customers. They felt they were getting confused messaging about whether it was adults at 18+ or instead age 16+ and wanted clarification (as also happened for example in relation to the parent/child class). The latter question in March 2023 was for a very specific reason. We do not consider that there is a sufficient prima facie case that it was Ms Burnett was driving the questions; as we accept Ms Rees' evidence that all the receptionists were asking. But even if it was Ms Burnett, we do not find a sufficient prima face case that it was because of/related to race.

121. The Claimant also refers to not receiving all the documents from the Respondent, but we specifically asked him about this, and he said in evidence that he could not recall other emails specifically on the point other than the initial decision making he did with Mr Bergamo and Mr Brown that included the minimum age limit for the gym. That this conversation happened is not in doubt and the absence of documents would not in our judgement be sufficient to shift the burden of proof by showing a prima facie case that the questioning by Receptionists, even if it followed that decision making, was then because of/related to race. The Claimant seeks to infer a discriminatory motive from what he sees as a lack of reason for the questions; but as we have stated the evidence from Ms Rees gives the context as to why there was initial confusion.

Paragraph 4.5 particulars of claim - Yoga instructor

Here it is alleged that: *Ms Burnett attempted to pressure the Claimant to use a particular yoga instructor and amend the scheduled yoga classes to accommodate.*

122. The Claimant again states that Ms Burnett was undermining him and not respecting his decision making and he believes that was because of/motivated by race.

123. We have very little information on this allegation including from the Claimant himself. He does not tell us which instructor he says Ms Burnett was pushing him to use and how the schedule was supposed to be amended (for example if there was a gap or demand to fill). Mr Bergamo said the Claimant was dealing with booking instructors and was not aware of any dispute like this. Ms Rees said she was likewise unaware of it. Ms Rees spoke of difficulties with double bookings of rooms on occasion. As already stated, we did not hear from Ms Burnett who no longer works for the Respondent and has moved abroad.

124. If we accept the Claimant's assertion that Ms Burnett was seeking to get the Claimant to use a particular instructor and to amend the yoga timetable we do not consider that the Claimant has shown us a prima facie case that this was because of/related to race. For reasons already given, Ms Burnett's absence as a witness in the circumstances is not sufficient. A difference in race and difference in treatment is, itself, also not sufficient and here there is also nothing to show a difference in treatment. The Claimant said he did not think there were any emails that were missing on this point that he would say were being withheld by the

Respondent. It is not conduct that is jumping out as having no potential reason other than a discriminatory motivation. We do not find that the Claimant has established sufficient facts from which we could find that this was conduct relating to/because of race.

Paragraph 4.6 particulars of claim - Timetable

Paragraph 4.6 of the particulars of claim asserts: *that in the week 20 February to 1 March 2023 the Claimant created a class timetable using the TechnoGym software. It is said that everyone had training on the TechnoGym software and it was accessible to everyone. It is asserted that it was the Receptionists' task to produce and publicise a written version of the class timetable and that instead of using the TechnoGym version Ms Burnett insisted the Claimant reproduce one for her manually. It is asserted that when the Claimant acquiesced Ms Burnett then objected to the choice of calendar used and raised concerns with Mr Bergamo.*

125. In terms of findings of fact, we have accepted the evidence of Ms Rees and Mr Bergamo that what Reception were missing was the class timetable that they could tie in with their outlook calendar that included everything else in the building they were looking after including for example the studio/hall. There was a need to avoid room booking clashes. The Claimant was asked for the timetable but did not have access to outlook and sent through a gmail version. The Receptionists could not then access the information they needed as they struggled with legibility and also could not "grab" the text, so it was raised with Mr Bergamo. The Claimant explained he did not have access to outlook, and it was triplicating work. Mr Bergamo therefore explained to Reception that the Claimant did not have access to outlook and asked the Reception team to work with what they had. So Reception set up a gmail account for the plaza, and created new calendars for each of their rooms and then updated those calendars for existing bookings from outlook. They were also able to view the Claimant's google calendar.

126. The Claimant again asserts that this was Ms Burnett making life difficult for him and undermining him/ complaining about him to Mr Bergamo. We do not consider that the Claimant has shown us facts from which we could conclude that the conduct in question, as found, was because of/related to race. We have dealt with the absence of Ms Burnett as a witness already above. There is no comparator evidence. So there is not a difference in race and a difference in treatment (which ordinarily would not be sufficient to shift the burden in any event). There is no other wider evidence on which we could infer that this was conduct related to/because of race. The Claimant again would say that an inference could be drawn based on his belief that there was no legitimate reason for why Ms Burnett did what she did and that it was unreasonable. But the wider contextual evidence instead points in the other direction; in indicating there could be a reason for why Ms Burnett (and others) did what they did. Namely a busy Reception team trying to run multiple parts of the building and avoid clashes who were struggling with the information the Claimant sent them, did not initially know that the Claimant did not have access to outlook and so raised it with Mr Bergamo in his role as operations manager.

Paragraph 4.8 particulars of claim - Force Booking

Here the particulars of claim allege*: that on or around 9 March 2023 Ms Burnett forced booked customers in for a gym induction. It is alleged that the Claimant responded to Ms Burnett's email to explain to the Reception team the process for booking customers together with the reasons for it. It is said that in response Ms Burnett sent a hostile email challenging the Claimant's reasons for providing the explanation.*

127. As far as we understand this allegation, the Claimant does not raise issue with Ms Burnett force booking the customers in because, at the time it happened, he said to Ms Burnett it was fine for her to do what she had done. (It was two family members booked in for the joint induction and not four individuals as referred to in paragraph 26 of the Claimant's witness statement). The complaint is about, when the Claimant replied to her email to the Reception team to explain why it was difficult to have joint inductions and that they should check with him before booking extra slots, Ms Burnett replied as set out at page [175] which the Claimant sees as hostile and challenging his reasons for giving the explanation.

128. In essence the email exchange shows Ms Burnett was asking why it was necessary for the Claimant to have sent his email when it was known that it was mother and son. The Claimant was saying it was because he was sending the email to the wider Reception group and explaining in general why group inductions could be difficult, and why he wanted them to check before booking extra slots because he used non-contact time for other tasks.

129. Ms Burnett's email is a little snappy, although nothing outside what the Tribunal in our industrial experience would see passing between managers in work. The question before us is whether there are sufficient facts before us from which we could conclude that it was related to race /because of race. For reasons already given, we do not draw on the fact that Ms Burnett was not before us as a witness. In terms of whether there is a difference in race and a difference in treatment, we do have some evidence about how evidential comparators would be treated through Mr Bergamo's and Mr Bennison's evidence that Ms Burnett could be a difficult person and they had had issues with her themselves. Mr Bergamo and Mr Bennison are white and indeed had difficulties with the way Ms Burnett spoke to them despite being higher up in the hierarchy to her. Evidentially this does not point towards the snappiness being because of/related to race rather than it being the way in which Ms Burnett could conduct herself even with more senior managers to the Claimant. We are not able to find that the Claimant has established a prima facie case, such as to shift the burden of proof on to the Respondent.

QR Codes on launch day

130. As already stated, this is not a specific pleaded allegation before us, but we nonetheless have addressed it. As the case progressed the Claimant said he was not asserting that Ms Rees had put up posters with just one QR Code as a means herself to disadvantage him because of race/related to race. The Claimant's view is that Ms Burnett lay behind Ms Rees only being given one QR Code to work with, and that Ms Burnett thought she knew best rather than respecting the Claimant's expertise in sending through the two Codes. The Claimant says Ms Burnett would not have done that to a white comparator, and that he was blamed for it on launch day when he had originally sent two QR Codes through.

131. The Claimant's original email with the two QR Codes did not say it was important to display both Codes. The email with the two QR Codes had also been sent through some weeks prior to launch day, on 6 February 2023. Ms Rees said that the Claimant or Mr Bergamo had signed off on the posters, and that the Claimant had also not said anything when she was putting them up round the building the day before. There is also nothing on which to necessarily suppose it was Ms Burnett who lay behind there only being one QR Code. The Claimant himself said that Ms Burnett was not particularly technically minded, and the Claimant's complaints about, for example, social media posts not being done in the way he wanted, the Claimant said was not aimed at Ms Burnett but Ms Rees, because Ms Burnett did not get involved in that activity.

132. But even if we presume that it was Ms Burnett who produced the one QR Code, then we would not find we have been shown sufficient facts from which we could conclude that it was because of/related to race. Again, we would not infer this from Ms Burnett's absence as a witness in the circumstances. There is no comparator evidence. We do not consider there is sufficient that could show that the reducing down to one QR Code was related to race/because of race. Again the Claimant would suggest it could be inferred from the wider circumstances, but these in our view point in the other direction: the QR Codes being sent through weeks before launch day; the email not specifically stating that the two Codes were needed; Ms Burnett not being a technologically minded individual; and no one (including the Claimant) noticing the second Code was missing from the posters. We do not find the burden of proof has shifted to the Respondent.

Paragraph 4.9 particulars of claim - 12 March 2023 meeting

Paragraph 4.9 of the particulars of claim alleges: *that after a discussion with the Directors that it would ease the working relationships with the Receptionists for the Claimant and senior management to be seen as a "united front", the Claimant then emailed Mr Brown and Mr Bergamo on or around 9 March suggesting that to avoid miscommunication or misunderstandings it may be useful to hold a team meeting to discuss roles and responsibilities. It is alleged the Claimant's understanding was the meeting would be organised with a view to resolving issues particularly regarding roles and responsibilities. It is alleged that however on 12 March Mr Brown and Mr Bergamo told the Claimant that they did not know what the friction between him and Ms Burnett and Ms Rees was, but that the Claimant was required to work with them. It is said that while the Claimant refuted he had created any issue and said the hostility was generated from them and they were not acting reasonably, he also perceived the comments as a veiled threat that unless he modified his behaviour his future employment was in jeopardy. Paragraph 7 of the particulars of claim also asserts that on 12 March the Claimant complained of unlawful harassment by Ms Burnett and Ms Rees but that the Respondent did not take steps to investigate it or address it and instead dismissed the Claimant.*

133. Our above findings of fact were that there was one meeting on or around 9 March. We did not find that the Claimant said the Receptionists did not want to work with someone **like him** [our emphasis]. The Claimant was told words to the effect that he needed to change his behaviour towards the Reception staff. It was said in the context that the Receptionists were looking for information to push the business forward, they were busy looking after the whole building, and sometimes were not getting the full information or blunt answers that was not helpful. The Claimant said he was not trying to be blunt and was giving the information he thought he was needed, and that the Claimant did not have a problem and that the Claimant thought Reception had a problem with him. Mr Bergamo thought this was swings and roundabouts with both sides complaining about the other. Mr Brown and Mr Bergamo did not say they did not know what the friction between the Claimant and the Receptionists and that the Claimant was required to work with them. We found it may well have been said that everyone needed to work together, but we do not find it was said in the way that the Claimant alleges. Mr Bergamo and Mr Brown were trying to get things on track moving forward and took other steps such as asking Ms Rees to help the Claimant more with social media and giving the Claimant responsibility for liaising with TechnoGym. We did not find that Mr Bergamo and Mr Brown were making a veiled threat to the Claimant that unless he modified his behaviour his future employment was in jeopardy. We accept that the potential for team meetings may well have been discussed. The Claimant did not complain of unlawful harassment (in those terms) by Ms Burnett and Ms Rees.

134. In terms of what we have found was actually said at the meeting, we are concerned with what was going on in the minds of Mr Bergamo and Mr Brown. We do not consider that the Claimant has established a prima facie case that it was because of/related to race. The Claimant's race was known to Mr Bergamo and Mr Brown, at least from interview stage. Mr Brown decided to employ the Claimant knowing his race, and in preference to another candidate. That the Receptionists had taken concerns to them does not raise that prima facie case. We have not found that the actions of the Receptionists/Ms Burnett was because of race/related to race. We have not found that the Claimant said that the Receptionists did not want to work with someone like him.

135. But in any event, we would find it established that what was said at the meeting was not in any way influenced by race/related to race. It happened because Mr Bergamo and Mr Brown thought there were communication problems between the Claimant and the Receptionists, and they thought the Claimant was not always helping Reception in his responses as much as he could do. It was an issue because this was early on, the Reception team were very busy with the whole building, and there was a need to get everyone working together. A key concern was the promotion of classes and they needed to get things working to get customers through the door.

Paragraphs 4.10 and 4.11 Particulars of Claim - Dismissal

Paragraph 4.10 of the particulars of claim asserts that: *on 16 March Mr Brown dismissed the Claimant without prior warning or any process. Paragraph 4.11 goes on to assert that: at the dismissal meeting Mr Brown stated that the reason for dismissal was because he had been advised by a national training company that his [i.e. the Claimant's] qualifications did not enable him to carry out the duties of the role. It is said that prior to the offer of employment the Claimant had instigated a 3 way conversation with CIMPSA and that all the qualifications had been deemed satisfactory for the role and the Claimant was employed. It is said the Claimant's employment was not conditional upon further confirmation or clarification from CIMPSA or any other regulatory body.*

Paragraph 4.11 says that on 15 March Mr Brown met a third party, Louise Babcock, who the Claimant had previously met on the same day and liaised with to provide photocopies of his qualifications and credentials. It is said Ms Babcock had confirmed to the Claimant there was not any problem, and if there were any updating or upskilling required this could easily be done in house through her company. Paragraph 4.11 also says that when Mr Brown was asked in the meeting on 16 March who the national training company was, Mr Brown initially refused to disclose with the Claimant who he had met with. It is said that on pressing Mr Brown admitted that the national training company he claimed had advised him and led him to terminate the Claimant's employment was Ms Babcock who they had both met with the day before.

Paragraph 9 of the particulars of claim asserts that the Respondent gave two different reasons to justify its decision to dismiss the Claimant with immediate effect, neither of which were true and that the true reason for dismissal was racial prejudice held by the Receptionists who refused to act collegiately with the Claimant and created a hostile working environment. Further or alternatively it is said the dismissal was unreasonable because the Respondent had no valid grounds on which to base a decision to dismiss and failed to follow any investigative procedure or provide an opportunity for the Claimant to improve performance by reference to specific concerns

136. We considered that in relation to the decision to dismiss the Claimant we should treat the burden of proof as having shifted, and it was fairest to the Claimant for us to do so. In particular, there is a discrepancy in relation to Mr Brown seeming to tell the Claimant that when he wrote to the Claimant he would give details of

individual at the national training company who had advised them, but then did not do so. There is a further discrepancy in the dismissal letter stating: "*it was explained to you that we were very dissatisfied with your performance during your Probationary Period*" when that was not said at the dismissal meeting.

137. We turn to the reason for dismissal. We find that Mr Brown made the decision to dismiss because of concerns raised by the NVQ training provider as to the adequacy of the Claimant's qualifications and in turn there were concerns about whether the Respondent was at risk/ whether there were risks with insurance cover, should something happen to a customer in the gym/a class. We reach this conclusion because the Claimant does not dispute that Ms Babcock spoke to him the day before the dismissal, and she had asked to see /took copies of his certificates. On the evidence before us we consider it likely that this had been an outstanding question in Mr Brown's mind. The Claimant accepted that Mr Brown had these concerns at the point of interview; the Claimant had made contact with CIMPSA in response. In our judgement, there is nothing in Mr Leker's response that puts the point to bed; he said the Claimant's qualifications would have to be put through their appropriate team for assessment. That was also a point made in the dismissal meeting itself, as shown on the audio recording. Furthermore, whilst the Claimant clearly has other skills, particularly in relation to community relations that we consider was likely to have appealed to Mr Brown at interview, the Claimant's qualifications were old. We also know from Mr Bergamo's and the Claimant's evidence that Ms Babcock had come to see Mr Brown about training up other members of staff. We know from Mr Bergamo's evidence that Mr Brown was himself undertaking NVQ training. It is logical that Mr Brown would have asked Ms Babcock about the Claimant's qualifications; hence her requesting to see them.

138. We consider it likely that Ms Babcock, having reviewed the Claimant's certificates, would have expressed concerns to Mr Brown about their adequacy and whether the Claimant was in turn properly insured to induct gym users/ run classes. As we have said they were old certificates. Whilst Ms Babcock may well have said to the Claimant she was impressed with the qualifications, on the Claimant's evidence she also said she would need to look through them more thoroughly. That suggests she may well have had the opportunity to take a more detailed look, and then express reservations to Mr Brown. Ms Babcock was not the Claimant's employer and so it was not her job to have an awkward conversation with an employee in the Claimant's position. Likewise Ms Babcock saying if there was a need to upskill it could be done through her company does not mean that she did not go on to have a conversation with Mr Brown that having an inadequately qualified gym manager (and the only employed member of staff at the time doing inductions and delivering classes) could be a risk.

139. We then found Mr Bergamo's evidence that, after speaking to Ms Babcock, Mr Brown was in a state of panic, to be impactful evidence, and evidence that was cohesive with the other evidence we have. We find it likely that Mr Brown was panicking. This was a brand new plaza building with a new gym, and he was facing real concerns that he may have recruited someone who was not sufficiently qualified and could jeopardise their insurance. It also accords with Mr Bergamo's evidence that Mr Brown decided that that he had to resolve it there and then by dismissing the Claimant (i.e. to remove the risk of the Claimant for example undertaking inductions if not properly qualified/insured). Again that also reflects what the Claimant was told at the dismissal meeting as shown by the audio file.

140. The Claimant says he could have been upskilled, but that did not resolve the issue that they had at that point in time with ongoing inductions/gym use and classes given the Claimant was the gym manager and only member of gym staff

in place at the time. The Claimant had been recruited to do the job of gym manager, not to train up to be it; again as stated to the Claimant in the dismissal meeting. That this was the reasoning also accords with the decision, as brutal as it was for the Claimant, that he had to be dismissed that day, to minimise potential risk to the Respondent/ customers going forward.

141. We do not find that the decision was made or materially influenced by the earlier concerns dealt at the meeting on 9 March. We accept Mr Bergamo's evidence that it was seen as a productive meeting and that after that things, whilst not perfect, were improving. It accords with the Reception staff working hard to assist the Claimant with promoting classes which was ongoing when the Claimant was dismissed. It accords with the Claimant being tasked to work with TechnoGym which again was ongoing. That there would be some settling down and less pinch points is also logical because increasingly the ways of working would have been bedding in. The class timetable was up and running, the induction system was in place, the social media adverts had been prepared and just needed to keep on being rolled out. It also accords with Ms Rees' shock on learning that the Claimant was no longer employed. It further accords with the fact that dismissing the Claimant caused problems for the Respondent. In particular, they had to cancel inductions for new gym members for a few weeks whilst they put alternative measures in place. That was not ideal for the Respondent when they were only a couple of weeks post launch, and again for us supports the conclusion that Mr Brown made the decision because he considered he had no other choice.

142. We also do not find that the decision was made because of racial prejudice held towards the Claimant by the Receptionists. We have not found the Claimant has discharged the initial burden of proof in showing such racial prejudice by the Receptionists. Further, as stated, what we ultimately concerned with are the reasons why Mr Brown dismissed the Claimant.

143. We also factor in that the Claimant's race was known to Mr Brown when he recruited the Claimant and recruited the Claimant in preference to other candidates. There is no inherent logic in Mr Brown then dismissing the Claimant, and causing problems with the running of the brand new gym, because of the Claimant's race/ related to the Claimant's race some 3 and a half weeks later.

144. For these reasons we are satisfied that the reason for the Claimant's dismissal was the qualification and insurance concern, and it was not in any way because of/related to race (or put another way race was not a material influence in the decision making process). We find we have cogent evidence to show this.

145. We did factor into our analysis that the Claimant's employment was not conditional upon confirmation from CIMPSA or another body. But that which was unfair to the Claimant does not make it discriminatory. As we have said, we are satisfied that it was an ongoing query in Mr Brown's mind. Mr Brown was recruiting the Claimant at relatively short notice in advance of the launch, and the panic that Mr Bergamo described accords with the sense that Mr Brown realised he may have made a serious mistake.

146. We also factored into our analysis that Mr Brown was not before us to give evidence when he is the individual who ultimately made the decision to dismiss (albeit he no longer works for the Respondent). We also factored in that Mr Brown told the Claimant that he would in the dismissal letter of 31 March 2023 confirm who the national training provider was who had given advice, but then did not do so. Why that was we do not know as Mr Brown did not give evidence and it is not covered in his witness statement. But at the end of the day, we know that discussion with Ms Babcock happened, and she had taken copies of the

Claimant's certificates. We therefore we did not consider the point really went to the reason why Mr Brown made the decision he did.

147. We also were very mindful of the point that the dismissal letter of 31 March 2023 does not refer to the Claimant's qualifications, but instead asserts that "it was explained to you that we were very dissatisfied with your performance during your Probationary Period." That was poor wording as its natural reading would seem to suggest ongoing performance concerns during the probationary period, rather than it being a concern about qualifications. Mr Brown does not really explain this in his witness statement other than saying the dismissal was a result of being informed the Claimant did not have the required qualifications and as the Claimant was still in his probation the view was that he had failed this period. But that does not fully explain the use of the expression "very dissatisfied with your performance." Mr Bergamo said he was told it was an administrative error, but that does not really by itself explain it. Mr Bergamo posited whether a template may have been used and not fully edited. There is a logic to that given the reference at the top of the letter to "YMCA headed paper", but again it is not a full explanation as there are other paragraphs of the letter that are tailored to the Claimant's situation rather than being simply a template.

148. But notwithstanding this discrepancy, we have all of the other evidence referred to immediately above. In particular, we had the clear evidence of Mr Bergamo who we considered to be a credible witness who did not embellish, made concessions (for example about the 9 March meeting) and was clear about what was and was not in his knowledge about what Mr Brown was saying and thinking. Also importantly, particularly given the absence of Mr Brown as a witness, we had the audio file of the dismissal meeting where the Claimant was able to put his case, but was clearly told that the dismissal was happening because of the qualification and insurance concern. For those reasons we find the Respondent has discharged the burden of proof, and has satisfied us that on the balance of probabilities the treatment was in no sense whatsoever because of/related to race. The evidence is sufficiently cogent it was because of the qualification and insurance concern.

149. We do here also acknowledge how deeply upsetting the situation was for the Claimant. The Claimant was recruited despite the question mark over qualifications and then dismissed for that very same reason. It was on the back of the Claimant feeling subjectively vulnerable. The Claimant then received the dismissal letter which talked about performance not qualifications and did not give all the information that had been promised. It is understandable why the Claimant felt what he did. But this is not an unfair dismissal case, and we find that the dismissal was not because of/related to race.

Paragraph 4.14 particulars of claim - dismissal letter

Paragraph 4.14 of the particulars of claim asserts that: *when on 31 March 2023 Mr Brown wrote to the Claimant confirming the decision to dismiss, Mr Brown asserted a different reason to the one given verbally on 16 March. In particular he wrote: "When we met on the 16th March it was explained to you that we were very dissatisfied with your performance during your Probation Period and as a result we felt we had no option other than to terminate your employment with immediate effect…" It is alleged that this assertion was untrue and that no such explanation was given at the time or at all and that at no point during his employment had any performance issue been raised with the Claimant.*

150. We have addressed above the dismissal letter in relation to its linkage to the actual decision to dismiss. This complaint also seems to be asserting that the letter, with its discrepancy, was itself was less favourable treatment because of

race/ harassing unwanted conduct related to race. We have found that the decision to dismiss was not because of/related to race. In those circumstances we do not consider that the Claimant has shown facts from which we could decide that the letter itself was because of race/related to race.

4.12 Escorted from the building

Paragraph 4.12 asserts that *the Claimant was dismissed with immediate effect and then chaperoned to take his personal belongings and was walked off the premises, to the Claimant's humiliation.*

151. We have not found that the Claimant was frog marched from the building. But he was dismissed with immediate effect and chaperoned to collect his belongings and walked off the premises. We accept that the fire exit was used because it exited straight into the carpark and the Claimant was carrying his personal property. The dismissal with immediate effect, we have addressed already above. In relation to chaperoning the Claimant, it is in the Tribunal's industrial experience a relatively common practice when employees are dismissed; often to protect the employer's information. The Claimant found it humiliating, but we do not find that it was done to deliberately humiliate him. We do not consider that the Claimant has shown a prima facie case that this was because of or related to race.

4.13 and 4.15 Subject Access Request

Paragraph 4.14 asserts that: *on 16 March the Claimant submitted a Data Subject Access request and the Respondent failed to respond to the Claimant within the statutory time limit or at all. Paragraph 4.15 asserts that: within the letter of 31 March the Respondent stated "Note that we will respond to your SAR request within the given timescales, however we may not be able to provide you with all the information you have requested if we believe we have a justifiable reason not to do so.*

152. The complaint asserts that as at the time of the presentation of the Tribunal claim, 26 July 2023, the Respondent had not responded to the SAR. It seems likely to us that we did not have a complete evidential picture of what happened with the SAR in total because the Claimant did talk in evidence about things being allegedly missing rather than never ultimately being given any documents at all. But in any event, it seems likely the Claimant had not had a response as at the point he presented his claim form. But we do not consider that the Claimant has shown facts from which we could decide that the failure was related to/because of race. In particular given we have not found that the actions of the Receptionists or the decision to dismiss were discriminatory, we cannot see how it can be shown, in a prima facie sense, that the failure to respond to the SAR in time was because of/ related to race.

Victimisation

Paragraph 8 of the particulars of claim asserts: *the Claimant did a protected act on 16 March in the Claimant giving advance notification of his intention to pursue these proceedings. …The Respondent decided not to respond to the Claimant's requests for information as to the justification of his treatment because of this.*

153. The List of Issues states that there were two protected acts: the Claimant allegedly telling Mr Brown on 16 March of his intention to pursue a claim under the Equality Act, and writing to Mr Brown on the same date with the same information.

154. We do not find that the Claimant performed a protected act. We do not find that

the Claimant told Mr Brown on 16 March of an intention to pursue a claim under the Equality Act; nor could it be reasonably discerned from what the Claimant did say to Mr Brown. The Claimant did speak of potential legal action but there was nothing to say it was a discrimination or Equality Act complaint. Likewise, the Claimant's email of 16 March was not a protected act. Again, it did speak of legal action but that was for alleged unfair dismissal, deliberate malfeasance and breach of contact. Nothing in the letter as a whole said or could reasonably be read as complaining of race discrimination or breach of the Equality Act. The letter did also refer to alleged unreasonable behaviours of Reception staff but again that could not reasonably be read as complaining of race discrimination or breach of the Equality Act. The victimisation complaint is not well founded and is dismissed.

Summary

155. We have above addressed the individual pleaded complaints as set out in the particulars of claim/ List of Issues. But we did ultimately also step back and consider all the complaints in the round as they do interlink. Doing so did not change our individual or overall analysis. For these reasons the Claimant's complaints of direct race discrimination, harassment related to race and victimisation are not well founded and are dismissed.

Employment Judge R Harfield

Date 5 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 6 August 2024

FOR EMPLOYMENT TRIBUNALS Adam Holborn

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