EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Roy	**v**	CMR Surgical Limited

Heard at: Cambridge **On:** 21/22/23 August 2024 & 16/17/18 & 23 October 2024

Before: Employment Judge Conley
Ms M Harris
Mr C Grant

Appearances
For the Claimant: Himself, as a Litigant in Person
For the Respondent: Ms B Davies, Counsel

RESERVED JUDGMENT

1. The claim of harassment because of race is well founded and is allowed, although it is limited in scope.

2. The claim of direct discrimination because of race is well founded and is allowed, although it is limited in scope.

3. The matter is to be listed for a remedy hearing on the first convenient date.

REASONS

BACKGROUND

1. By a claim form presented to the Employment Tribunals on 28 September 2023, following a period of early conciliation between 3 August 2023 and 13 September 2023, the claimant sought to pursue the following complaints:
   i. Harassment related to his race (he is of Indian ethnicity and citizenship)
   ii. Direct discrimination on the grounds of race.

2. In summary, the basis for his claim was that having been employed in August 2021 as a Supplier Engineer by the respondent, a medical technology company whose core business was in the design and

construction of surgical robots, he initially thrived under the line management of John Bailey, the man who had interviewed him and made the decision to hire him.

3. However, he claims that after his line manager was changed when Marta Tubacka, a colleague with whom he already had a difficult relationship, was promoted, he was subjected to unfavourable treatment, excessive scrutiny, unfair criticism of his performance, and ultimately a pre-determined redundancy exercise after which he was dismissed by the respondent.

4. He asserts that what he perceived to be the unfair treatment that he received from Ms Tubacka was very substantially as a result of his race, in that he is an Indian citizen, and that this amounted to harassment and direct discrimination because of his race.

5. The claim was resisted by the respondent and on 8 December 2023 they presented a response which included comprehensive Grounds of Resistance to the claim. In essence, the claim is resisted on the grounds that there were a considerable number of issues with the claimaint's performance in his job, particularly but not exclusively in relation to his communication style with colleagues and suppliers, which was said to be confrontational and at times aggressive.

6. The respondent asserts that Ms Tubacka's management of the claimant, whilst admittedly robust, was fair and proportionate in addressing the underlying performance issues, and that it had nothing whatever to do with his race.

7. They say that the redundancy process was conducted fairly and that he was dismissed because he scored lowest in the pool, and that it was not the case that his dismissal was connected to his race.

THE PROCEEDINGS

8. It is necessary to set out in a little more detail that would usually be the case the history of the proceedings. Regrettably, the manner in which these proceedings were conducted - by both parties - contributed to making the task of the Tribunal considerably more difficult than would have been desirable.

9. The matter came before Employment Judge Moore for a Case Management Hearing on 27 February 2024 when the parties appeared via the Cloud Video Platform (CVP). At that time, the complexity of the issues, the amount of evidence relied upon by the claimant, and the extent to which the evidence of the respondent's witnesses was to be challenged was not, nor could not, have been known to the Judge that dealt with that hearing.

10. In those circumstances, a rather unwieldy list of issues was produced (running to 38 separate allegations of discriminatory acts, a number of which lacked clear definition), and a time estimate of 3 days for the final hearing was provided.

11. This time estimate, even on the basis of what was known by the parties at that first hearing ,was inadequate, but in the light of what followed became even more glaringly so. In the end the hearing took a total of 6 and a half days, including a day and a half in chambers for deliberation.

12. It emerged on the first day of the hearing that the parties had been unable to agree a final hearing bundle and that in the days leading up to the hearing there had continued to be a stream of correspondence between the parties in relation to number of documents that the claimant had sought to have included in the bundle.

13. Judge Moore had ordered that the bundle index be agreed by the 21 May 2024 and the agreed bundle be provided by 4 June 2024 so the fact that the content of the bundle was still highly contentious in early August was to say the least unsatisfactory.

14. The bundle included a significant amount of duplication and a swathe of documents that had absolutely no place in an agreed bundle - documents which included the claimant's own annotations and commentary, highlighted passages, edited excerpts from emails etc, and submissions. No satisfactory explanation was ever provided as to how this was allowed to happen.

15. Whether in an effort to ensure that the hearing went ahead on the scheduled date, or perhaps because the relationship between the parties had broken down to such an extent that any attempt at resolution of these issues had failed, the respondent was prepared to include these documents in the bundle. This was extremely unhelpful to the Tribunal because it was extremely misleading and blurred the lines between submissions on behalf of the claimant and the primary material to such an extent that it made a difficult task even more so.

16. In addition, the claimant made a very serious allegation that a number of the documents had been forged. He had formed a view that an Excel spreadsheet in relation to his Performance Improvement Plan (PIP) had changed its appearance between two versions of the document and concluded from this that it had been a forgery, and that he could not discount the possibility that there may be other forged documents in the bundle. Because this matter had not been resolved in advance, it was the subject of further argument during the course of the merits hearing. The Tribunal concluded that this was nothing more than a formatting error but nevertheless it was a source of considerable anxiety to the claimant and a distraction for the Tribunal.

17. The claimant also made a number of complaints about the exchange of witness statements, which was due to have taken place by 16 July 2024 but (in the case of John Bailey) did not take place until 8 August. The claimant argued that this late service had affected his ability to prepare adequately for the hearing. In particular, he stated that he had not appreciated that John

Bailey would be a witness and as such had been taken by surprise when served with his witness statement. This led to an application to exclude his evidence. This application was refused on the grounds that it had not led to any unfairness and that it ought to have been clear that Mr Bailey was a material witness, but once again it did contribute to an impression of unfairness in the mind of the claimant.

18. It really does beggar belief why, when it became so clear that the time estimate was insufficient and there were so many live issues outstanding, that the parties did not seek to vacate the 3 day hearing and list the case for a further Case Management Hearing in order to clarify the issues further, resolve the disagreements about the composition of the final bundle, and list for a final hearing with a more appropriate time estimate.

19. Without wishing to attribute blame, it does seem to the Tribunal that the respondent, as the legally represented party, ought to have taken the initiative in addressing these issues. It does appear from some of the material that the claimant did attempt, unsuccessfully, to bring these matters to the attention of the Tribunal prior to the final hearing.

20. The Tribunal was put in an invidious position and sought to try to resolve the case by way of hearing 3 days of evidence before going part-heard. This was unsatisfactory but was considered the least worst option at the time.

21. As it turned out, the case was to last even longer that the worst-case scenario that had been envisaged when the decision was taken to commence the hearing in August. This was in large part due to the length of cross-examination of the respondent's witnesses by the claimant, whose questioning went into extraordinary levels of forensic analysis of the technical minutiae, with all witnesses, but Marta Tubacka in particular, being cross-examined for many hours, at times repetitively. In the case of Ms Tubacka this was clearly causing her some significant emotional distress. The Tribunal attempted to impose time limits upon his cross-examination on a number of occasions, which he invariably exceeded. In the end it was necessary to impose a hard stop on his cross-examination because otherwise Ms Tubacka would have to be part-heard in her evidence over the course of several months.

22. The hearing was also disrupted by allegations made by Ms Davies, counsel for the respondent, against the claimant of collusion with his witness Mr Riaz, coupled with an extraordinarily hostile cross-examination of Mr Riaz, and serious allegations of mala fides made by the claimant against Ms Davies, which were wholly unacceptable.

23. The Tribunal was mindful that the claimant was a litigant in person and every reasonable accommodation was made in light of that fact but nevertheless the Tribunal found it very difficult to try ensure that the focus of the hearing remained on the issues, not least because of a pervasive atmosphere of hostility between the parties that existed for the majority of the hearing.

THE ISSUES

24. It is not necessary for the extensive list of issues to be reproduced here. Each of the allegedly discriminatory acts will be examined individually in the course of the Tribunal's conclusions below. Suffice it to say that the live issues as far as we are concerned are as follows:
    i. Did the Respondent commit any of the 38 acts identified by the claimant?
    ii. If so, were they related to his race?
    iii. If so, did the conduct (a) amount to harassment or (b) amount to less favourable treatment because of his race? (For the purposes of (b), this would include the decision to dismiss the claimant on the grounds of redundancy.)
    iv. Whether, in determining the matters above, the Tribunal has jurisdiction to consider any matters prior to 4 May 2023 (whether because any discrimination was continuing over a period, or if not, whether it would be just or equitable to extend the time period).

THE EVIDENCE

25. The evidence in this case came from the following sources:

    a) The written and oral evidence of the Claimant:

    b) The written and oral evidence of Malik Riaz (a former employee of the respondent) and written statements of Murphy Brown, Ian Hepple and Kenoye Muzan-Ekpelu (none of whom attended for cross-examination and as such the weight to be attached to their evidence is reduced), all on behalf of the claimant;

    c) The written and oral evidence of John Bailey (a former employee of the respondent and his original line manager), Marta Tubacka (the claimant's line manager at the time of his dismissal and the person against whom most of the allegations of discrimination were made), Benjamin Summers (who conducted the claimant's grievance investigation) and the written statement only of Natalie Forster (who was due to give evidence at the original hearing but was unavailable for cross-examination on the date of the adjourned hearing and as such her statement is given limited weight).

    d) A Bundle of Documents amounting to 623 pages.

26. Unfortunately, as previously stated, the bundle had not been agreed in advance of the final hearing and there were a number of issues that arose relating to it. The claimant had sought to include a large number of documents which were composite documents featuring extracts from various different sources, such has extracts from email chains which he had highlighted and juxtaposed with extracts from other documents; and which contained his own annotations in which he provided his own commentary on his interpretation of the material.

27. The Tribunal was provided with submissions from both parties to whom we are grateful, and which we have considered with care.

FINDINGS OF FACT

BACKGROUND

28. On 9 August 2021 the claimant commenced employment with theespondent as a Supplier Engineer. His contract was signed July 2021.

29. John Bailey, who conducted his interview for the role, concluded that the claimant possessed all of the required experience and qualifications for the role. He also found him to be very keen and enthusiastic, and had a number of interesting ideas; and that he appeared to be someone who would be easy to work with.

30. Mr Bailey was, at the time, the Supplier Engineering Manager, who had line management responsibilities for ten employees, including the claimant and Marta Tubacka. He was a very senior and highly experienced manager.

31. During the course of his first few weeks in the role, various communication issues relating to the claimant came to light from colleagues and suppliers. However, none of these issues resulted in any formal complaint against the claimant and under cross-examination Mr Bailey was unable to identify any specific complaint and accepted that he had not considered the complaints sufficiently serious to justify any form of disciplinary action.

THREE MONTH REVIEW

32. On 12 November 2021, the claimant had a 3 month review with Sophie Paterson, the Senior People Team Business Partner. During the course of the review, the claimant continued to show enormous enthusiasm for the company and his job within it.

33. He was specifically asked about his relationship with his manager Mr Bailey. He stated that he felt supported and that Mr Bailey had told him that he was ‘doing a good job’. However, he also reported to Ms Paterson during the meeting that Mr Bailey had informed him that his communication style was very direct and ‘black and white’, and that they were not ‘able to understand each other’s view points’ which the Tribunal took to be an early indication on the part of the claimant that he had some awareness of some of the more negative perceptions of him and his communication style even at that early stage in his employment, and the need to undertake some additional training in order to address this communication issue.

34. He also recorded in the form the following statement: ‘Part of my role is to be bad to the supplier’, which tends to support the assertion that his communication style was causing a deterioration of relationships between the respondent and their suppliers.

35. Ironically, Mr Bailey was not at this stage aware of any issues of communication between himself and the claimant, but he had been made aware of issues that others in the company and externally had with the claimant.

36. The Tribunal finds that this is characteristic of Mr Bailey's patient and supportive management style, and indeed of his obvious warmth towards the claimant at this time.

37. However, as time progressed, Mr Bailey was notified of a number of other complaints about the claimant's mode of communication. It is correct that none of these amounted to formal complaints of misconduct such that needed to be investigated or would result in any form of disciplinary action (as was explored and highlighted by the claimant in cross-examination); rather, they were reported to Mr Bailey informally and he attempted to deal with them through supportive management, mentoring and guidance. Mr Bailey became concerned that this approach was proving to be ineffective and that the claimant was not responding to his guidance.

FIVE MONTH REVIEW

38. In January 2022, Mr Bailey conducted a Five Month Review with the claimant. Once again the claimant expressed his characteristic positivity and enthusiasm for his role, and spoke highly of his relationship with Mr Bailey, stating, 'I feel supported by my manager. Things have drastically evolved for me and John in a good way'.

39. As before, Mr Bailey provided feedback which was broadly very positive, praising the claimant for his enthusiasm and stating that 'some of his work has been exceptional and outside of what I'd expect from him'.

40. He did however note that the claimant needed 'nurturing with regards to his approach' although stating that 'comments/complaints have reduced regarding his comms with others'.

41. Mr Bailey did sign off the claimant's probation period as completed. The Tribunal found that Mr Bailey may have underplayed his concern about the claimant's communication style, instead placing more emphasis on his technical ability and zeal for the job. We nevertheless find that in making the decision to sign on the claimant's probation period, Mr Bailey glossed over the concern that he had about his ability to commicate effectively with others.

42. This was repeated in the context of the claimant's 2021/22 appraisal which was conducted by Mr Bailey in February 2022.

APPRAISAL

43. In the Appraisal Form, there can be seen the first significant example of something that became a feature of the claimant throughout his time with the respondent: holding a somewhat inflated view of his own performance whilst being somewhat oblivious to the subtleties of the criticism of his communication style. The claimant assessed himself as 'exceeding expectations' whereas Mr Bailey settled on a rating of 'meets expectations', taking into account those issues.

44. Mr Bailey made a number of references to these issues during the appraisal, stating that 'Looking at his all round performance I must consider the

relationship issues raised from internal colleagues and external contacts therefore I reduces rating to 3' and that the claimant 'needs to understand the implications, learn the subtle means of approach and respect in dialogue with others'.

45. Mr Bailey's decision in relation to this rating came about by reflecting upon issues that had been fed back to him from a variety of sources within the company, likely to include Marta Tubacka, but he independently took the decision to rate the claimant 3/5. This was a fair decision and was his honestly held opinion. It was not a decision he made as a direct result of Ms Tubacka's intervention. At that early stage in his career with the respondenta rating of 3/5 was entirely appropriate. By contrast, the claimant overestimated his own performance.

46. That said, it does appear that, looking solely at the claimant's technical performance in the role, Mr Bailey would have rated the claimant as 4/5, indicating that he did exceed expectations in that regard, and it was the issues with his communication that resulted in the reduced rating.

47. The issues with the claimant's performance had not reached a level requiring disciplinary action and did not present an obstacle to the claimant passing his probation period. The Tribunal finds that, once again, Mr Bailey attempted to adopt a supportive and 'light touch' approach to managing these issues which the claimant did not appear to understand or respond to.

48. This became further apparent following the appraisal when Mr Bailey found that the difficulties with the claimant's communication worsened. This was witnessed by another Supplier Engineer, Zane Wall, and as a result of which Mr Bailey had to ramp up the degree of intervention with frequent meetings and conversations, and had to spell out to the claimant the need to listen in a way that he had never had to do with any other colleague.

49. Mr Bailey's view of the claimant deteriorated to the point that he stated that, 'in 40 years of managerial experience, he had never encountered anyone as difficult or as stubborn as the claimant'. However, this severely critical assessment of the claimant is not supported by any contemporanous document in the bundle or by reference to any formal complaint made by or to Mr Bailey about the claimant. In the circumstances it does appear to the Tribunal to be a retrospective assessment and it is understandable, given the lack of management action by Mr Bailey if he felt as strongly as this suggests, why the claimant may have felt that Marta Tubacka's management of him felt persecutory.

PROMOTION OF MARTA TUBACKA

50. On 1 September 2022 Marta Tubacka was promoted to Supplier Engineering Manager, and the claimant started reporting to her rather than Mr Bailey.

51. Mr Bailey noted that her management style was more direct and forthright and as a result there had been some of what he described as 'low-level friction' between her and some colleagues.

52. There was in reality considerably more than low-level friction between her and the claimant. In fact there was open hostility and the claimant was extremely unhappy at the prospect of being managed by her. It is not entirely clear why this was the case. It is possible that it was because she had previously been his peer and he resented her promotion to where she was his superior; or it could be because he did not respect her professionally; or simply because they just didn't like each other on a personal level. It seems likely that it was a combination of all three.

53. It was clear that the management approach to the claimant that Ms Tubacka adopted from the outset only served to antagonise the claim and lead to a worsening of their professional relationship.

54. In their first meeting following her promotion, the claimant made his feelings towards Ms Tubacka clear, indicating to her that he already perceived that their relationship was bad and that his life would be 'a disaster' with her as his line manager.

55. The Tribunal's view is that there was an atmosphere of mutual antagonism, with Ms Tubacka perceiving, because the claimant was seeking opportunities elsewhere in the company, that the claimant was determined to make their relationship fail.

56. We find that the failure of the relationship was something of a self-fulfilling prophecy due to the actions of both the claimant and Ms Tubacka. Ms Tubacka was correct in perceiving that the claimant's highly negative view of her, and in particular the idea of her becoming his line manager did set an exceptionally negative tone for their working relationship from the outset which was always going to be difficult to overcome. However, we also find that her direct, if not confrontational, approach to managing the claimant, which was the polar opposite of the passive but fundamentally supportive approach of Mr Bailey to which the claimant had become accustomed, only served to heighten the tension between them, as did the fact that the claimant would frequently undermine Ms Tubacka's authority by being dismissive of her and complaining about her to numerous other colleagues and seeking out other, conflicting, opinions about her actions.

NCRs

57. A significant aspect of the claimant's role was to carry out Non-Conformance Report (NCR) processes, whereby he was required to address any issues identified in an NCR, take appropriate action in resolving the issue, and then submit request that the NCR be closed down.

58. The claimant's performance on NCRs was criticised because he had on a number of occasions caused NCRs to be closed down without having resolved them satisfactorily and as a result caused "re-work". On the other hand, there was evidence that the claimant had taken on substantial numbers of NCRs and had managed to reduce the numbers significantly.

59. The Tribunal finds that the performance issue identified in relation to NCRs was as a result of the claimant's eagerness to please and to take on a greater workload than he was capable of managing at that time, albeit with the best of intentions. The claimant was able to point to a number of examples of praise from senior colleagues, including the COO of the respondent, and his most frequently complimented attribute was his boundless enthusiasm for his job. Ms Tubacka however was concerned that his eagerness to complete his work led to errors being made.

60. On 13 October 2022 MT requested that the claimant to try to sign a document relating to a review of supplier corrective actions using the respondent's document management system 'M-Files'. The claimant encountered some technical IT issues in completing this task. The claimant interpreted this request as being 'forced labour' on account of his inability to complete this task due to the aformentioned IT issue.

61. The Tribunal finds this assertion to be misguided, and one of a number of examples of where the claimant been hypersensitive to the words and actions of others (particularly Ms Tubacka) in relation to mundane matters. We accept Ms Tubacka's evidence that she was trying to direct him appropriately to the M-Files package because he the claimant was erroneously attempting to open via email. We accept that the communication was somewhat clipped, which appear to be characteristic of Ms Tubacka's style, but not unduly so in this instance.

COVERT RECORDINGS

62. On 4 October 2022, the claimant covertly recorded Ms Tubacka saying 'You are a foreigner'. This was said to him as a means of explaining to him that his mode of communication could be misunderstood in the workplace. Her intention had been, ironically, to establish a point of similarity between herself (as a Polish woman) with him, in that they were *both* 'foreigners' and as such they both had to be mindful of how they communicated with British colleagues that spoke English as a first language. However, it did have the effect of singling him out as different from his colleagues by reason of his race and was offensive and humiliating.

63. On 21 November 2022 Ms Tubacka emailed the claimant to warn him about the future consequences of covert recording colleagues following the discovery that he had recorded his colleague Neil King without his knowledge on the 2 November 2022. He had also been warned in similar terms by Sophie Pattinson.

64. When challenged by Ms Tubacka about whether he had been making covert records, the claimant denied having done so. This was plainly dishonest.

65. In evidence the claimant repeatedly refused to accept that that carrying out these covert recordings was dishonest and sought to suggest that he had been 'very specific' when denying having been recording their conversations that he had been referring to that day ie the day on which he was challenged.

66. The Tribunal finds this explanation to be highly evasive and disingenuous at best. Whilst we are prepared to accept that the claimant's interpretation of what constitutes dishonesty may not include conducting covert recordings, we are entirely satisfied that it was behaviour which lacked integrity and was reprehensible; and that his decision to continue to do so and to deny having done so when challenged was thoroughly dishonest.

67. In relation to the 'transcripts' that have been provided, unfortunately these are incomplete records of the recorded conversations and as such they are of limited assistance to the Tribunal. The claimant accepted in cross-examination that he had only provided 'extracts that support his case'. However the effect of this selective approach is that the Tribunal cannot place as must emphasis upon these recordings as the claimant would like.

COMMUNICATION ISSUES

68. A number of colleagues within the respondent, in addition to Ms Tubacka, identified concerns with the claimant's manner of communication.

69. In the course of an interview with Scott May as part of the claimants appraisal, he stated that there had been 'heated exchanges' between the claimant and suppliers.

70. Bilal Ahmed said of the claimant that he 'had been a little aggressive and there had been conflict with suppliers'. Indeed, a manager one of the respondent's major suppliers, Prima, had stated that he would not do business with the respondent any more following an argument with the claimant.

71. Sophie Paterson described the claimant's communication style as 'quite direct, we've had complaints'. Likewise, Nathalie Sorde had also raised issues regarding the claimants communication style.

72. As was a consistent feature of the claimant's evidence, he was resistant to such criticism unless it was what he considered to be 'evidence based'. However, the Tribunal is satisfied that the consistency and regularity of issues raised concerning the claimant's performance and, in particular, his communication, is a proper basis for concluding that there was genuine concern about these matters at the respondent company.

INFORMAL PIP

73. On 5 December 2022, in an effort to address what she considered to be deficiencies in a number of different areas, Ms Tuback placed the claimant on an Informal Performance Improvement Plan (PIP).

74. Notwithstanding the fact that there was considerable room for improvement in the claimant's performance, this was an action that would inevitably result in the further destabilisation of Ms Tubacka's relationship with the claimant. He had only been passed on his probation period earlier that year, and it was a premature and somewhat heavy-handed approach to managing a person who was, it must be remembered, a relatively junior member of staff who had only been under Ms Tubacka's management for a matter of weeks. It is not remotely

surprising that he reacted negatively to the implementation of this management tool.

75. It is also notable that the way in which Ms Tubacka assessed the claimant's performance against the criteria was extremely negative. Even where the narrative response by her could be said to amount to at least a 'partial achievement' of the criteria, the claimant was assessed as 'unsuccessful' and, as he stated in evidence, the PIP was coloured in almost exclusively in red. Whilst the Tribunal does not accept that this was 'frightening' as the claimant suggested, it was certainly harsh and would have been very demoralising.

76. The operation of the PIP tends to suggest that progression to a formal PIP was something of an inevitability and the process was not particularly supportive of the claimant. The Tribunal overwhelmingly concluded that the claimant was being 'managed out' of the business

MISSING PART

77. In January 2023 a test part (camera head), at a value of around £7,000, went missing due to a lack of traceability. The internal systems that the respondent had in place for keeping track of inventory showed that the claimant was the last to have it. He sent emails to colleagues Abby Lord (inventory controller) and Christopher Cocks on 17 January 2023 seeking help in locating the part. Mr Cocks indicated that if the part could not be located it would have to be 'written off' at a significant cost to the respondent. The claimant agreed that had "forgotten" where the parts were.

78. Ms Tubacka emailed the claimant asking him about the location of the part and, when responding to his 'FYI' email which informed her of the missing part, she did question the fact that he offered no explanation about the 'traceability' of the part that he took, and told him not to take any part from quarantine, or from the stock, or have them transferred under sale order to his name.

79. Although expressed as a direction, the tone of the emails does suggest an element of blame, but in the circumstances this was justified and indeed it could be said that Ms Tubacka showed a certain amount of restraint in the way she addressed it. It was a serious incident, and the Tribunal formed the view, as did Ms Tubacka, that the claimant did not view it as being particularly serious.

80. Given the seriousness of the part being untraceable, Ms Tubacka discussed her concerns with her own Line Manager, Bilal Ahmed, but did not raise a formal complaint against the claimant or seek to initiate any disciplinary action. It was not clear on the evidence that there was any reference to this incident in a 'morning meeting' and it may be that the claimant was conflating this with a separate incident in his evidence.

FORMAL PIP

81. On 6 February 2023, Ms Tubacka emailed the claimant to say that as a result of the claimant not having met the required standards during the course of the informal PIP, the respondent would be 'progressing down the formal capability process'.

82. On 1 March 2023 Ms Tubacka and Natalie Forster (Senior People Team Advisor) held a meeting with the claimant to inform him that he was to be subject to a formal PIP for the subsequent three months, until 31 March 2023, and set out the details of the PIP and attempting to identify examples of lapses in his performance. Ms Tubacka went on to confirm this with the claimant and informed him that he was having number of key responsibilities removed from him, namely: the management of supplier Zollner; management of supplier GTK; and Richard Wolf investigation and management.

83. In response to this meeting, the claimant submitted a detailed email in which he refuted a number of the criticisms by presenting detailed evidence of his own performance and identifying where some criticisms of him by Ms Tubacka were factually inaccurate.

84. On the face of this evidence it would appear that a number of Ms Tubacka's criticisms of the claimant were either factually inaccurate or overstated.

85. In that email the claimant complained of not being heard and that Ms Tubacka's management of him was a case of 'my way or the highway'. There is some justification for both of these observations in the view of the Tribunal.

86. It is accepted that the legitimate concerns about the claimant's performance remained and this was what led to the escalation to a Formal PIP. However the PIP was complex and unwieldy, and it did burden the claimant with a lot of additional work. It was difficult to see how the claimant could have succeeded in 'passing' the PIP.

87. Although many of the issues identified during the operation of the PIP were entirely valid, some of them were at times trivial and patronising eg in relation to insignificant errors in spelling and punctuation. These were also issues which may have disproportionately affected the claimant as a non-native English speaker.

88. During the course of the formal PIP Ms Tubacka did say to the claimant that 'if it [the PIP] does not go well then we would say bye-bye'. This was an unfortunate and ill-judged phrase to use in this context and she ought to have expressed the PIP process differently. The Tribunal accepts that the process being presented to him in this way would have caused him to feel anxious, threatened and insecure in his position and it undermined the stated aim of the PIP of supporting the claimant and improving his performance in certain areas.

APPRAISAL BY MARTA TUBACKA

89. In February 2023 Ms Tubacka completes the Claimant's 2022 appraisal, which she concluded by assessing him as 2/5 ('does not meet expectations') a reduction of one point from his appraisal for 2022 which had been conducted by John Bailey.

90. Whilst it could not be said that this was an unreasonable assessment, given the issues that Ms Tubacka had identified, it does nevertheless stand at variance

with the feedback that the claimant regularly obtained from senior colleagues across the business, examples of which he supplied as part of his self-assessment. He was also able to produce extensive and specific examples of evidence-based support for his own performance, whereas much of Ms Tubacka's criticisms were generic, which suggests that her assessment was rather subjective and personal in nature.

91. The claimant, in his own self-appraisal, rated himself as 5/5 ('significantly exceeds expectations'). This was plainly a wholly unrealistic overestimation of his own abilities and performance, and there was no acknowledgement at all by him of his various performance issues.

92. As a result of the gulf between their appraisals of the claimant, he received a bonus which was commensurate with Ms Tubacka's rating which was far below what he was expecting. The Tribunal concludes that the claimant was not 'deprived' of his bonus as he alleges but that he simply received less than he had been hoping for.

REDUNDANCY EXERCISE

93. On 30 March 2023 the Respondent announced that it would be conducting a large-scale redundancy exercise.

94. On 4 May 2023 the claimant's first redundancy consultation took place with Ms Tubacka and Sophie Paterson, and it was explained that the respondent would be reducing its workforce by around 350 employees, and that the claimant's role had been placed at risk because his role was 'reducing in headcount in the new proposed structure' and that he was being placed in a pool of 9 for 6 roles of Supplier Engineer across Supply Chain (one role) and OPM (five roles).

95. 17 May 2023 the claimant's redundancy matrix is completed, by Marta Tubacka.

96. The claimant stated in evidence that he challenged all of the scores. Whilst this was a further example of the claimant lacking insight into issues regarding his performance and tending to overestimate his ability, the Tribunal nevertheless finds that the redundancy scoring exercise was deeply flawed. Some of the scores attributed to the claimant by Ms Tubacka are difficult to comprehend.

97. Firstly, scoring the claimant 1 out of 3 for 'Commitment to CMR' flies in the face of a wealth of evidence from many different sources across the business, including senior management, of the claimant's zeal and boundless enthusiasm for his job and his unfailing commitment. Even Ms Tubacka made reference to his desire to take on greater responsibilities, his support for his colleagues, and his ambition to succeed in his job in her appraisal of him for 2022. It was one of the few silver linings that could be found in what was otherwise a lacklustre appraisal of him. This was a very unfair score.

98. Secondly, scoring the claimant 1 out of 5 for 'Validation' when this was not even a feature of the role that he was competing for, and the fact that he had never received any training upon, put him at a very substantial disadvantage.

99. Thirdly, scoring him at 1 out of 3 for Education/Experience, given his impressive CV in terms of both education and experience was deeply unfair.

100. Whether or not a more fairly conducted redundancy scoring exercise would have ultimately made a difference to the outcome may not be known, but the Tribunal considers that the way in which the matrix was scored gives rise to a perception of bias on the part of Ms Tubacka. It is in our view understandable that whilst awaiting the decision, the claimant was resigned to the view that his redundancy was inevitable.

101. On 18 May 2023 the claimant's redundancy is confirmed

GRIEVANCE

102. 30 May 2023 the claimant raised a grievance. No reference to his race or racism towards him was mentioned within the grievance application. He did however refer to 'bias' against him of an unspecific kind.

103. On 12 June 2023 the claimant's employment with respondent ended.

104. On 13 June 2023, the claimant sent an email to Maddie Jarvis and Ben Summers in which he attaches a screenshot from a former colleague, Murphy Brown. He did not make any direct allegation of discrimination on the grounds of race in the body of the email; however the screenshot does include a reference to race, raised by Murphy Brown who, in response to the claimant informing him that he had raised a complaint about Marta Tubacka, replied 'she also appears to be racist'.

105. On the same day a meeting is held with the claimant, Ben Summers, and Maddie Jarvis to discuss the claimant's grievance. During the course of this meeting, the claimant did not expressly assert racism against Ms Tubacka but once again quotes his former colleague Murphy Brown in saying that Ms Tubacka had been racist towards him.

106. On 21 June 2023 the Claimant received a written outcome to his grievance. He subsequently appealed the decision in an email of the same date, timed at 9:16am, in which he makes no mention of discrimination on the grounds of race, instead referring to challenging the findings in relation to the closing of NCR tickets and his relationships with suppliers. He followed this email up with a further email timed at 11:58am requesting the preservation of data on his laptop and implying that he was contemplating legal action. He once again makes reference to placing reliance upon the evidence of colleagues and former colleagues, but does not expressly state what the nature of that evidence would be or what it would purportedly prove. In evidence he stated that this was a reference to alleged racism, and in light of the matters previously mentioned by him in relation to Murphy Brown, we find that this is what he meant.

107. On 30 June 2023 the claimant was invited to a grievance appeal meeting by Heidi Salmon but declines to attend, saying in an email to Emma Armstrong, senior people team advisor, of 30 June I don't want to sound too harsh but I

value my time and I am not too motivated to attend any further meetings to explain myself once again…unless there is any legal binding or other agenda to fulfill…if so not then I have to give it a polite decline'. He went on to reassert his claim to an improved bonus at a rating of 5 out of 5.

108. Ms Armstrong in her reply did make reference to the allegation of racism raised in the grievance, stating, 'We note that during the process you made reference to feeling discriminated against while employed at CMR and made reference to racism. This is obviously very concerning and something we take very seriously. We would therefore like to explore this with you. Please can you confirm if you would be willing to have a call with me about this?'

109. The claimant initially responded that he would be available for a discussion via Teams the following day, but also made it clear that he was in contemplation of a complaint to the Tribunal.

110. As it turned out, the Teams meeting did not ultimately take place, leading to the appeal being concluded in his absence.

111. On 6 July 2023 The Claimant is informed via email about the conclusion of the grievance appeal.

112. On 13 July 2023 Emma Armstrong suggests a meeting over Teams to discuss new allegations of racism and discrimination made by the Claimant

113. On 19 July 2023 a Teams meeting is held to discuss the new allegations.

114. On 26 July 2023 the Claimant contacts the CEO and the Cambridge media, prompting the respondent to send a letter summarizing their position.

THE LAW

Time Limits/Jurisdiction

115. 123(1)EqA [Subject to [section 140B] proceedings] on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the purposes of this section—

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

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

116. A tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time, the exercise of the discretion is the exception

rather than the rule, as per the CoA in *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA

117. The factors listed in s.33 Limitation Act 1980 are a useful guide, but should not be adhered to slavishly, as per the CoA in *Southwark London Borough Council v Afolabi* 2003 ICR 800, CA

118. The factors are as follows: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

119. The question to be asked is one of the balance of prejudice.

120. On continuing acts, it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period', as per the CoA in *Commissioner of Police of the Metropolis v Hendricks* 2003 ICR 530, CA

121. In considering whether separate incidents form part of an act extending over a period, *'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents', as per Aziz v FDA* 2010 EWCA Civ 304, CA

122. Any unproven acts of discrimination cannot form part of the continuing act, as per *South Western Ambulance Service NHS Foundation Trust v King* 2020 IRLR 168, EAT

123. . The statutory test –
13. (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.

124. As to the burden of proof, the initial burden lies on the Claimant to establish a "prima facie' case, as per Mr Justice Elias (then President of the EAT) in *Laing v Manchester City Council and anor* 2006 ICR 1519, EAT: '*the onus lies on the employee to show potentially* ***less favourable treatment from which an inference of discrimination could properly be drawn'****.*

125. As Advocate General Mengozzi said in *Meister v Speech Design Carrier Systems GmbH* (Case C-415/10) [2012] ICR 1006, para 22: "*A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the respondent* ***solely on the basis of the victim's assertions***."

126. The treatment must be what is called, "a detriment" and another person, (or a hypothetical person) must have been, (or would have been) treated more favourably.

127. The reason for any such difference must be, in this case, race. *Madarassy v Nomura International Pie* [2007] I RLR 246 CA explains that a mere difference in treatment is not enough, Mummery LJ stating:

> *"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"* ***There must be, "something more" other than the difference in treatment, to suggest that reason for the difference is race.***

128. It is legitimate for a tribunal to look at all the material before it when determining whether there has been less favourable treatment, and that this may include evidence about the conduct of the alleged discriminator before or after the act about which the particular complaint is made, see *London Borough of Ealing v Rihal* 2004 IRLR 642, CA

129. It is well established that unfair treatment is not to be equated, as such, with discriminatory treatment, see *Glasgow City Council v Zafar* [1998] ICR 12

130. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour, see *Anya v University of Oxford and anor* 2001 ICR 847, CA

131. However, tribunals must be careful not to leap from a finding of unfair or unreasonable conduct — which may well amount to less favourable treatment than that which was (or would have been) meted out to a comparator (whether real or hypothetical) — to the conclusion that such conduct was motivated by the protected characteristic relied on and was thus directly discriminatory. There must be some evidential basis for drawing such a conclusion or adverse inference, see *Messeri v Royal Hospital for Neuro-Disability* ET Case No.2301983/20

132. In *Gould v St John's Downshire Hill* 2021 ICR 1, EAT, Mr Justice Linden, after summarising the established case law discussed in detail below, helpfully explained:

> *'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it* ***is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of****. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.'* (emphasis added)

133. As per Lord Nicholls in *Nagarajan v London Regional Transport* 1999 ICR 877, HL:

> *'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, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible.* ***If racial grounds… had a*** **significant influence** ***on the outcome, discrimination is made out'****. The crucial question, in every case, was 'why the complainant received less favourable treatment… Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'*

134. As per Lord Phillips in *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors* 2010 IRLR 136, SC, in cases where the conduct complained of is not inherently discriminatory, it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

135. On actual comparators, as per Lord Scott in *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL:

> '*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.*

136. On hypothetical comparators, as per Mr Justice Linden in *Gould v St John's Downshire Hill* 2021 ICR 1, EAT:

> *'Where a tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic… The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic.'*

Harassment

137. Section 26 of the Equalities Act states that:

(1) A person (A) harasses another (B) lf-

(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 (the person harassed);

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

138. A single incident can constitute conduct, "*provided it is sufficiently serious*" - see *Bracebridge Engineering Ltd v Darby* (1990) IRLR 3

139. "Purpose" in EqA s.26(1)(a) means that the maker of the statement must have intended his comment to violate the Claimant's dignity – see *Richmond Pharmacology v Dhaliwal* [2009] ICR 724.

140. The words "violating dignity" are "significant" and "strong" words. Offending against, hurting, dignity is not sufficient. The words "*look for effects which are serious and marked*" - see, eg, *Betsi Cadwaladr UHB v Hughes* UKEAT/0179/13/JOJ

141. The conduct complained of "must reach a degree of seriousness" before it can be regarded as harassment, in order not to "*trivialise the language of the statute*" -see *GMB v Henderson* [2015] IRLR 451

142. Simply being upset, or angry, therefore1 is not sufficient- see *Land Registry v Grant* [2011] ICR 1390 (CoA).

143. In deciding whether particular conduct, related to a protected characteristic, created a proscribed environment, the ET "must" take into account "the other circumstances of the case" (EqA s.26(4)(b)).

144. Whether as part of the s.26(4)(b) consideration, or as a standalone issue, context is central to the evaluation of whether the effect of conduct was to create a proscribed environment - see, *Land Registry v Grant* per Elias LJ

"When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect.

145. If the conduct did create a proscribed environment for the Claimant, the tribunal "must" consider whether it was reasonable for that conduct to have had that effect (EqA s.26(4)(c)).

146. In practice, the concepts of context and reasonableness merge because, as stated in *Richmond Pharmacology v Dhaliwal* UKEAT /0458/08/CEA, per Underhill P at §15:

"Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. ***It will be important for it to have regard to all the relevant***

circumstances, including the context of the conduct in question*. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely to produce the proscribed consequences); the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."* (emphasis added)"

CONCLUSIONS

147. In this case, there has been an exceptionally long list of allegations of discriminatory acts, many of which overlap with one another, and many of which are lacking specificity such as to enable the Tribunal to reach a clear finding. It would have been helpful for everyone involved in this case, not least the claimant himself, for this list to have been refined and shortened to enable the Tribunal to focus upon those particular alleged acts that form the bedrock of the claimant's broad assertion that the conduct of Marta Tubacka, which he found to be oppressive and unfair, was borne out of a hostility towards him based upon his race.

148. As it is, the Tribunal has attempted to approach the allegations and make findings in respect of each of them individually, before stepping back and taking a broader view of the conduct as a whole, its causes, and its effects upon the claimant.

149. Because it is asserted by the claimant that the same alleged acts amounted to both harassment and direct discrimination, we need not consider the issues separately, save in relation to the allegation that it was the alleged acts which, jointly and severally, led to his dismissal on the grounds of redundancy, which we must address separately.

FINDINGS ON THE INDIVIDUAL ALLEGATIONS

150. Many of our findings in relation to the allegations have already been foreshadowed within our findings of fact set out above but so far as is necessary they will be repeated here.

i. In about November/December 2021 did Marta Tubacka say, following the claimant sneezing in the office, that if the claimant had sneezed like that at her previous company disciplinary action would have been taken.

The only evidence of the use of this phrase comes from the claimant. Ms Tubacka's evidence in relation to this is that she *might* have said *something* in relation to the claimant sneezing and that if she did, it would have been in the context of the COVID 19 pandemic which was still acutely affecting workplaces in the UK at that time. It seems to the Tribunal that in that particular context it would not be unusual that a person sneezing in the workplace would be commented upon. Ms Tubacka stated that she does not recall using that phrase. We simply do not have sufficient evidence before us to determine the precise words used. We do not consider that the incident is an invention by the claimaint - we are satisfied that Ms Tubacka made an observation in relation to his sneeze - but that this would almost certainly have been due to the sensitivity concerning personal hygiene that

existed at that time. To this extent, we prefer the evidence of Ms Tubacka in this regard, and that even if a comment had been made in a way that the claimant had found to be discourteous, we do not consider that there is any basis to conclude that it was to do with his race, nor that it would have satisfied the statutory test for harassment.

ii. February 2022 Ms Tubacka complained about the claimant to John Bailey so that the claimant's rating was reduced from 4/5 to 3/5.
As stated above, we find that Mr Bailey independently took the decision to grant a rating of 3/5 on this appraisal having considered all of the information that he had at his disposal. Ms Tuback was not the claimant's line manager at the time. There is no evidence before the Tribunal that it was as a a result of any particular complaint made by her that Mr Bailey made this decision. In any event we find on the basis of the evidence of his performance at that early stage in his career with the respondent that a rating of 3/5 is entirely appropriate, and once again we make the observation that the claim has a tendency to overestimate his performance. We find that Mr Bailey was giving his honestly held views of the claimant, and for him to say that the claimant 'meets expectations' should not be taken as indicating a concern about the claimant's performance. We cannot rule out the possibility that Ms Tubacka might have said negative things about the claimant's communication style but we do not find that she was instrumental in causing Mr Bailey to reduce his score.

iii. On 4 October 2022 Ms Tubacka called the claimant a 'foreigner'.
This fact is agreed by the respondent. The question for the Tribunal is whether this amounted to harassment or less favourable treatment. The respondent has submitted that the comment was not relating to the claimant's race. The Tribunal cannot accept this. It is in our judgment unarguable that the claimant's race was at the root of this comment - calling an employee a foreigner is an overt reference to that person's race by reason of their 'otherness' from the race of the other employees. It has been submitted that the statement was not intentionally offensive and was in fact an attempt by Ms Tubacka to identify a point of similarity between herself and the claimant. She may well have been intending to do just that but it was exceptionally ill-judged. It is open to any person to identify him or herself as 'foreign' but it is not appropriate to attach that label to another. It singled him out. It was a microaggression. Put simply, it would not have been said to a white British employee, and this fact alone would be capable of leading to the conclusion that this was less favourable treatment than to the hypothetical white British comparator. Added to this, we must also consider the nature of Ms Tubacka's relationship to the claimant. She was his line manager and he was her subordinate and as such was in a position of weakness. She was also fully aware that they did not have good relationship, and therefore ought to have been aware that this was likely to heighten his sensitivity to her words. In the context of a relationship that was difficult this comment would inevitably be unwelcome and offensive.

We find that the claimant was genuinely and justifiably offended by that comment and that it did have the effect of creating an intimidating, hostile,

degrading, humiliating or offensive environment for him. Accordingly we find in favour of the claimant in relation to both harassment and direct discrimination in relation to this allegation.

iv. On 13 October 2022 Ms Tubacka forced the claimant to try to sign a document on Microsoft Teams although it wasn't possible for him to do it.
We do not accept that the claimant was 'forced' to do anything of the sort as previously stated. We accept Ms Tubacka's evidence that she was trying to direct him appropratiely to the M-Files package because he the claimant was erroneously attempting to open via email. We accept that the communication was somewhat clipped but this reflects the high pace of the work environment and was not a reflection on Ms Tubacka.

v. In December 2022 Ms Tubacka subjected the claimant to an informal Performance Improvement Plan (PIP)
This fact is agreed and is well documented. The real question is whether or not this amounted to less favourable treatment or harassment. As stated about the Tribunal has concluded that this was a premature and heavy handed measure to put in place particularly where the working relationship was already strained, and that Ms Tubacka's feelings towards the claimant undoubtedly influenced her decision to embark on this course.

vi. *Ms Tubacka proposed ISO 13485 training to all members of the team apart from the claimant.*
We accept Ms Tubacka's explanation as to why the training was not offered to the claimant. Others on the team were senior in terms of length of service, and she had determined that the claimant was not ready for the training. She told him the following: 'I wanted you to get broader knowledge about the other topics because your focus was on NCRs, I thought you would benefit more from the trinaining when you had more experience.' which seems fair and reasonable. The respondent has also pointed out that, in relation to this training programme, two other team members - Michelle and Anura - did not receive the Lead ISO 13485 training.

vii. *In about January 2023 Ms Tubacka blamed the claimant for losing a part worth £7K.*
The respondent has confirmed that their internal systems showed that the claimant was the last person to have the parts, and that he had "forgotten" where the parts were. Ms Tubacka's evidence was that she did not blame the claimant, but asked him about the location of the parts. Whilst we detect an element of blame in the way in which she approached the claimant in this regard, we find that this was not unreasonable, given the evidence that she had as to the parts whereabouts.

viii.In about January 2023 Ms Tubacka raised a complaint against the claimant to Bilal Ahmed in respect of the missing part.
We accept that, given the seriousness of the loss of this valuable part, Ms Tubacka would have discussed her concerns with her Line Manager, Bilal Ahmed, but we do not find that she raised a formal complaint against the

claimant. Even if she had, it would have been justifiable in the circumstances.

ix. In about January 2023 Ms Tubacka shared that the claimant had lost the part in a morning meeting.
The Tribunal did not find any evidence to support this allegation, and it appears that the claimant may have been confusing this incident with a separate incident.

x.In about January 2023 Ms Tubacka instructed the claimant not to take any part from stock or from quarantine for inspection
This fact is agreed but we find this to have been reasonable and not discriminatory, given what had happened with the camera head.

xi. In about February 2023 Ms Tubacka told C had failed the informal PIP
This fact is agreed. As we have previously observed, however, the claimant's failure of this PIP did seem to be inevitable and it was implemented harshly.

xii. In about February 2023 Ms Tubacka subjected the claimant to a formal PIP
This fact is agreed but once again we found that it was the next inevitable step given the difficulties in their working relationship.

xiii. On about 30 January 2023 Ms Tubacka told the claimant that if he didn't pass the PIP they would say "goodbye" to each other
This fact is agreed and is another example of unhelpful language used by Ms Tubacka to address a sensitive matter with the claimant.

xiv. In about February 2023 Ms Tubacka reduced the claimant's rating to 2/5
This fact is agreed. The issue here is whether the decision to rate the claimant as 2/5 was discriminatory. It was certainly a rather negative appraisal in which Ms Tubacka appeared to be focussed upon finding fault and little regard was paid to some of the evidence based submissions made by the claimant as to his various achievements during the course of the year. It should be remembered that Ms Tubacka had only been the claimant's line manager for 4 months of 2022. On balance the score of 2/5 was not entirely unreasonable given the communication issues but it was somewhat ungenerous. However, we cannot accept that the claimant could possibly be deserving of a 5/5 rating as per his self-assessment. At the very most he might have achieved a 3/5 but no higher.

xv. On 21 February 2023 Ms Tubacka called the claimant aggressive.
This fact is agreed. Again this was a further example of somewhat intemperate language used by Ms Tubacka towards the claimant.

xvi. Ms Tubacka deprived the claimant of his annual bonus.
It is accepted that the bonus given to the claimant was commensurate with the bonus to which he was entitled in light of his performance rating. This

rating was highly contentious and the source of considerable anger to the claimant, who thought he should have been rated 5/5. This was a wholly unrealistic expectation on his part. As stated above, there may well be a basis for concluding that 2/5 was an ungenerous assessment of his performance but it could not be said to be unduly harsh. At best the claimant might have justified a rating of 3/5 but it cannot reasonably be said that the claimant was 'deprived' of his bonus.

xvii. Ms Tubacka asked the claimant to send her daily updates
This fact is agreed by the respondent. It cannot be said that this was unreasonable in the context of the issues that Ms Tubacka had raised about the claimant's performance.

xviii. Ms Tubacka micromanaged the claimant
The Tribunal was unable to reach a clear determination of this allegation due to the fact that the term 'micromanagement' is pejoritive and not clearly defined. In the view of the Tribunal Ms Tubacka did adopt an approach to management of the claimant that, to someone on the receiving end, could be regarded as micromanagement. He was certainly subjected to a very considerable degree of oversight by Ms Tubacka when under the PIP. We have no doubt that in the mind of the claimant this would have amounted to an oppressive level of scrutiny, and that it made the claimant extremely uncomfortable and resentful of his line manager, and we are sympathetic to him in that regard.

xix. When the claimant was 10 minutes late for a 121 meeting, Ms Tubacka raised a complaint against the claimant with Bilal Ahmed.
Ms Tubacka accepted reporting this incident back to Bilal Ahmed. We do not accept that this was 'raising a complaint' as such. We note that the claimant often used the phrase 'raise a complaint' which has a certain connotation which isn't borne out by the evidence. The fact is that the claimant did not appear to have prioritised his meeting with Ms Tubacka and he was in the wrong but did not appear to take this seriously.

xx. In about January 2023 Ms Tubacka instructed the claimant to copy Supplier Engineering on his correspondence during his absence
This fact is agreed and the Tribunal does not find it to be unreasonable or discriminatory.

xxi. Ms Tubacka asked the claimant to send her his emails so she could check them before she sent them to the suppliers
This fact is agreed, but given that the nature of the claimant's communication with suppliers was the greatest area for concern, this was neither unreasonable nor discriminatory.

xxii. Ms Tubacka asked the claimant to tag her in every NCR
The evidence as it emerged was that it was in fact the claimant that made this proposal rather than Ms Tubacka. The claimant accepted in oral evidence that tagging someone in a NCR automates the updating process which would otherwise have to be done by email. He further accepted that

tagging in an NCR is normal practice. In the circumstances this cannot be regarded as discriminatory conduct.

xxiii. Ms Tubacka asked the claimant to put all his desktop files on the shared drive.
The claimant accepted in oral evidence that this is the respondent's standard practice, and it is difficult to see any possible basis for concluding that this was discriminatory.

xxiv. Ms Tubacka criticised the claimant's use of his Excel sheet in his annual appraisal form.
The Tribunal has not found this allegation proved. From the material we have considered, it is not clear at all that this is a direct criticism of the spreadsheet.

xxv. All but one of the claimant's suppliers were transferred to other members of the team overnight.
We find that this allegation is proved, in essence. It may not have been 'overnight' but it is overly literal to apply this interpretation. The reality is that the transfer of the suppliers from the claimant to other members of the team happened within a relatively short space of time. Whilst it is noted that there was a need to reduce the claimant's workload in order for him to address some of the performance issues that had been identified and to implement the PIP, it appears that this did amount to Ms Tubacka taking steps to substantially erode the responsibilties of the claimant.

xxvi. The claimant was not involved in a single new project in 2023 (except the packaging project which was his own initiative).
The claimant accepted in oral evidence he was involved in the new Aluma ICG project in 2023. The Tribunal finds that the claimant may have had a particular idea about what constituted a 'project' which implied something rather more ambitious that the work that he was carrying out, but it would be wrong to suggest that he was not involved in any new projects.

xxvii. In 2023 the claimant was not invited to any meetings in the electronics category of the business, except one.
We accept that during this period the claimant was not regularly being included in meeting of the electronics team, however were are unable to say on the evidence available whether this due to him actively being excluded. He definitely perceived that he was being excluded.

xxviii. Ms Tubacka checked the claimant's personal drawer.
There was no evidence that the claimant, or anyone else, had a personal drawer. The claimant might have treated the desk as his own but it wasn't private to him. We accept Ms Tubacka's evidence that the claimant did not have a desk, and that the cables were on the desk he commonly used. The claimant accepts that the quarantine cables had red labels on them, that the desk he commonly used was next to a walk way, and that the red labels would easily be seen.

xxix. Ms Tubacka took photos of parts inside the claimant's drawer without his consent.
This is as per number xxviii. above.

xxx. Ms Tubacka told C she 'could not trust his words'.
This fact is agreed, and is a further example of communication with the claimant of a kind which was likely to be considered offensive and damaging to their working relationship. The Tribunal accepts that there were occasions when the claimant had not followed through in relation to certain commitments that he has made and that this was Ms Tubacka's intended meaning, to tell the claimant that she did not trust him was inflamatory.

xxxi. Ms Tubacka overlooked the claimant's initiatives.
It was not clear what 'initiative' the claimant was referring to in relation to this allegation. In the circumstances this allegation is not proved.

xxxii. Ms Tubacka made unfair criticisms.
Ms Tubacka's feedback was frequently fair and appropriate but it has to be said that some of her criticisms of the claimant were exposed in cross-examination as being unfair and petty. The Tribunal accepts the respondent's submission that there were occasions when Ms Tubacka acknowledged the claimant's efforts but she also had a tendency to nit-pick and these criticisms did at times relate to the claimant's use of the English language (for example, criticisms of the usages of certain words, and of his spelling and grammar) which could understandably be perceived as having a connection to his race. Perhaps the most consequential unfair criticisms were those made within the context of scoring the claimant's redundancy matrix.

xxxiii. Between June 2022 and May 2023 Ms Tubacka bombarded the claimant with emails.
The claimant accepted in the course of his evidence that the numbers of emails over the course of the period of Ms Tubacka's management did not exceed 3 per day and as such, and given the nature of their working relationship, this could not be said to be a bombardment.

xxxiv. Ms Tubacka complained that the claimant needed a visa to travel because of his nationality.
The Tribunal does not accept that this was a complaint per se. it was merely a statement of the position with respect to visas and the need for the claimant to organise himself better in advance of travel abroad. This was entirely justified in the circumstances. Although we can see that the claimant may have been sensitive to the fact that his travel arrangements were more complicated than those of his British counterparts, the Tribunal does not find anything objectionable about Ms Tubacka reminding the claimant to make his visa applications in a timely way so as to ensure that business travel could be arranged.

xxxv. In about May 2023 Ms Tubacka gave C a rating of 29/60 in the redundancy consultation process

This fact is agreed subject to the correction that the overall mark was out of 56 rather than 60. The question of whether this was discriminatory will be addressed at the conclusion of this decision. We have already observed that some of the criteria appear to have been marked exceedingly harshly.

xxxvi. In about June 2023 the claimant's grievance was misinterpreted by the respondent.
In relation to this allegation the Tribunal accepts the respondent's submission that Ben Summers fully investigated the claimant's grievance; and he provided a full investigation outcome. The claimant had not advanced that he believed his treatment was related to his race during his grievance. When he then clearly raised allegations of discrimination following the grievance, he was invited to a further meeting which he declined to attend. The Tribunal cannot see how it could be said that the grievance was misinterpreted.

xxxvii. On 21 June 2023 HR wrote a letter to the claimant telling him he had taken an aggressive stance towards a supplier
This fact is agreed, the letter was from Ben Summers who conceded in cross-examination that 'aggressive' was a strong word.

xxxviii. The respondent alleged that the claimant had closed non-conformance tickets "for the sake of it".
This was plainly a misunderstanding on the part of the claimant. It was never being suggested that NCR tickets were being closed for the sake of it. What was being suggested is that they were being closed hastily and without sufficient attention to detail and causing 're-work'.

151. As far as time-limits are concerned, we have decided, having considered the circumstances of the case as a whole and the factors set out in section 33 (see above), that it would be just and equitable to consider the entirety of the facts as we found them to be from the point at which Ms Tubacka assumed the role of the claimant's line manager.

152. We find that the 'foreigner' remark, made very shortly after Ms Tubacka assumed this role, was not only discriminatory on its own terms; we find it to be revealing of an attitude toward the claimant that permeated her view of him throughout the duration of their working relationship.

153. In reaching this decision wehave had particular regard to the detailed analysis of the 'because of' test set out very helpfully in the case of *Gould v St John's Downshire Hill* 2021 ICR 1 paragraphs 60 - 81.

154. We wish to make it plain that we do not seek to label Ms Tubacka as being overtly racist nor do we find that she deliberately set out to discriminate against the claimant on the grounds of his race. But we do find that she was unconsciously biased against him, for reasons which included her perception that his poor communication and other behaviours were attributable to the fact that he was 'foreign'.

155. This unconscious bias played at least some part in the manner in which she treated the claimant thereafter, and this included, we find, the way in which she conducted the redundancy scoring exercise as far as the claimant was concerned.

156. It may well have been the case that a fairly conducted redundancy exercise would still have had the same result. But we cannot rule out the possibility that the outcome was pre-determined, at least in part, as a result of this bias. We therefore find for the claimant in relation to issue 5 *xl.*

CONDUCT OF THE CLAIMANT

157. Notwithstanding the Tribunal's findings in relation to the central issues in this claim, it is important that we record some of our observations in relation to the conduct of the claimant, which may be relevant to the question of remedy, as well as providing some balance and context in relation to some of the actions of the respondent (and Ms Tubacka in particular).

158. The Tribunal found the persistent use of covert recording by the claimant, in the face of firm warnings to desist, unacceptable and reprehensible, and could, in our view, have justified his summary dismissal.

159. Some of his other behaviours as an employee - especially his tendency to seek to undermine and question Ms Tubacka's authority by repeatedly going over her head, and his resistance to advice and ideas which conflicted with his own - would have made him a very difficult, almost impossible, colleague to manage. We fully understood how Mr Bailey came to this opinion, in spite of his obvious warmth towards the claimant and desire that he should succeed.

160. Finally, as so much has been made of the issues relating to the claimant's communication style, it is important that we record some of our own observations. The Tribunal noted that the claimant had real difficulties with understanding any form of nuance, or accepting opinions which differed from his own. If another person held a different view to him, they were 'lying'. If he disagreed with the content of a document, it was 'a forgery'. Perhaps the most extreme example was when the claimant compared being asked to sit in the back seat of a car as with the brutal *apartheid* policies of South Africa. If any criticism was levelled at him, whether constructive or not, in his mind he had been 'failed'. It was also noted that he appeared to find it difficult to regulate himself to refrain from interrupting the witnesses, Counsel, and the Tribunal, and to accept that the Tribunal's decisions made in the course of the hearing were final.

161. None of these observations excuse or justify the actions of the respondent in discriminating against the claimant in the limited ways that we have found. However, it is important to note that there were a number of aspects of the claimant's behaviour that doubtless contributed to the manner in which he was treated by the respondent, and this must be acknowledged and reflected in any award made to the claimant as a result of our findings.

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Employment Judge Conley

Date: 20 February 2025

Sent to the parties on: 20 February 2025

For the Tribunal Office