



# EMPLOYMENT TRIBUNALS

**Heard at:** London South                      **On:** 6 to 14 November 2023, 3  
to 7 February 2025, 10 and  
26 February 2025

**Claimant:** Mr A Abdullah

**Respondent:** Tesco Stores Limited

**Before:** Employment Judge Ramsden

**With members** Dr S Chacko

Mr C Rogers

**Representation:**

**Claimant** Ms R Omar, Counsel

**Respondent** Mr J Cook, Counsel

## RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant's claims are not well-founded and are dismissed.

### Background

2. The Claimant, who describes himself as a Black African Muslim of Somalian origin, worked for the Respondent from 6 January 2003 until his dismissal 20 May 2021, latterly as Lead Night Manager of the Croydon Fulfilment Centre (the **CFC**).
3. He has brought complaints against the Respondent of:
  - a) Unfair dismissal;
  - b) Direct discrimination because of race;
  - c) Direct discrimination because of religion; and
  - d) Harassment related to race.

4. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in an extensive list of issues agreed between the parties and sent to the Tribunal on 24 January 2023. Those issues were somewhat refined on the first day of this hearing, and are set out in the appendix to this judgment.
5. The genesis of the case is that the Claimant had a romantic relationship with a junior colleague, Bianca Tordai – a white woman of Italian origin - who was line managed by a person the Claimant line managed. After that relationship ended, Ms Tordai made a complaint that the Claimant had used his authority over her within the Respondent's organisation so as to reduce her earnings because their romantic relationship had concluded. This prompted an investigation by the Respondent, and it dismissed the Claimant for misconduct connected to his actions concerning Ms Tordai, namely for:
  - a) Authorising payment for additional working hours to Ms Tordai between April 2020 and January 2021 so as to inflate her salary when those hours were not worked by her (**Allegation 1**);
  - b) Providing a reference letter on behalf of Tesco PLC to support a mortgage application for Ms Tordai which included inflated salary information for her (**Allegation 2**); and
  - c) Making Ms Tordai fearful for her job and career with the Respondent – displaying coercive behaviour (**Allegation 3**)(together, the **Allegations**).

## Complaints

6. The Claimant says that his dismissal was unfair – he makes 24 criticisms of the fairness of his dismissal.
7. The Claimant also says that, as a Black African man of Somalian origin, he was treated less favourably than named comparators because of race. He makes seven complaints of direct race discrimination (the **Direct Race Complaints**).
8. The Claimant further avers that, as a Muslim, he was treated less favourably than named comparators because of his religion. He makes five complaints of direct discrimination on the basis of religion (the **Direct Religion Complaints**).
9. In addition, the Claimant says that he was subjected to harassment related to race by the Respondent, and he cites 21 instances of conduct in this regard (the **Race Harassment Complaints**).
10. In relation to his direct discrimination allegations, the Claimant relies upon following relationship comparators (each of whom is non-Muslim):
  - a) Jon Thatcher (White British) and Lisa Fulkes (White British);
  - b) Danny Lake (White British) and Andrew (Black Caribbean);

- c) Alexandra Bozern (South American) and Radomir Koczr (Polish, White European); and
  - d) Dave Parker (White British) and Cheryl Samuel Todd (Black British)  
(together, the **Relationship Comparators**).
11. The Claimant relies upon the following overpayment comparators:
- a) Justyna Madejczyk (White Non-Muslim); and
  - b) David Dellow (White Non-Muslim)  
(together, the **Overpayment Comparators**).
12. In the alternative to these actual comparators the Claimant relies on a hypothetical comparator.

### **Facts**

13. The Claimant started working for the Respondent on 6 January 2003. At the time of the events with which this claim is concerned, the Claimant was working as a Lead Night Manager at the Respondent's CFC – a senior position. The Claimant's line manager was Steve Freeman, the Centre Manager of the CFC.

### Context

14. The CFC is a large operation, with approximately 1,200 individuals working from it. The CFC has many hundreds of drivers operating out of it, and it supplies numerous Respondent stores. It is a busy operation, with a large amount of stock passing through it.
15. Entrance to the CFC is - in the main - via turnstiles, with Respondent employees each holding a 'clocking card' which they would use to enter and exit the CFC by the turnstiles. There is also a staff shop, which has its own door, and which connects to the store. The staff shop is a way in which colleagues who work there can access the store, going through the shop, without using the turnstiles, however there is an expectation that the staff use the turnstiles.
16. The turnstile 'clocking' system cannot be used by all employees based at the CFC. By way of example, if a colleague is sent to work at another store by way of cover, they cannot use the CFC turnstiles at the start and end of their working day, and so the time recording system also has a mechanism whereby colleagues may be manually clocked in and out – i.e., an entry is made into the payroll computer system informing it of the start and finish time of that employee's work on a given date. Only certain employees at the CFC have access to the payroll system so as to do this manual clocking. As a matter of practice, these manual clockings are authorised by managers, and are entered into the system by one of the CFC's Wages Clerks. There were three such Wages Clerks at the time of the events with which this claim is concerned.

17. Each individual employee has a unique employee number recognised by the payroll system, and each has their shift pattern entered into its data bank. This means that the payroll system knows when a particular person clocks in earlier than the scheduled shift start time, or clocks out later than that shift was due to finish. Clock-ins outside of the shift pattern generate what the Respondent calls 'exceptions', and each of those exceptions needs to be 'designated' appropriately, i.e., a code would need to be entered into the payroll system telling it how to treat those aberrations from the shift pattern for pay purposes. A colleague may, for instance, leave earlier than their shift finish time due to illness, or may clock in late because they have worked extra hours. Whether the colleague is paid for the variations from their scheduled work pattern depends on how their exceptions were coded.
18. The parties agree that one of the responsibilities of the Claimant as Lead Night Manager was to 'code' or 'designate' exceptions – to look at a raft of printed exception sheets and mark those up with handwritten instructions as to how those should be coded. This occurred daily. Those handwritten designations would be typed into the payroll system by the Wages Clerks. The Claimant would naturally have holidays, sickness absences, etc., and so there were others at the CFC who had the requisite authority to code exceptions.
19. One of the matters that arose in the course of the investigation of the Claimant's conduct was whether it was standard practice at the CFC for employees to have two clocking cards. This is because the parties agree that Ms Tordai had two such clocking cards.
  - a) The Claimant says that this was absolutely normal and standard practice. He is supported in this position by Mr Joseph, another former employee of the Respondent. Mr Joseph's team was largely drivers who operated out of the CFC (Mr Joseph estimated that drivers comprised 600 out of the 610 members of his team). Mr Joseph's evidence was that around 90% of the staff in his unit had two clocking cards, and that when those clocking cards are found, they are disposed of.
  - b) The Respondent says that it is not normal practice for employees to have two clocking cards. It relies on the evidence to the Tribunal of Mr Oral (the People and Safety Manager at the CFC, who had some responsibilities for payroll), and the evidence gathered by Ms Eastwell from Karolina Klejdysz, one of the Wages Clerks at the CFC who was responsible for making entries into the payroll system, including manual clockings. Both said that this was not normal practice, but did occur on occasion. Mr Oral said this occurred when a colleague lost their first clocking card.
  - c) The Tribunal is not persuaded that it was normal practice for staff at the CFC to have two clocking cards. If it was, Mr Joseph and his unit would have no reason to dispose of the clocking cards they found. Mr Joseph's position is, in fact, consistent with Mr Oral's, that a second card would be

printed when the first was misplaced, and any cards found would be disposed of. The Tribunal finds that there was no normal or standard practice at CFC of staff having two clocking cards.

### Ms Tordai

20. Ms Tordai also worked for the Respondent at the CFC, and at some point began working nights under the line management of Philip Samuel-Todd, Night Manager. Mr Samuel-Todd was in turn managed by the Claimant, so the Claimant had indirect line management responsibility for Ms Tordai.
21. The parties agree that the personal relationship between Ms Tordai and the Claimant – described by the Claimant as an “intimate” relationship - commenced in December 2019/January 2020. Neither party informed the Respondent of it. There is disagreement between them as to when it ended, with the Claimant saying around September 2020, and Ms Tordai January 2021.
22. The Claimant was sent to work at the Respondent’s Clapham store on a ‘placement’ (a temporary ‘acting up’ role) for the period February to March 2020, before returning to the CFC.
23. Ms Tordai informed Ms Eastwell that, around March 2020, she was told by a colleague that the Claimant was married and had a girlfriend (something the Claimant denies). Ms Tordai said that she ended her relationship with the Claimant at that time, and he was upset and made threats regarding her job. In any event, the relationship between them resumed.
24. Ms Tordai was considered by the Night team at Croydon to have prospects for promotion. Ms Eastwell, a People Partner of the Respondent, who had responsibility for the CFC (among other sites), came into contact with Ms Tordai as a result, she says, of the Claimant’s identification of Ms Tordai as up-and-coming talent.
25. In that context, Ms Eastwell met with Ms Tordai on a few occasions, and liaised with other stores about possible ‘acting up’ roles for Ms Tordai, where she could be stretched and demonstrate the qualities that would stand her in good stead for a future promotion.
26. As a result of this development programme, for the period October to December 2020, Ms Tordai was sent on a ‘placement’ to the Respondent’s Elmers End store on a temporary promotion to the role of Night Team Leader (a role which, if she secured that position at the CFC, would directly report in to the Claimant). During that time, the CFC was responsible for paying Ms Tordai, and there was an arrangement reached between the CFC and the Elmers End store about reimbursement for the relevant costs. Whilst on placement, Ms Tordai’s line manager was Ben Peebles, the Lead Night Manager (equivalent to the Claimant’s position) at Elmers End.

Ms Tordai's placement in Elmers End

27. While Ms Tordai was on placement in Elmers End, she was entitled to deputising pay in addition to her normal remuneration.
28. There are a number of disputes between the parties relating to this period:
- a) Was the Claimant involved in the identification of Ms Tordai as an up-and-coming talent?
  - b) Was Ms Tordai overpaid, apparently for additional hours worked that were not in fact worked by her, during the period when she was on placement at Elmers End?
  - c) If Ms Tordai was overpaid for these extra hours, was it the Claimant who authorised that overpayment?
  - d) If it was the Claimant, was it acceptable for the Claimant to (as he said he did) 'take her word for it' and assume that the hours of work Ms Tordai told him she worked were hours she had, in fact, worked?
  - e) The allegation made by the Respondent is that the Claimant authorised Ms Tordai's additional hours "*to inflate her salary*", i.e., that there was conscious intent on his part to authorise hours he knew she had not worked. If Ms Tordai was overpaid, and the Claimant authorised those overpayments, did he do so intentionally?
29. On the first matter, whether the Claimant was involved in the identification of Ms Tordai as an up-and-coming talent, the Claimant says that he was not, but rather it was Ms Eastwell, J Ryall and Mr Samuel-Todd. The Respondent disagrees, relying on the evidence of Ms Eastwell, who says that the Claimant was the person who put Ms Tordai forward.
30. The Tribunal considers that:
- a) The Claimant's position is implausible – he was the Lead Night Manager, and he line managed Ms Tordai's line manager, Mr Samuel-Todd. It is not credible for the Claimant to assert that Ms Tordai was identified as a promising future talent, and mentored and offered training for being so, without the Claimant having considered whether that was appropriate and given his approval to that course.
  - b) Moreover, there is clear evidence that contradicts the Claimant's account.
    - (i) Ms Tordai told Ms Eastwell on 13 April that the Claimant started "*pushing me/supporting me – offering me all to become a manager*", and when Ms Eastwell asked her if the Claimant said he could fix her placement, Ms Tordai replied, "*Yes he says I can make it happen like a God make it happen – put a signature and make it happen like on a string puppet – Depends on him*".

(ii) When Mr Freeman was sent Ms Tordai's feedback from Mr Peebles regarding her placement in Elmers End, the Claimant emailed Mr Freeman, saying "*I was well embarrassed when I spoke with Ben on Thursday and asked him to email us with the official feedback*". It is not likely that the Claimant would feel embarrassed if he did not have some responsibility for the recommendation that led to Ms Tordai's placement.

(iii) Most significantly, in his interview with Ms Eastwell on 13 May 2021, the Claimant told her "*Feb/ March time before I went on my placement to Clapham we talked about developing talent in the centre and both Amy and Bianca were put forward to the options programme. They were the only 2 who showed interested and **we** got them signed on*" (emphasis added).

31. The Tribunal notes that it has no direct evidence from Ms Tordai (as she is not a witness in these proceedings).
32. However, in light of the above evidence from Ms Eastwell, and the documentary evidence involving the Claimant, we find that the Claimant was involved in, and pushed for, Ms Tordai's progression within the Respondent organisation.
33. On the second, whether Ms Tordai was overpaid in the period when she was on placement in Elmers End:

#### Travel time

- a) The Claimant gave oral evidence to the Tribunal that he considered that Ms Tordai should be paid for the additional time she spent travelling to Elmers End. He said that he instructed her to start her day by 'clocking in' via the turnstiles in the CFC before going to Elmers End and doing her shift, and she should then return to the CFC to 'clock out'. Critically, he said this was consistent with the Respondent's practice, that colleagues should be paid for their travel time when asked to work at a different store to their home location (i.e., this was not special treatment).
- b) The Respondent witnesses say Ms Tordai should not have been paid over-and-above her salary and the deputising pay she received for 'acting up' in a higher level role. Mr Oral said that the reimbursement arrangements between the 'home' base and the 'host' placement store would be agreed before an employee goes on placement. He said that ordinarily travel costs would not be reimbursed, but even if it was an unusual situation where they were, those costs would need to be evidenced by way of mileage and petrol receipts which would require authorisation. Conor Basquil - a Store Manager of a different store to the one at which the Claimant worked - was the person who took the decision to dismiss the Claimant said there was no Respondent policy for travel time to be paid when a colleague was on placement, and they certainly would not be paid overtime.

34. The Tribunal prefers the Respondent's account, for the following reasons:

a) If there was a practice of paying for the additional costs incurred by a person travelling to a different work location, the natural response to that is to pay travel expenses. If travel time was also to be paid, it is not clear why that should be at the overtime rate.

b) Moreover, in his interview with Ms Eastwell on 13 May 2021, the following exchange took place:

*“AE Just to pick up one point there, in light of you clarifying that Steve wasn't aware of the hours of bianca during her placement, it would seem to me that volume of hours was paid without any authorisation?”*

*AA I will hold my hand up to that, putting my business head on I assumed it was the right decision. Like 50-60 colleagues getting paid for their travel time – I used to ask them to come here, clock in, then go to the store”*

The Claimant later seemed to 'row back' on that:

*“AE Where you are talking about travel time, how is that relevant?”*

*AA Just saying that everyone has been paid for their extra time.*

*AE Are you saying Bianca was paid travel time?”*

*AA No, just that we paid colleagues for additional time that was fair. Even with paying this travel time, I haven't requested or asked Steve, I went and done it and made sure the stores transferred cost back.”*

c) Mr Peebles told Ms Eastwell that:

(i) He did not recall Ms Tordai working any overtime, save for one overtime shift in the CFC;

(ii) Most managers work 30 to 45 minutes over their shift, but the Claimant did not; and

(iii) When Ms Tordai first started working at Elmers End, she was under the impression that she needed to clock in at the CFC and clock out there at the end of her shift. Mr Peebles did not know who had told her to do this, but he said that Ms Tordai stopped doing this after about two weeks.

d) We find that there is evidence to support the Respondent's position that Ms Tordai was paid for overtime while on placement at Elmers End that she did not work. At least some of that appears to be attributable to the Claimant's view that she should be paid for travel time.

#### Sunday shifts

35. The Claimant says:



- a) He only authorised payments to Ms Tordai for Sunday working where it was appropriate to do so; and
  - b) Ms Tordai frequently forgot to bring her clocking in card to the CFC, which is why the Claimant had a second clocking card made for her, but her forgetfulness regarding her card is why the turnstile reports are not always accurate in respect of her.
36. The Respondent says:
- a) Ms Tordai told Ms Eastwell on 22 April 2021 that she did not work Sundays, and knew nothing about the fact that she had been paid for Sundays throughout August and September 2020.
  - b) Ms Tordai does not appear to have used the CFC turnstiles on various Sundays in August or September 2020 (save for 20 September 2020), as there are no entries on the turnstile reports for those dates. However, the Respondent's Attendance Management Overtime + Absence Correlation document indicates, as a result of manual clocking entries, that Ms Tordai worked five Sundays in that period.
  - c) Ms Tordai told Ms Eastwell on 22 April 2021 that she did not enter the CFC other than through the turnstiles, so the Claimant's contention that she could have entered and exited the CFC via the staff shop on those numerous Sundays is contradicted by that account.
  - d) Mr Peebles told Ms Eastwell that:
    - (i) Ms Tordai's shift pattern during her placement at Elmers End was Tuesday night to Saturday, 10pm to 7am (i.e., it did not include Sundays);
    - (ii) (As above) He did not recall Ms Tordai working any overtime, save for one overtime shift in the CFC (the 20 September 2020 shift);
    - (iii) The practice for a host store being charged for overtime worked by an employee on placement would involve the host store instructing the home store to charge them; and
    - (iv) Ms Tordai "*definitely did not do*" the extra hours recorded as having been worked by Ms Tordai on a sheet shown to him by Ms Eastwell.
37. The Tribunal considers that:
- a) The Claimant's position has been evasive and contradictory as to whether:
    - (i) He just accepted what Ms Tordai told him about Sunday working 'on trust', which he says was the Respondent's practice during covid (which he said in oral evidence to the Tribunal); or
    - (ii) He regularly spoke to Mr Peebles about Ms Tordai's hours and days to confirm them (as he told Ms Eastwell on 29 April, in a record of their meeting signed by him as accurate).

Either position is contradicted by statements taken by Ms Eastwell from Ms Tordai and Mr Peebles.

- b) While the turnstile reports do not account for the 'whole picture', the Claimant's position is either that Ms Tordai worked Sundays at Elmers End - a position contradicted by both her and Mr Peebles - or at CFC - when she would be expected to show up on the turnstile reports. The Claimant's position is strongly challenged by that evidence, and it is not credible to think that Ms Tordai would enter and exit the CFC via the shop on all of those occasions, when she says she always used the turnstiles.
  - c) While the Tribunal has not heard from either Ms Tordai or Mr Peebles directly:
    - (i) Mr Peebles signed the notes of his conversation with Ms Eastwell to confirm their accuracy; and
    - (ii) While the notes of Ms Eastwell's meeting with Ms Tordai on 22 April 2021 are not signed by Ms Tordai, there is also a handwritten version of those notes (also not signed). The fact there is a handwritten version of those notes is suggestive of their authenticity, and Ms Eastwell gave evidence of their accuracy, which the Tribunal accepts.
38. Consequently, the Tribunal finds that Ms Tordai was overpaid during the period when she was on placement at Elmers End for a number of Sundays she did not work.
39. As for the third dispute – whether the Claimant was responsible for authorising the overpayments made to Ms Tordai:
- a) The Claimant says that there is no evidence that any manual clockings or exception codings pertaining to Ms Tordai in this period were done by him, and that numerous others carried out those tasks, including the managers in his team and the Wages Clerks.
  - b) The Respondent agrees that there is no *direct* evidence to show that the Claimant authorised those clockings or codings, but it considers there is sufficient evidence to support its conclusion that the Claimant did so. It points to:
    - (i) Witness statements taken by Ms Eastwell which describe the Claimant as having significant control surrounding the payroll for the Nights staff (the signed statements from Karolina Klejdysz, Zoltan Kuti and Lynette Sabiel). This would be consistent with his position as Lead Night Manager for the CFC.
    - (ii) The Claimant and Mr Oral agreed that one of the tasks for which the Claimant was responsible was coding the previous night's exceptions.

(iii) The three CFC Wages Clerks (who would input the clockings and exceptions codings) gave witness evidence to Ms Eastwell (which was signed by them to confirm its accuracy) that:

- i. (From Lynette Sabiel) Ms Sabiel was the Clerk who input most of the exception coding for Nights staff;
- ii. (From Ms Sabiel and Zoltan Kuti) The Claimant was the person who gave instructions to manually clock Ms Tordai;
- iii. (From Ms Sabiel) The Wages Clerks only administered exceptions codings upon manager instructions;
- iv. (From Ms Kuti) Ms Kuti would administer the exceptions herself, without a manager, save if she was unsure about an exception; and
- v. (From Ms Kuti and Ms Klejdyaz) The Claimant was the person who would complete the coding for exceptions.

(iv) The managers in the Claimant's team gave evidence to Ms Eastwell that the Claimant was largely responsible for coding exceptions for the night staff (John Dadd and Mr Samuel-Todd).

- c) In her 13 April 2021 meeting with Ms Eastwell, Ms Tordai said that the Claimant told her he would arrange for her to be paid for a particular shift she did not work, and more generally that he told her that he had control over her earnings.
40. The balance of evidence clearly supports the conclusion that the Claimant was responsible for the manual codings and exceptions payments in respect of Ms Tordai during her placement at Elmers End. The Tribunal finds that he was.
41. On the fourth point of dispute – whether it would have been in accordance with Respondent policy or practice for the Claimant to accept Ms Tordai's word about the hours she worked:
- a) The Claimant says that this was how things worked at the time of the Covid pandemic, when the work demands were immense and there were lots of staff members shielding or off sick. He says that there was plenty of overtime work, and it was important that the Respondent paid it to keep things going, particularly given the Respondent's role in supporting the nation through the pandemic. He points to the emails included in the Supplementary Bundle (admitted into evidence at the start of the resumed hearing), which indicate that another employee of the Respondent, Graeme Reid, was permitted to email his hours of work, and those hours were manually clocked by the Respondent.
  - b) The Respondent says:

- (i) That the Claimant had a responsibility, as the Lead Night Manager, to ensure that staff were only paid for the hours they worked.
  - (ii) During Ms Tordai's placement at Elmers End, the Claimant was required to obtain confirmation from Mr Peebles before authorising payment for any extra hours (besides her scheduled shifts) that Ms Tordai said she worked.
  - (iii) (With evidence given by Mr Oral on this point) Mr Reid's working hours were not "manually clocked", but were "ad hoc'ed", due to a very unusual arrangement in place for Mr Reid to work from home, due to a manager authorising that. Such a working from home arrangement did not apply to Ms Tordai, and was not common place.
- c) The Tribunal prefers the Respondent's account. The Respondent's point about responsibility is a logical one, given the Claimant's seniority. Its position about Mr Peebles' authorisation being needed is:
- (i) Consistent with that responsibility;
  - (ii) Supported by the evidence of Mr Oral and Ms Eastwell to the Tribunal;
  - (iii) Supported by Mr Peebles' signed statement given to Ms Eastwell as part of her investigation; and
  - (iv) Supported by some of the Claimant's account to Ms Eastwell was that he had been in regular contact with Mr Peebles about the Claimant's hours. While factually that was contradicted by Mr Peebles, it gives credence to the view that that was the requisite process to authorise additional payments to her during that placement period.

The evidence in relation to Mr Reid does not demonstrate a widespread practice of accepting hours of work without question, but rather (according to Mr Oral, whose evidence we accepted) was a particular bespoke arrangement for Mr Reid to work from home. The Claimant was not working from home – she was working from Elmers End, where her hours were capable of verification.

42. The Tribunal finds that even if the Claimant received messages or telephone calls from Ms Tordai claiming she had worked hours over-and-above her scheduled shifts (for which he has offered no evidence besides his own word), it was plainly not sufficient, and not in accordance with the Respondent's policy or practice, for him to simply accept that. The Claimant had a responsibility to check that those hours had been worked before authorising payment for them, and he had a ready opportunity to do so by asking Mr Peebles.

43. In relation to the fifth points of dispute – whether the Claimant intentionally authorised overpayment to Ms Tordai knowing she had not worked those hours:

- a) The Claimant says he did not. He says that:
- (i) He had a genuine belief that people placed in other stores should be paid for their travel time; and
  - (ii) The disputed Sunday hours in August and September (i.e., those excluding the 20 September, which the Respondent accepts the Claimant worked at the CFC) were in fact worked. He says he was told this by Ms Tordai, and he reasonably took her word for it.
- b) The Respondent says that:
- (i) The Claimant was an experienced and senior employee of the Respondent – he was familiar with the policies and practices of the Respondent. The Respondent says he authorised overtime payments for the Claimant for non-Sunday working times knowing that the Claimant had not worked these, as he was in regular contact with Mr Peebles who says the Claimant did not work any extra hours, and Mr Peebles' instruction would have been needed to authorise payment for any extra hours, which Mr Peebles said he did not do. The Claimant knew he was authorising payments to Ms Tordai, with whom he was having a secret relationship at the time, so as to inflate her earnings; and
  - (ii) It is not credible to suppose that Ms Tordai entered and exited the CFC to work numerous disputed Sundays in August and September 2020 without using the CFC turnstiles. Her evidence to Ms Eastwell was that she did not work those Sundays, and that she always used the turnstiles at the CFC. The Claimant has offered no evidence of Ms Tordai telling him that she worked those shifts, and instead there is the account given by Ms Tordai to Ms Eastwell that the Claimant, at least on one occasion, told her she would get paid for a shift he knew she would not work. Ms Tordai told Ms Eastwell that the Claimant assured her that he would help her, and he did so abusing his position as the person best-able to authorise manual clockings for CFC night staff.
- c) The Tribunal prefers the Respondent's position. In particular, we agree with the position articulated by Adrian Connell (a Store Director of a different region to the branch of the Respondent at which the Claimant worked, who heard and determined the Claimant's appeal against his dismissal) in the appeal outcome letter:
- "It cannot be a coincidence that this colleague was significantly overpaid. She was in a relationship with you and you were the controller of wages*

*and adjustments... Given your time in role and extensive experience, these coincidences suggest to me a level of dishonesty”.*

#### Ms Tordai's return to the CFC

44. Ms Tordai did not impress the local Lead Night Manager, Mr Peebles, during that secondment. Mr Peebles' feedback was sent to Mr Freeman, the Centre Manager for CFC (and the Claimant's line manager), who sent it on to Ms Eastwell and the Claimant. In reply, the Claimant wrote to Mr Freeman (copying Ms Eastwell) that:
- “I was well embarrassed when I spoke with Ben on Thursday and asked him to email us with the official feedback. Can I sit down and go through the feedback with Bianca now we have got it”.*
45. The evidence from some of Ms Tordai's colleagues was that, upon her return to the CFC in January 2021:
- a) Her performance had dipped, and the Claimant made negative comments about her (John Dadd, one of the Night Managers);
  - b) She was *“down and not her usual bubbly self”* (Paul Edwards, Night Team Leader); and
  - c) Having been *“full of energy, nothing too much, early stages of leadership”*, she came back from placement *“a different person, lost her energy and drive”* (Mr Samuel-Todd).
46. In January 2021, Ms Tordai applied for the position of Night Team Manager at Croydon CFC, but was unsuccessful (and Irina Cazau was appointed).

#### April/May 2021: Ms Tordai raises concerns with Ms Eastwell

47. Ms Tordai requested a meeting with Ms Eastwell, which was arranged for 6 April 2021. Given their contact had, until that point, been in the context of the Claimant's development, Ms Eastwell expected that the request pertained to that. She was therefore surprised when the Claimant arrived at the meeting with her 16 year old son.
48. The Tribunal did not hear evidence from Ms Tordai, but Ms Eastwell's unchallenged evidence is that almost immediately that that meeting began, Ms Tordai broke down. Ms Eastwell's practice is to carry a notebook and to write notes for herself of what occurs in meetings. A typed version of those notes was included in the Bundle, and that records that Ms Tordai:
- a) Told Ms Eastwell about her relationship with the Claimant;
  - b) Said she thought the Claimant had identified how she had desperately needed opportunity/money and he had presented himself to her offering both of those things;
  - c) She had seen the benefits of that, such as increased wages;

- d) She had been afraid to end the relationship due to the impact on her career; and
- e) Since the relationship had ended, her earnings and prospects had reduced.

This note was not signed by Ms Tordai.

49. Ms Eastwell treated the concerns expressed by Ms Tordai as having raised a grievance, and she met with Ms Tordai again on 13 April 2021 (with a note taker present, and Ms Tordai's son accompanying her again) to discuss that. These notes were signed by Ms Tordai, and record that Ms Tordai (whose first language is not English):

- a) Recounted to Ms Eastwell that, in the early period of meeting the Claimant she had told him that she would not be staying in the Respondent's employment long-term, as she needed to earn more money to support her family. In response to her saying that she was going to leave the Respondent's employment, the Claimant told her that was "*not going to happen*", and he then started to support her/push her for progression within the Respondent's organisation;
- b) Described the relationship between her and the Claimant as a sexual one;
- c) Told Ms Eastwell that the Claimant "*said as aware [I was] trying to buy house, 'if you don't behave you won't get this', and 'He took advantage of my vulnerability he knew I was desperate'*";
- d) Said that the Claimant implied that if she broke her relationship with him, there would be trouble for her;
- e) Told Ms Eastwell that the Claimant told her that he would arrange for her to be paid for a Sunday shift she did not work;
- f) Said that she was afraid that she would lose her job and that the Claimant could ruin her chance to have a career, and she believed he would do so, because he had cut her hours since their relationship ended;
- g) Told Ms Eastwell that the Claimant had started to say negative things about her (Ms Tordai) to other managers, and to Ms Tordai herself in front of other people, and had threatened her with deportation; and
- h) Showed Ms Eastwell some text messages between her and the Claimant which read:

Claimant: "*Could be more*"

Ms Tordai: "*Is fine whatever you can*

*How can be more??*

*Maybe as Senior Manager*

*But not in my position"*

Claimant: *“Ask me when you electrocute me and I will confess lol”*

Ms Tordai: *“Ok*

*Sounds a little strange ...like if I give you something, ill get you something”.*

50. While the evidence gathered in that meeting predominantly came from Ms Tordai (in the form of her oral evidence and her showing Ms Eastwell various text conversations with the Claimant), Ms Tordai’s son did recount events and show Ms Eastwell text messages as well.
51. Ms Eastwell and Ms Tordai met for a third time on 22 April 2021, with Ms Elliott present as note-taker again, but Ms Tordai was not accompanied on this occasion. These notes were not signed by Ms Tordai. In this meeting, Ms Tordai:
- a) Gave Ms Eastwell the names of some witnesses to the Claimant’s less favourable treatment of her; and
  - b) Was asked about being paid for Sundays in August and September where she is not recorded as having gone through the CFC turnstiles. Ms Tordai said that she did not know anything about it, and had not worked those Sundays.
52. The Claimant questions:
- a) The accuracy of the notes taken by Ms Eastwell of her meetings with Ms Tordai given, he avers, they were not signed; and
  - b) Whether Ms Eastwell was right to treat those discussions as raising a formal grievance.

The Claimant points to the Respondent’s Grievance Policy in support of these questions.

53. Ms Eastwell, for the Respondent, says that:
- a) The note of her discussion with Ms Tordai on 6 April 2021 was not signed because Ms Eastwell had attended that meeting (without a note-taker)( expecting it to be about Ms Tordai’s progression, and so Ms Eastwell had only brought her personal notebook in which it is her habit to record key points from meetings she attends. It was only when that meeting began that she realised it was of a very different character, and the seriousness of what was involved. She therefore typed up a summary of that meeting, but it was a note summary rather than a statement from Ms Tordai. Ms Tordai was not asked to sign it.
  - b) Then being apprised of the subject matter, Ms Eastwell invited Ms Tordai to a follow-up “Grievance hearing” to be held on 13 April 2021. A note-taker attended and took a handwritten note of the conversation, with a typed copy produced afterwards. Ms Tordai was asked to sign the handwritten copy of the notes, which she did.



- c) The 22 April 2021 meeting was also the subject of a formal invitation, describing that meeting as a “follow up grievance meeting”. A note-taker was present and again took handwritten notes which were then subsequently typed. Ms Eastwell is baffled as to why Ms Tordai was not asked to sign the handwritten notes of that meeting – she puts it down to error rather than intent.
54. The parties agree that:
- a) The Respondent had a general practice of asking witnesses to sign the statements of evidence they provided;
  - b) The Respondent’s Grievance Policy anticipated that, in many situations, there may be an attempt to resolve a grievance informally;
  - c) That Policy provided that, in order to raise a formal grievance, “*you need to write your concerns down and given them to your manager*”; and
  - d) That Policy also stated: “*In all cases, if a grievance has been handled informally and you raise a formal grievance about the same matter then a different manager will deal with it*”.
55. The Tribunal finds:
- a) The key meeting at which Ms Tordai went into the most detail about the events with which this claim is concerned was the meeting of 13 April 2021, and Ms Tordai confirmed the accuracy of those notes by signing them.
  - b) Ms Tordai was aware, from her invitation to the meeting on 13 April 2021, that Ms Eastwell regarded the meeting being called as “*a formal meeting to discuss [Ms Tordai’s concerns with regards to the Claimant]*”. The letter was titled “*Re: invitation to grievance hearing*”. When Ms Tordai signed the notes recording what was discussed in that 13 April 2021 meeting, she raised a formal grievance.
  - c) Ms Eastwell’s designation of Ms Tordai’s complaints as raising a formal grievance, and the decision she made not to try to resolve it informally, were appropriate in the context of the seriousness of the allegations, for both Ms Tordai and the Claimant. We find the Respondent’s Grievance Policy was not breached, as it does not contain an absolute commitment to try to resolve the matter informally, it leaves the discretion to attempt to do so to the manager – Ms Eastwell in this case. She exercised that discretion entirely appropriately in determining not to do so in this case.
  - d) The Tribunal has no reason to doubt the accuracy of the notes Ms Eastwell took of the 6 April meeting, or the handwritten and typed versions of the meeting of 22 April 2021. Those notes are consistent with the content and theme of the signed notes of 13 April 2021. We find they are an accurate summary of the 6 April meeting, and an accurate record of the 22 April meeting.

Ms Eastwell began to investigate the Claimant's conduct: April 2021

56. On 27 April 2021 the Claimant was invited to an investigation meeting two days later, by and with Ms Eastwell. The investigation centred upon three allegations:
- a) That the Claimant authorised payment for additional working hours for Ms Tordai between April 2020 and January 2021, even though Ms Tordai had not worked those hours, so as to inflate Ms Tordai's salary;
  - b) That the Claimant provided a letter on behalf of Tesco PLC to support a mortgage application for Ms Tordai, and that letter included inflated annual salary information; and
  - c) That the Claimant made Ms Tordai fearful for her job and career with Tesco, and displayed coercive behaviour.
57. That meeting took place on 29 April 2021, with a note-taker present. In the course of this meeting the Claimant:
- a) Described his relationship with Ms Tordai as having been "*an intimate relationship*" for around six months, between April and October 2020;
  - b) When asked if he had been her line manager at that time, the Claimant replied that "*technically*" she reported into Mr Samuel-Todd;
  - c) When asked by Ms Eastwell "*Do you think it was appropriate to be in a relationship with BT?*", replied: "*Didn't see anything wrong with it... I refuse to give into demands that would influence my decision making*";
  - d) Told Ms Eastwell that exception coding was done by (i) him, (ii) two of the managers who reported in to him, and (iii) the wages clerks if none of him or those two managers were around *and* they were confident the hours had been worked;
  - e) Described how, when Ms Tordai worked at Elmers End, he "*was touching base with Ben around her hours and days*" so as to verify the hours she was claiming;
  - f) Said that he transferred various sums of his own money to Ms Tordai as she was experiencing financial hardship;
  - g) Agreed that he had provided a letter setting out that Ms Tordai earned £39,000 per annum, which he considered was an accurate reflection of her earnings in 2020/2021. When Ms Eastwell referred to the fact that Ms Tordai's contracted/guaranteed income was significantly lower, the Claimant referred to the fact that Ms Tordai had two other jobs, which would cover more than what Ms Tordai earned with the Respondent through overtime;
  - h) Was asked to comment on the notes of the interview between Ms Eastwell and Ms Tordai (i.e., the notes of the meeting of 13 April 2021), which Ms Eastwell described as Ms Tordai referring "*to you [i.e., the Claimant]*

*imply[ing] a level of fear or power where if she's doesn't go along with what you want there will be repercussions".* The Claimant denied doing so; and

- i) Asked if he could have a copy of the notes of Ms Eastwell's 13 April 2021 meeting with Ms Tordai. Ms Eastwell refused, "*as we are still in investigation*".
58. The meeting was adjourned for Ms Eastwell to carry out some further investigatory work.
59. The Claimant confirmed by email that the note taken of this meeting was a true reflection of what had been discussed.
60. On the same date (29 April 2021), Ms Eastwell met with Suleyman Oral, People & Safety Manager, as part of her investigation. Mr Oral told Ms Eastwell that he and the Claimant realised after-the-event that Ms Tordai had been over-paid for the deputising element of her pay during her placement at Elmer's End, so then her pay dropped. Mr Oral said that, because they had realised the error and realised it was not Ms Tordai's fault, it was decided by him and the Claimant jointly to 'let it go' instead of claiming the overpayment back from her.

#### Reference writing training, 29 April 2021

61. The Claimant says that, after the investigation meeting between him and Ms Eastwell (which began at 11:00 and ended at 14:12), Ms Eastwell checked his file and realised that no training record was available on it to suggest that he had been trained on reference writing and exception coding. The Claimant says that, on that same day, he was taken to Mr Freeman's office and was given a training booklet and told to copy already-prepared answers into a workbook for "Managing Wages in HRAM Stores for Team Manager". He did so.
62. The Respondent offers no evidence to dispute that this occurred.
63. The Tribunal accepts the Claimant's account.

#### Ms Eastwell's investigation continued, May 2021

64. Ms Eastwell met with Mr Peebles, Lead Night Manager at Elmers End, on 4 May 2021. Mr Peebles informed Ms Eastwell of the matters summarised in paragraphs 34 c) and 36 d) above.
65. Over 6, 7, 10 and 11 May 2021 Ms Eastwell met with eleven other members of staff at the CFC, to interview them in the presence of a note-taker as part of her investigation. Ms Eastwell interviewed three of those individuals twice.
66. The Claimant has questioned the reliability of an investigation note of Ms Eastwell's discussion with one of the CFC Wages Clerk, Karolina Klejdysz, given that note was not signed by Ms Klejdysz. Ms Klejdysz was, in fact, interviewed twice by Ms Eastwell, and Ms Klejdysz signed the first note. The second has typed in at its base "AGREED VIA TEAMS". The Tribunal has found Ms Eastwell to be an honest witness - if the note says it was agreed via Teams, we accept

that as having been the case (as, indeed, we do the accuracy of the signatures apparently provided by the other witnesses on the notes of their evidence to Ms Eastwell).

67. The Claimant was invited on 12 May 2021 to attend a second investigatory meeting with Ms Eastwell the following day. That meeting took place on 13 May 2021, with a note-taker present.
68. Ms Eastwell concluded her investigation on 18 May 2021. Ms Eastwell's thinking was recorded as part of a document entitled "Investigation Checklist". That document recorded her thinking on each Allegation, setting out:
- a) A summary of the Allegation;
  - b) What she had seen or heard that supported the Allegation;
  - c) What she had seen or heard that did not support the Allegation; and
  - d) Her conclusion and the reason for it.

None of the evidence referred to in this summary was supplied by Ms Tordai's son. Ms Eastwell's conclusion was that each Allegation should be forwarded to a disciplinary manager to consider.

69. She wrote to the Claimant on that date, inviting him to attend a disciplinary hearing. The letter:
- a) Defined the purpose of the meeting as being to discuss the three Allegations, which were set out again (with some specific examples of dates of overpayment given, being both hours over and above the information provided by turnstile clockings, and overtime payments during her Elmers End placement); and
  - b) Referred to dismissal as a possible outcome.

There is no mention in the content or conclusion of the letter of any documentation sent with it.

70. A point of dispute between the parties is when the Claimant was provided with a copy of Ms Tordai's grievance investigation notes.
- a) The Claimant says that he did not receive those notes until after his dismissal but before the appeal hearing.
  - b) The Respondent says it was as part of the disciplinary pack sent to the Claimant at the same time as the invitation to the disciplinary hearing.
  - c) The Tribunal finds that the Claimant was given those notes on 18 May 2021. This is because the document in which the Claimant set out his grounds of appeal includes the following:

*"I was also given 100's of pages of statements on the 18th of May @15:30 eventhough I asked for the notes on the 13th of May. BT's and some of the witness statements were hand written and poorly photocopied, which*

*made it difficult even to read ( see attached copy of BT's Statment) which again put me at a disadvantage to defend myself and my integrity that has been intact for 18 years."*

71. It is abundantly clear to the Tribunal that the Claimant received Ms Tordai's statements – which were treated by the Respondent as her grievance – along with copies of all the other witness statements gathered by Ms Eastwell, on 18 May, ahead of the disciplinary hearing. Moreover, the Tribunal considers the Claimant an intelligent man, who had held a senior position in the Respondent organisation for some years. It is implausible that he would have attended the disciplinary hearing without having and having considered those documents.

Mr Oral enquires about the Claimant's right to work/asks for the Claimant's passport, 19 May 2021

72. On 19 May 2021, the day before the disciplinary hearing, Mr Oral contacted the Claimant and asked him to bring some documentation pertaining to his right to work in the UK when he came in to the CFC the next day. The request itself is not in evidence, as Mr Oral says he made the request in person to the Claimant. The Claimant says that Mr Oral asked him to bring his British passport, whereas Mr Oral says he asked for the Claimant's right to work documentation.
73. The Claimant says that he had observed Mr Oral and Ms Eastwell looking at his personnel file before this, on 22 April 2021. He says that they would have been aware from this that he had a Somalian passport with indefinite leave to remain, as that documentation was on his personnel file.
74. When the Claimant asked Mr Freeman for a copy of his right to work documentation on 17 June 2021, that was provided by Mr Freeman to the Claimant the next day, on 18 June 2021.
75. For this reason, the Claimant considers that "*The Only reason why Abigail Eastwell requested my British Passport knowing that I was not a British Citizen and that I was Somalian was to Harass me because of my nationality and ethic origin*".
76. The Tribunal therefore needs to determine:
- a) Whether Mr Oral asked the Claimant to bring his British passport into the CFC, or his right to work documentation; and
  - b) The reason Mr Oral requested that.
77. Mr Oral's position is that:
- a) He asked for the Claimant's right to work documentation;
  - b) He did so because he was responsible for carrying out a right to work audit, which he did in that period. For some reason, the Claimant's indefinite leave to remain was not seen by Mr Oral on the Claimant's file, but the Claimant's status was resolved to Mr Oral's satisfaction; and

- c) He asked more than 20 other members of the staff for the same documentation.
78. The requests made to other members of staff are not evidenced by the Respondent, either by emails or witness statements from relevant individuals saying that they were asked for the same material. However, Mr Joseph for the Claimant has said that, while his name appears on Mr Oral's spreadsheet, he was never asked to bring any documentation in to Mr Oral.
79. Mr Oral has relied upon a spreadsheet he says he used at the time to record the data he had on all 1,200 CFC staff for these purposes. That spreadsheet is included in the Bundle. One of its sheets includes a table of names (each of which has been redacted besides the Claimant's), with adjacent columns of "start date" and "RTW". There are far fewer names in this spreadsheet than 1,200 (there are 30), which Mr Oral says is because the checks on the 1,200 left these people's right to work checks needing further investigation.
80. The entries in the RTW column for these individuals are colour-coded.
- a) Green entries include "*No RTW Needed*", "*Passport*", "*Permanent Visa*", "*Passport and Visa*", "*Birth Certificate and NI*", and "*Keesing*";
  - b) Amber entries: "*Check Folder*"; and
  - c) Red entries: "*Keesing Needed*".
81. "*Keesing*" is a reference to a technology subscription service that can check the authenticity of documents provided.
82. The Claimant's entry shows a red "*Keesing Needed*" entry in the RTW column.
83. A further page in the Bundle, which Mr Oral says is a later copy of the spreadsheet, does not display the Claimant's name. Mr Oral says this is because that was the later version of his spreadsheet, which had the Claimant's name removed once Mr Oral had seen the Claimant's indefinite leave to remain and his right to work check had been satisfied.
84. The Microsoft Excel meta-data for the document shows that it was created 11 May 2021, and was last modified on 24 July 2023, both by Mr Oral. The Claimant says this modification of the document in 2023, considerably after the events concerned, was deliberately done to cover-up Mr Oral's harassment of him, i.e., to remove his name. Mr Oral says that, after completing the right to work checks, he deleted the document, and he only restored it from his computer's 'recycling bin' when he became that this was an issue in the Claimant's case, whereupon he added headings, such as "*Management Right to Work*", to enable the document to be better-understood by the Tribunal, and redacted the names of other employees. Mr Oral says that he restored two different versions of the spreadsheet – one before he was satisfied of the Claimant's right to work (when the Claimant's name appeared in it), and one after (when the Claimant's name had been removed).

85. Mr Oral agrees that he and Ms Eastwell were looking at the Claimant's personnel file at an earlier point in time, but he says that was to look at all night managers' entitlement to night premiums, not their rights to work.
86. The Claimant also says that he had worked for the Respondent since 2003, and that he had never, since that time, been asked to produce a copy of his passport or any other right to work documentation. The Claimant says that, if the record of his Somalian passport and indefinite leave to remain had been misplaced, Mr Oral would have been in touch with him in prior years to ask for it. The Claimant says that Mr Oral's request for his British passport was designed to harass him ahead of his disciplinary hearing.
87. The Tribunal:
- a) Notes that the title of the spreadsheet relied upon by Mr Oral is "*Right to work Outstanding*", and the "RTW" column entries which are green refer to a mixture of passports, visas, birth certificate and NI, as well as Keesing. This indicates that Mr Oral was satisfied of other evidence of right to work besides passports, so this would support his contention that he requested right to work documentation of the Claimant;
  - b) Observes that it is regrettable that Mr Oral altered the document in 2023. That casts doubt on the authenticity of its content, but his explanation of this is also entirely plausible: that, not being a litigator, he restored the document and sought to be make its contents explicable to the Tribunal when he became aware of the detail of the Claimant's complaints (and the list of issues agreed by the parties was sent to the Tribunal in late January 2023);
  - c) Found Mr Oral to be a clear and knowledgeable witness. He answered questions put to him in a straightforward manner, agreeing with the Claimant's Counsel when he thought it appropriate to do so, and disagreeing with her on other occasions;
  - d) Notes that, when Ms Eastwell gave evidence about Ms Tordai's pay, she characterised the Respondent's systems as "*quite archaic*", and in that context referred to the fact that, because Ms Tordai worked nights, night premiums were involved. It is entirely plausible that, following Ms Tordai's complaint and Ms Eastwell's starting to investigate her pay, Ms Eastwell wished to look at the Claimant's, and possibly other managers', entitlement to night premiums to understand the factual picture as regards Ms Tordai (and possibly the Claimant, given her emerging concerns about his conduct). The timing of when the Claimant said he saw them looking at his personnel file – 22 April – fits more with this explanation, following not long after Ms Eastwell's detailed discussion with Ms Tordai on 13 April, than with a right to work check, or a desire to harass him in respect of the same, which occurred in mid-to-late May given Mr Oral's request to the Claimant on 19 May; and

- e) Can see that the Claimant's appeal against his dismissal, presented on 20 May 2021, stated that he was "*asked to provide [his] right to work after 18 years of loyal service on the 19th and 20th of May*".

88. We find that:

- a) Mr Oral asked the Claimant for his right to work documentation. Anyone with even a basic understanding of immigration requirements would appreciate that there are different ways to have the right to work in the UK, a number of which do not require British citizenship. Mr Oral had far better than a basic understanding of these matters, and his spreadsheet shows a number of different ways by which he was satisfied of other employees' right to work in the UK besides holding a British passport. Moreover, the Claimant referred to Mr Oral asking for his "*right to work*" documentation in his appeal letter; and
- b) Mr Oral asked for the right to work documentation as part of an audit, not so as to harass the Claimant. If, as the Claimant says, Mr Oral had already seen the Claimant's indefinite leave to remain on his personnel file, Mr Oral would know that the Claimant would not be remotely harassed or intimidated by the request to produce his right to work documentation - it could be readily provided. It is far more plausible that that right to work documentation had simply been misplaced, and had been found by Mr Oral when he removed the Claimant's name from his spreadsheet, which is why Mr Freeman could find it easily in June 2021 and send it to the Claimant in response to his request.

#### The disciplinary hearing, 20 May 2021

- 89. On 20 May 2021 Mr Basquil conducted the disciplinary hearing with the Claimant (in the presence of a note-taker).
- 90. The Respondent disclosed the handwritten notes of this meeting, signed by the Claimant, during the course of this hearing. This late disclosure was regrettable, but the Claimant, who had complained about the accuracy of the typed version of the notes of this meeting that had been disclosed, maintained his argument that the typed notes attributed statements to him that he did not make in this meeting. That was plainly an unsustainable position in the face of the handwritten notes being uncovered which contained the same statements and which the Claimant had signed on every page, and is a matter of regret that he did not concede these points in the face of plain evidence to the contrary.
- 91. The Claimant asserts that, at the outset of this meeting, Mr Basquil told him that he was sure that the Claimant would soon be dragging him before the Employment Tribunal (which the Claimant says indicates that the decision to dismiss him was pre-meditated). Mr Basquil denies doing so. The Tribunal does not accept that contention in light of the handwritten notes, signed to confirm their



accuracy by the Claimant, which do not include that statement. We find that statement was not said by Mr Basquil.

92. The disciplinary hearing began just after 11:00 and ended at 16:42. The meeting was adjourned at 15:15 for Mr Basquil to make his decision, and it reconvened at 16:26. Mr Basquil confirmed at the end of meeting that the Claimant was summarily dismissed for gross misconduct, with Mr Basquil concluding that all three Allegations were made out.
93. Following that meeting, Mr Basquil confirmed in writing that the Claimant was dismissed with immediate effect, in a letter sent on 21 May 2021.
94. The Claimant makes a number of criticisms of the disciplinary hearing and the manner in which Mr Basquil reached his conclusions. The Claimant says:
  - a) He was not given a copy of Ms Tordai's grievance investigation notes until after this meeting;
  - b) He presented evidence at this hearing that was not reviewed by Mr Basquil;
  - c) Mr Basquil accepted Ms Tordai's statements contrary to the requirement of the Respondent's evidence checklist;
  - d) He was dismissed for taking the totality of Ms Tordai's earnings into consideration when writing a mortgage reference for her, but:
    - (i) The Claimant was not trained on mortgage reference writing;
    - (ii) The Respondent had no policy on mortgage reference writing where the Claimant worked; and
    - (iii) The reference written by the Claimant for Ms Tordai was as such references were usually written by the Claimant's colleagues;
  - e) Mr Basquil did not analyse the evidence submitted by Ms Eastwell, but rather copied and pasted Ms Eastwell's findings with a one-page letter, without giving any reason for his decision;
  - f) All evidence pointing to the dishonesty and bad character of Ms Tordai, given by her colleagues, was ignored;
  - g) He was the only person dismissed for allegedly overpaying a colleague, issuing a mortgage letter in the format he did, and being in a relationship with Ms Tordai, whereas other member of staff that did the same things (with some staff deliberately overpaying themselves) were not dismissed; and
  - h) He was dismissed for following Mr Oral's instruction to all lead managers to manually clock colleagues.
95. In relation to those criticisms:

- a) The Tribunal has already found that the Claimant was provided with copies of Ms Tordai's statements on 18 May 2021.
- b) The Claimant has not identified any evidence that he presented to Mr Basquil which he says Mr Basquil did not consider. The notes of their meeting record the Claimant showing Mr Basquil paperwork, and showing him documents on his laptop, on numerous occasions during the meeting. Mr Basquil's written evidence to the Tribunal is that:

*"[The Claimant] had his laptop and ready to show me new evidence... The meeting was quite long and I wanted to give him every opportunity to give me his side of things and version of events... Abdi was very keen to show me evidence as to how he had not overpaid this colleague and that she was working on these shifts... It felt like he was going to show me a couple of examples where he could prove she worked from a rota saved on his laptop which was date stamped. We went through each date and after a couple, he showed one incorrect rota and became flustered... I accepted that for the first couple of dates for alleged overpayments, he could prove with the rotas that the colleague may have been working. However, his method didn't work for all the dates."*

The notes recorded that the Claimant and Mr Basquil discussed Allegation 1 until 13:40, so for more than two hours.

The Tribunal finds that Mr Basquil did look at the evidence provided by the Claimant in the hearing, and he accepted that some of it proved that some of the alleged overpayments were genuine payments for work done.

- c) As for the criticism that Mr Basquil accepted Ms Tordai's statements "*contrary to the requirements of the Respondent's evidence checklist*", it is not apparent from those words alone what the Claimant meant by this, but the case the Claimant put to the Tribunal was that Ms Eastwell and Mr Basquil failed to consider the evidence that weighed against the Allegations. The Respondent's Investigation Checklist says that the investigation manager should take all evidence into consideration – seeing both sides – before determining whether the combination of evidence supports or does not support the allegation made. Given the Claimant also says that two of the three Allegations were made by Ms Eastwell and not Ms Tordai, the Claimant's complaint here must relate to Allegation 3, the only one of the three Allegations that was made by Ms Tordai. However, the evidence before the Tribunal showed the opposite:
  - (i) Ms Eastwell's investigation summary recorded the evidence that supported Allegation 3, and the evidence that did not support it.
  - (ii) The notes of the disciplinary meeting with Mr Basquil record that the Claimant read out a statement taken by Ms Eastwell from Irina Cazacu (who described the Claimant as supportive of Ms Tordai

after Ms Tordai's return to the CFC, and Ms Tordai as resistant to criticism), and the Claimant and Mr Basquil discussing that a bit, before Mr Basquil gave the Claimant the opportunity to add anything else he wanted to. The Claimant did raise other points, which were discussed. The notes clearly record that Mr Basquil considered evidence on both sides as regards Allegation 3 (and, indeed, Allegations 1 and 2).

The Tribunal finds that this criticism made by the Claimant is not supported by the evidence.

- d) As for the Claimant's criticisms pertaining to Mr Basquil's decision to uphold Allegation 2:
- (i) The Tribunal accepts that the Claimant had not received training on reference writing at the time he wrote the mortgage reference for the Claimant (22 October 2020).
  - (ii) If the Respondent had a policy on how such references should be written, it was not shown to the Tribunal – we find they was none.
  - (iii) The Claimant did not show the Tribunal any examples of references written by any of his colleagues – or himself for other people - that followed the same approach as the Claimant's for Ms Tordai's. We cannot find that the reference the Claimant wrote for Ms Tordai was in the same format as references written by the Claimant's colleagues for other people.
  - (iv) The notes record that there was discussion in the disciplinary hearing of whether the figures used in the reference letter by the Claimant were appropriate. The notes record the Claimant as having said: *"I looked at payslips to write letter assumed higher rate correct one again no justification for getting wrong for schoolboy error – reason did – if asked to write letters – see statements 15 years"*. At a later point the Claimant said *"We looked at wrong figures – gross pay – I take responsibility"*. The Tribunal finds that the Claimant accepted at the time of the disciplinary hearing that the figures he used in the reference he wrote for Ms Tordai were not appropriate figures to use.
  - (v) Mr Basquil's simple evidence to the Tribunal was that he had upheld Allegation 2 because the Claimant accepted he had done it. That is supported by the notes of the hearing (including that Mr Basquil said in the outcome part of the meeting that the Claimant had admitted it, which the Claimant did not contradict). Whether the Claimant had had reference writing training, had complied or failed to comply with the Respondent's policy on reference writing, or written a reference for Ms Tordai consistent or inconsistent with the

references written for others at the CFC were not the reason Mr Basquil concluded that Allegation 2 was made out. The reason Mr Basquil found that Allegation 2 was made out was the Claimant's admission that he had done as alleged.

(vi) However, contrary to the Claimant's contention, the Claimant was not, according to Mr Basquil's evidence, dismissed "for" Allegation 2. Mr Basquil's written and oral evidence to the Tribunal is that he would not have dismissed the Claimant for Allegation 2 alone – although the Tribunal finds that Mr Basquil failed to make that clear in his oral explanation to the Claimant, or in the letter setting out the outcome of the disciplinary process.

- e) The Claimant's contention that Mr Basquil did not analyse the evidence submitted by Ms Eastwell is not supported by the fact that the disciplinary hearing was more than five hours long, and Mr Basquil accepted some of the Claimant's explanation about the time for which Ms Tordai had been paid. Mr Basquil *did* engage with the relevant material, albeit that the oral and written record of why he concluded as he did was cursory – albeit that that was all that was needed in respect of Allegation 2, given the Claimant's admission of that one.
- f) The Claimant did not direct the Tribunal to any evidence about the dishonesty and bad character of Ms Tordai. Ms Cazacu gave evidence that Ms Tordai was resistant to criticism, but that was not bad character evidence. We conclude that no such evidence was ignored, as none was presented.
- g) The Claimant made vague assertions about colleagues who had overpaid themselves or others. He identified two overpayment comparators in the list of issues – Justyna Madejczyk and David Dellow.
  - (i) Ms Madejczyk: The Claimant agreed with the suggestion put to him in cross-examination that there was no evidence that Ms Madejczyk was overpaying a person she was in an undeclared relationship with. Mr Joseph was also familiar with Ms Madejczyk's case, and said that it was not a deliberate error, and involved inadvertently overpaying people who were shielding during the Covid pandemic because they were suffering from cancer. The Tribunal concludes for both these reasons – but particularly because Ms Madejczyk had not consciously overpaid anyone else, unlike the position the Respondent contended applied to the Claimant in Allegation 1 - that Ms Madejczyk was not an appropriate comparator to the Claimant's situation.
  - (ii) Mr Dellow: The Claimant was the only person who recalled anything to do with Mr Dellow, who apparently worked at the CFC about 15 years ago. The only evidence provided to the Tribunal in

relation to Mr Dellow was the Claimant's memory that Mr Dellow deliberately overpaid himself and was not dismissed. The Tribunal has had reason to doubt the Claimant's honesty, in light of:

- I. The fact that he told Ms Eastwell at the time of her investigation that he had had an intimate relationship with Ms Tordai, and yet he sought to recharacterise that relationship in the presentation of his case to the Tribunal as one of friendship only;
- II. The fact that he alleges he did not receive copies of Ms Tordai's statements, and we find he did on 18 May 2021;
- III. The fact that the Claimant contended that statements were attributed to him in the disciplinary hearing which he did not make, and the (regrettable) late disclosure by the Respondent has shown those notes to be accurate in all material respects; and
- IV. The fact that the Tribunal does not believe that the Claimant did not have copies of the handwritten notes of the disciplinary hearing in his possession,

and so, absent any other evidence besides his word about Mr Dellow having overpaid himself around 15 years ago and not having been dismissed for doing so at the time, we are not prepared to accept that this happened.

In any event, the Claimant accepted that he was not dismissed solely for Allegation 1 (overpaying Ms Tordai), but because of Mr Basquil's conclusion (upheld by Mr Connell) that all three of the Allegations were made out. It is not surprising, therefore, that the Claimant was the only person dismissed for those things, as that combination of misconduct complaints cannot be expected to arise frequently, and did not apply to either Ms Madejczyk or Mr Dellow – so neither is an appropriate comparator to the treatment he received.

- h) The Claimant says he was dismissed for following Mr Oral's instruction to all lead managers (into which email the Claimant was copied) to manually clock colleagues. That email stated, in relation to colleagues who were sent to support other stores from March 2020, that they should be manually coded for their contracted hours. However, the Claimant was clearly not dismissed for doing this. The Claimant was dismissed for the combination of all of the Allegations being made out. Allegation 1 was not that he had manually clocked Ms Tordai for her contracted hours, but that he had authorised payment for additional hours to her so as to inflate her salary when she had not worked those hours.

ACAS early conciliation and the Claimant presents the Claim Form to the Tribunal, May/June 2021

96. ACAS early conciliation began on 23 and ended on 24 May 2021.
97. The Claimant appealed the decision to dismiss him. The Claimant's letter is not dated, but it appears from the Bundle index that this was on the same day as the disciplinary hearing and its outcome.
98. Mr Freeman, the Claimant's line manager, scheduled the Claimant's appeal hearing with Mr Connell. While corresponding with Mr Freeman about those arrangements the Claimant requested (on 17 June 2021), and was provided (on 18 June 2021) with, various documents by Mr Freeman (including the copy of his indefinite leave to remain held by the Respondent).
99. On 21 June 2021 the Claimant filed his Claim Form to commence these proceedings.

The appeal hearing, 30 June 2021

100. Mr Connell held the appeal meeting on 30 June 2021, in the presence of a note-taker, with the Claimant and his trade union representative, Mr Briggs.
101. The Claimant's letter setting out the basis for his appeal ran to nine pages, but Mr Connell distilled it to seven grounds.
102. Those grounds were discussed over the course of the hearing, which lasted for more than five hours.
103. Mr Connell gave the Claimant a decision orally, and in email form, on that day – he had not upheld the Claimant's appeal.
104. An appeal outcome letter was written by Mr Connell and sent by the Respondent on 5 July 2021.
105. The Claimant makes several criticisms of this appeal stage. He says that:
  - a) All the questions raised by him during the appeal process were ignored and not answered;
  - b) Mr Connell changed his appeal decision between the 30 June (when he gave the Claimant his oral decision on his appeal) and 5 July (the date of the written appeal outcome letter); and
  - c) Mr Connell made oral criticisms of Ms Eastwell, Ms Tordai and Mr Basquil in the appeal hearing, which he did not include in the appeal outcome letter.
106. The Respondent says:
  - a) The appeal hearing lasted five hours, and Mr Connell considered the points made by the Claimant during that time;

- b) Mr Connell did not change his decision. He confirmed, orally, that he was not upholding the Claimant's appeal and he explained why, and he later recorded that thinking in a letter which is not materially different from the oral explanation. The Respondent pointed to the fact that Mr Connell used typed notes to deliver his oral decision, which he emailed to one of the Respondent's People Partners, and to the Claimant, shortly after that meeting. The Respondent says that a comparison between that email and the letter sent on 5 July shows they are the same in all material respects; and
- c) The points Mr Connell made orally in the meeting about Ms Eastwell, Ms Tordai and Mr Basquil were reflections on the Claimant's criticisms, and things that could be done better by the Respondent in the future. They were points for improvement, rather than failings with the process that had been followed in this case. They do not change the fact that Mr Connell's appeal outcome was to reject every ground of appeal raised by the Claimant.

107. The Tribunal finds that:

- a) Mr Connell did consider the points made by the Claimant. The appeal hearing minutes show the discussion between the Claimant and Mr Connell as Mr Connell tried to understand the points the Claimant was making, e.g., about how he personally provided some financial support to Ms Tordai out of his own pocket because she was struggling;
- b) Both the notes used by Mr Connell to orally deliver and explain the appeal outcome to the Claimant in the meeting and the letter that was later sent were consistent in that Mr Connell rejected all seven grounds of appeal, and his reasoning is the same. What is different between the two documents is set out below; and
- c) The differences between the email and the letter were:
  - (i) The self-reflective 'points for improvement' for the Respondent; and
  - (ii) The points to follow-up as regards any consequences for Ms Tordai,

which Mr Connell likely shared orally with the Claimant to acknowledge that the process followed had not been perfect, but which were not relevant to him going forwards, as his summary dismissal had been confirmed, and any process being followed with Ms Tordai was confidential. Those points did not need to be included in the written letter.

#### Progression of the Claimant's claim

108. The Respondent filed its defence of this matter, and the Claimant later made an application to amend his claim so as to allege discrimination on the ground of religious belief on 6 August 2021.

109. That application fell to be determined at a preliminary hearing for case management of the matter on 25 November 2022, when that requested amendment was not contested by the Respondent. The List of Issues between the parties was not agreed on that day.
110. The Respondent was permitted to amend its Grounds of Resistance, which it did on 16 December 2022.
111. The parties agreed a List of Issues between themselves by correspondence, and informed the Tribunal of that fact on 23 January 2023.

Are there any inferences of discrimination that should properly be drawn from considering the totality of the primary facts?

112. The Tribunal is conscious that, as observed by Neill LJ in *King*, direct evidence of discrimination is unusual, but it does not mean that discrimination has not occurred. The Tribunal therefore needs to consider, in light of the totality of the primary facts (those agreed by the parties together with those found by the Tribunal), whether it is appropriate for us to infer from those facts, and all the circumstances of the case, that there was a racial and/or religious belief ground for the acts the Claimant complains of (*Qureshi*). The significant number of criticisms made of the Respondent by the Claimant in this case, and the substantial amount of factual background and disputed facts, makes this exercise all the more important. We are also reminded that any inferences drawn must be based on evidence, not by making use (without evidence) of a verbal formula such as ‘institutional discrimination’ (*Stockton on Tees BC v Aylott* [2010] ICR 1278).
113. We concluded that no such inferences should be drawn.
114. There were aspects of the factual matrix, and other circumstances of the case, that gave us initial cause for concern:
  - a) The (apparently unchallenged) contention from the Claimant that, on the same day as the second investigation meeting between the Claimant and Ms Eastwell, the Respondent took the Claimant to Mr Freeman’s office, and instructed him to copy pre-prepared answers to “Managing Wages in HRAM Stores for Team Manager” into a training booklet – i.e., that the ‘training’ he was given was totally ineffectual and was designed to indicate that the Claimant had been effectively trained on this subject ahead of his disciplinary hearing.
  - b) Ms Tordai’s evidence was significant in assessing the veracity of Allegation 1 and Allegation 3, and she was not a witness before the Tribunal. Furthermore, she was referred to by some of the witnesses as herself having been the subject of disciplinary proceedings for her complicity in some of the events that are the subject of this case.



- c) The Respondent's approach to disclosure was extremely poor, repeatedly discovering additional relevant documents that had been in existence since the time of the events complained of, and had not been disclosed as they should have been.
115. However, it is important to put these matters into their proper context when considering whether they should form the basis for an inference of discrimination:
- a) The Tribunal concluded that the fact that the Claimant's records indicated that he had been trained on "Managing Wages in HRAM Stores for Team Manager" was not taken into account by either Mr Basquil or Mr Connell, and the Claimant described the events of 29 April 2021, when he was apparently 'trained' on this subject to each of them. It is understandable that Ms Eastwell, learning that the Claimant had not had that training, would have alerted others in HR to that, and they would have acted on that information – though obviously not appropriately. This can be explained by incompetence rather than an attempt to mislead the disciplinary (or appeal) managers, and in any event did not mislead them.
- b) Ms Tordai's account was important to the Respondent's consideration of Allegation 1 and Allegation 3, but there was other evidence – particularly on Allegation 1 – that was relied upon in relation to each of them. Mr Connell's rationale – the only one expressed to the Claimant at the time (as Mr Basquil did not explain his decision) made it clear that a very weighty factor in his thinking was his assessment of the Claimant's knowledge of the Respondent's policies and procedures, and therefore his view as to the Claimant's lack of integrity and dishonesty in what had happened in relation to Allegation 1. Mr Connell was also clear in his criticism of Ms Tordai (in both the email and letter explaining his decision) (e.g., "*I do question her honesty in relation to her part in some of the overpayments in terms of knowledge*"). The Respondent did not have evidence that perfectly pointed only to one possible conclusion on the Allegations, but its conclusions are explicable and have been explained, and acknowledge the concern with Ms Tordai's own honesty. They do not support an inference of unlawful discrimination, but an assessment of what should reasonably be expected of a manager of the Claimant's experience and how his actions fell short of those standards.
- c) The very poor approach to disclosure is regrettable, and fairly shocking in an organisation the size of the Respondent. However, upon hearing the beginning of the Claimant's evidence referring to handwritten notes, Mr Oral went to the CFC and looked in various cupboards and found several carrier bags worth of relevant material. If there was malice, rather than lack of competence, in the Respondent's approach to disclosure, he would not have brought those documents to the Tribunal. This does not support an inference of unlawful discrimination.

116. These points of note also need to be seen in the context of sheer number of criticisms made by the Claimant that are entirely without evidence or clearly exaggerating or misrepresenting the facts (e.g., that Mr Connell 'substituted' the appeal outcome, or that Ms Eastwell described the Claimant's relationship with Ms Tordai as 'inappropriate' – neither of these things happened).
117. We consider that, looking at the evidence and all the circumstances of the case, it is not appropriate to draw any inferences that there were the averred discriminatory grounds for the acts complained of.

## **The hearing**

### General conduct of the hearing

118. The Claimant was represented in the hearing by Ms R Omar, and the Respondent by Mr J Cook, both Counsel.
119. The hearing was very disorganised and fragmented, in part because of the Respondent's late disclosures, but also the responsiveness of the Claimant to those late disclosures. The Tribunal was not able to start to hear witness evidence until part-way through the second day of the hearing due to these issues, and the need to seek clarification on the list of complaints and list of issues.
120. The witnesses who appeared before the Tribunal were, for the Claimant:
- a) The Claimant; and
  - b) David Joseph, a former colleague;
- and for the Respondent:
- c) Abbie Eastwell – who, at the relevant time, was part of the Respondent's Human Resources team with the role of People Partner. Ms Eastwell conducted the investigation into the Claimant's conduct;
  - d) Conor Basquil - a Store Manager of a different store to the one at which the Claimant worked. Mr Basquil was the person who took the decision to dismiss the Claimant;
  - e) Adrian Connell - a Store Director of a different region to the branch of the Respondent at which the Claimant worked. Mr Connell heard and determined the Claimant's appeal against his dismissal; and
  - f) Suleyman Oral – the People and Safety Manager at the CFC, who had some responsibilities for payroll.
121. The Claimant suffered with back pain through some part of the hearing, and when giving his evidence the Tribunal offered him additional breaks to try to assist him. The Claimant gave some of his evidence standing (with the bundles and witness statements elevated), so as to ease the pain on his back, and only when he had confirmed he was well enough to do so. After the initial cross-examination of the Claimant ceased, the parties agreed with the Panel's suggestion that we "break"

the Claimant's evidence and heard evidence from Mr Joseph, so as to enable the Claimant to walk around the hearing room and to resume giving evidence the following day when he expected his pain to have reduced. The Claimant therefore remained under oath throughout Mr Joseph's evidence and his evidence resumed the next day.

122. Breaks were also scheduled to facilitate Ms Omar's needs to pray within particular time windows.
123. The Tribunal also sat late on each day of sitting due to the time pressure on the hearing window. Despite this, for the reasons set out below, the hearing went part-heard on 13 November 2023, and due to unusually challenging scheduling challenges, did not resume until 3 February 2025. In that long break between the two parts of the hearing, Ms Eastwell remained under oath, but as she had ceased working for the Respondent some time before the first part of the hearing commenced, she informed the Tribunal that she would not expect to find it difficult not to talk about her evidence in the gap between the two halves of the hearing. Upon the resumption of the hearing Ms Eastwell confirmed that she had not spoken to anyone about her evidence in the intervening period.

#### The list of issues

124. At a Preliminary Hearing for Case Management on 25 November 2022 EJ Webster noted that the list of allegations prepared on behalf of the Claimant was overly complicated and confusing. EJ Webster Ordered that the Claimant re-do a draft list of issues and send it to the Respondent for agreement. That is what happened, and the parties jointly wrote to the Tribunal requesting that the subsequent hearing listed to consider that list be vacated. That list of issues was, regrettably, still lengthy and confusing in places.
125. At the outset of this hearing, therefore, the Tribunal spent some time clarifying the complaints recorded in that list, and the comparators relied upon by the Claimant.
126. On the second day of the hearing, after many discussions and breaks for Counsel to try to clarify points that remained unclear to the Tribunal, the list of issues was amended, and the version appended to this judgment is that list. The Tribunal has since added complaint numbers to that list for ease of reference.
127. Upon enquiry by the Tribunal, the Respondent confirmed at the conclusion of evidence that it does not rely upon any argument that any of the complaints were raised out of time. The Tribunal also did not understand any of the complaints to be raised out of time, and so this was not considered further by the Tribunal.

#### The hearing bundle and applications to admit additional documents

128. The Tribunal made it plain to the parties that they could only rely on the Tribunal reading and considering those documents in the bundle to which it was were taken by written or oral witness evidence or submissions, and that the parties

should not assume that the Tribunal would otherwise read any contents of the bundle which neither party was relying on.

129. The parties had agreed a bundle of 793 pages, and there was a section at the back of that document concerning 17 pages which was labelled "DISPUTED DOCUMENTS". The inclusion of ten of those 17 pages had been resisted by the Respondent, but it withdrew that objection. The inclusion of the remaining seven pages was not resisted by the Claimant, but the Claimant wished to point out concerns with the authenticity of those documents – which the Tribunal considered could be aired in the course of hearing evidence and/or submissions.
130. In fact, some documents elsewhere in the bundle were also the subject of dispute by the Claimant. The Claimant's position was that:
  - a) The typed note of the disciplinary meeting the Claimant attended, chaired by Mr Basquil, on 20 May 2021, was inaccurate. The Claimant said that the original handwritten notes had been signed by the Claimant to confirm it as an accurate record of that meeting, and those handwritten notes were apparently no longer in either party's possession; and
  - b) The accuracy of records of interviews of people other than the Claimant as part of the Respondent's investigatory process was questionable where there is no record of those individuals confirming the accuracy of those notes - in breach of the Respondent's practice (where the individual would indicate accuracy either by signing the meeting notes or providing that confirmation by email).
131. The Respondent applied to admit two further documents into evidence on this first day of the hearing, those being copies of its Disciplinary and Conflict of Interest policies. The Claimant objected to the admission of those documents: in relation to the Disciplinary Policy because it was an earlier version than that which had applied at the time of his dismissal, and in relation to the Conflicts of Interest policy on the basis that the Claimant had never seen it before. The Respondent then produced a later version of the Disciplinary Policy so as to satisfy the Claimant that the version sought to be admitted was the applicable version for the purposes of the events with which the claim is concerned.
132. At this point, therefore, the Claimant resisted the admission of three documents into evidence, those being:
  - a) The typed notes of the Claimant's disciplinary hearing of 20 May 2021;
  - b) The Respondent's Disciplinary Policy; and
  - c) The Respondent's Conflict of Interest Policy.

The Panel determined that each of these documents was relevant to the issues in the case, and in the case of the policies, their admission was necessary in order to enable the Panel to determine some of the matters in the agreed list of issues. In the case of the typed notes of the disciplinary hearing, the Panel

concluded that the Claimant could give evidence about those aspects of the notes which he regarded as inaccurately reflecting what was said in the disciplinary hearing. All three documents were therefore admitted into evidence. At this point the Bundle ran to 827 pages.

133. The Tribunal proceeded to hear evidence from the Claimant and Mr Joseph. At the start of the fourth day of the hearing, after conclusion of:

- a) Mr Joseph's evidence; and
- b) the evidence-in-chief and cross-examination of the Claimant but before Panel questions and re-examination had commenced,

the Respondent informed the Tribunal that it had discovered some additional relevant material which it had not disclosed to the Claimant nor included in the bundle. Those documents comprised:

- (i) The original handwritten notes of the disciplinary hearing, signed by the Claimant;
- (ii) The original handwritten notes of a meeting involving Ms Eastwell and Ms Tordai of 13 April 2021;
- (iii) A "Let's Talk" document from 27 August 2020 relating to the Claimant;
- (iv) Attendance management reports concerning BT;
- (v) An overtime record for BT, with some handwritten notes from Ms Eastwell;
- (vi) A copy of a reference written by the Claimant for BT on 22 October 2020;
- (vii) A "Let's Talk" document from 16 April 2021 relating to BT; and
- (viii) A series of undated text messages which the parties agree were sent between the Claimant and BT.

134. The Claimant also produced an email chain on the fourth day of the hearing which related to additional hours worked by individuals within the Claimant's team who were sent to work in other stores to support those stores due to Covid-19-related staff shortages. That two-page email chain had the title "Wage Transfers", and the latest email in that chain was from the Claimant on 18 May 2021. The Claimant applied for this to be admitted as relevant to the process of approving hours for CFC employees assigned to work at other stores during the pandemic, and the Respondent did not object to its admission.

135. After some consternation expressed on the part of the Panel that these documents had not been disclosed earlier, and particular frustration expressed by the Claimant (who expressed an intention to apply for a costs order at the end of the hearing), the Claimant's evidence resumed so that he could answer the Panel's questions and conclude his evidence, so as to enable him to seek advice

from and give instructions to Ms Omar about the Respondent's application to admit the new evidence. Mr Cook agreed that, in light of the fact that further evidence will need to be sought from the Claimant on the new material, Ms Omar's re-examination of the Claimant could follow his second set of evidence-giving and relate to the entirety of his evidence. The Claimant was then in position to give instructions to Ms Omar.

136. The Panel also instructed Mr Cook to produce a summary of the differences between the handwritten and typed notes of each of the:
  - a) Meeting involving Ms Eastwell and BT of 13 April 2021; and
  - b) Disciplinary hearing of 20 May 2021.
137. Upon taking instructions, Ms Omar informed the Panel that, whilst the Claimant vociferously complained about the Respondent's failure to disclose these documents earlier (particularly given some of the documents had been requested by the Claimant of the Respondent on numerous occasions), the Claimant did not object to the admission into evidence of any of these documents.
138. The Panel determined to admit these further documents – the eight documents sought to be admitted by the Respondent, the further document sought to be admitted by the Claimant (the email chain) and the summary document requested by the Panel. The Bundle then stood at 925 pages.
139. The Claimant was given permission to produce a supplemental witness statement concerning these newly-admitted documents, which he did at midday on day six of the hearing (the **Claimant's Supplemental Witness Statement**). That witness statement complained about what was regarded by the Claimant as a short period of time permitted by the Panel for the Claimant to produce any supplementary witness statement in relation to the new documents, though the Panel notes that some of those documents were in the Claimant's possession and admitted into evidence six days previously, and in the case of the remaining documents, four and a half days previously. The Panel considered this ample time – in the regrettable circumstances of very late disclosure by the Respondent - not least given that the content of a number of those documents was already known to the Claimant (e.g., the handwritten notes of his disciplinary hearing, the Respondent's Disciplinary Policy, the Claimant's "Let's Talk" from 27 August 2020).
140. The hearing resumed halfway through day six of the scheduled seven day hearing.

#### Application to amend

141. The Claimant's Supplemental Witness Statement contained within it:
  - a) In the section concerning the "Let's Talk" document from 27 August 2020 relating to the Claimant, reference to the facts that:

- (i) the Claimant had acted as joint guarantor, along with Mr Samuel-Todd, over a property rented by some colleagues;
  - (ii) at the time of the Claimant's "Let's Talk", he had ceased to be joint guarantor when Mr Samuel-Todd had remained as a guarantor; and
  - (iii) the Claimant was issued with a "Let's Talk", whereas Mr Samuel-Todd (identified in the Claimant's Supplemental Witness Statement as White, and referred to orally in the hearing as a non-Muslim) was not; and
- b) In the section concerning the Respondent's Conflict of Interest Policy, reference to two further couples who work or worked at the Respondent, where one part of the couple is senior to the other part, and where both members of the relevant couple work in the same team or department. These couples were not included in the list of Relationship Comparators identified above.

This new content appeared to:

- (1) Refer to comparators not previously identified by the Claimant;
- (2) Introduce a new allegation of direct race discrimination concerning the "Let's Talk" issued to the Claimant on 27 August 2020; and
- (3) Introduce a new allegation of direct discrimination on the basis of religion concerning the "Let's Talk" issued to the Claimant on 27 August 2020.

Ms Omar confirmed, when asked, that the Claimant wished to make an application to amend his claim to include these new complaints and comparators.

142. After a further break to enable Mr Cook to read the Claimant's Supplemental Witness Statement and take instructions on the upcoming applications to amend, Ms Omar, over a period of around half an hour, outlined the Claimant's position for making the amendments sought. The Claimant's arguments can be summarised as follows:

- a) The Respondent disclosed its Conflict of Interest policy on the second day of the hearing, and the Panel admitted that document into evidence. The two new comparators of further couples in the Respondent's employment where one partner has or had direct or indirect line management responsibility for the other partner is relevant to the fact that the Claimant understood the Respondent to be making a case for the Claimant being in breach of its Conflict of Interest policy, a position not taken by the Respondent during investigation by Ms Eastwell or the disciplinary hearing chaired by Mr Basquil;
- b) The admission of the 27 August 2020 "Let's Talk" concerning the Claimant into evidence represented a development in the Respondent's case, as that had formed no part of the Allegations. In those circumstances, the

Claimant should be permitted to amend his claim to rely on relevant comparators and complain about the race discrimination and discrimination on the basis of religious belief that this involved, as it forms part of the Claimant's existing case about there being a pattern of discrimination on these grounds;

- c) The Respondent has had these documents in its possession, and was aware of the 27 August 2020 "Let's Talk", and so was not prejudiced by these amendments; and
  - d) As for the time and manner of the application, the Claimant said that these amendment applications derived from the Respondent's late disclosure, which the Claimant (and his representatives) responded to swiftly.
143. For its part, the Respondent argued that the balance of injustice and hardship lay firmly in rejecting these amendments, for the following reasons:
- a) The application to admit two new, other-employees-in-couples, comparators is unrelated to the disclosure of the Conflict of Interest policy. The Claimant has already pointed to four Relationship Comparators, and it's not clear why these couples were not included at that time;
  - b) The Conflict of Interest policy was disclosed as a background matter, because the Claimant alleges that the Respondent had no policy on this subject. The Respondent does not say that the Claimant was dismissed for breaching this policy specifically. It does not warrant an amendment to the Claimant's pleaded case;
  - c) In any event, the Respondent disclosed the Conflict of Interest Policy to the Claimant on the Friday before the hearing commenced (on the Monday), and so the new comparators could have been discussed on the first day of the hearing when the List of Issues, which included comparators, was discussed, and it was not raised by the Claimant;
  - d) In the case of the "Let's Talk", the Claimant has known of its existence since 27 August 2020, and could have raised any discrimination allegation concerning it when he filed his original claim;
  - e) The nature of the amendments sought would increase the scope of the Tribunal's factual or legal enquiry:
    - (i) in the case of the new discrimination allegation, given the "Let's Talk" was only an informal process/counselling conversation with the relevant employee, it is hard to see how it amounted to a detriment or harassment;
    - (ii) as the requested amendment is substantive which, even if made out, would only be expected to result in a modest compensation award; and



- (iii) as each of the amendments would require evidence on the treatment of the comparators as well as the comparators' circumstances, and in the case of the application to permit new couple comparisons, the Claimant already relies on four other Relationship Comparators;
  - f) A new claim of discrimination on the basis of the "Let's Talk" would be substantially out of time and the Claimant has offered no explanation why he did not raise it previously, which is wholly unacceptable for a represented party; and
  - g) The Claimant already has a vast suite of allegations – the Claimant seems to be seeking to delay the determination of those by these applications, and the Tribunal should get on and hear them.
144. After a break, the Panel concluded that the amendments should be rejected, as the balance of injustice and hardship (as per *Selkent Bus Co Ltd v Moore* [1996] ICR 836, and refined in subsequent cases such as *Vaughan v Modality Partnership* [2021] ICR 535) weighed against allowing the Claimant to amend his case at this late stage. Specifically:
- a) The Panel was not convinced that the disclosure of the further documents – whilst most unfortunate – represented any kind of change of case on the part of the Respondent.
  - b) The "Let's Talk" incident dated back to August 2020 (and the Claimant was involved in that and was apprised of its contents at that time), and the Claimant filed his Claim Form commencing these proceedings almost a year after that. If he had concerns about the "Let's Talk", they should have been included in that form. Furthermore, the Claimant successfully applied to amend his claim in November 2022, a year prior to this hearing. Each of those occasions provided an opportunity for the Claimant to reflect on the discrimination he was already asserting to determine the acts or failures to act on which he was seeking to rely.
  - c) As regards the further couples comparators the Claimant sought to add, again, it was unclear to the Panel why the new documents would prompt the Claimant to rethink his chosen comparators – the existence or admission into evidence of the Conflict of Interest policy does not change the fact that the Respondent's case - since the time the investigation into his conduct began in April 2021 - has been partly concerned with the propriety of the Claimant's actions in his indirect line management of Ms Tordai whilst in a romantic relationship with her. The Claimant has referred to four sets of Relationship Comparators as part of his existing case as to why his treatment on this point by the Respondent is, he avers, unfavourable on the basis of his race and/or his religion. It is not clear to the Panel why the addition of further comparators is sought in light of the newly-disclosed documents.

- d) Furthermore, the Panel considered that, were the amendments permitted, justice would require the Respondent be given the opportunity to gather, disclose and refer in additional witness evidence to the circumstances and treatment of any new comparators permitted.

The balance of injustice and hardship very clearly lies against permitting the requested amendments.

145. Following that decision, the hearing proceeded, with the Claimant giving evidence for the second time, and he was re-examined (at length) on the totality of his evidence by Ms Omar after cross-examination and Panel questions.
146. Ms Eastwell then took the stand, but the conclusion of the allocated hearing time meant that this matter went part-heard at the end of 14 November 2023. Ms Eastwell remained under oath, and subject to the prohibition on discussing her evidence until her evidence has concluded, in the gap. As Ms Eastwell no longer works for the Respondent, this did not pose the difficulties it might otherwise have done. However, there was a concern expressed by Mr Cook that Ms Eastwell may be disadvantaged by the gap between parts of her evidence-giving, inevitably involving some memory fade. The Tribunal suggested that Ms Eastwell take a confidential note on the evening of 14 November 2023 to act as her own “aide memoire” before the hearing resumes. The Panel were clear that that note should be kept confidential.

#### The gap between the two parts of the hearing

147. The first part of this hearing finished in November 2023, and then, due to extraordinary scheduling challenges (the Tribunal’s as well as the Respondent’s), the matter did not resume until February 2025.
148. In the intervening period, a further hearing was listed to begin on 15 July 2024. Unfortunately, the witness the Tribunal was part-way through hearing, Ms Eastwell, had ceased to respond to the Respondent’s correspondence, and was not present at that hearing. Regrettably, neither were the Tribunal members, due to a listing error on the part of the Tribunal (no fault was attributable to the members). EJ Ramsden therefore converted that hearing to a case management hearing, and made a witness order for Ms Eastwell’s attendance at the to-be-resumed February 2025 hearing.
149. The Orders made by EJ Ramsden obliged each of the parties to write to the Tribunal by 6 January 2025, ahead of when the hearing was scheduled to resume on 3 February 2025, to confirm their readiness for that hearing. Neither party did so. The Tribunal wrote to the parties on 23 January 2025, requiring them to confirm by close of business on 27 January 2025 if the February hearing was still required. The Claimant replied in time, the Respondent a day late, each confirming that the hearing was still required.
150. The Respondent, having been informed by Ms Eastwell on 20 January that she had a medical appointment for 3 February (the date she was Ordered to attend

the resumed hearing), wrote to the Tribunal to inform it of that on 30 January 2025, i.e., two working days before the hearing resumed. The Respondent did not provide any evidence of Ms Eastwell's appointment with this correspondence. The Tribunal requested that that medical evidence.

When the hearing resumed

151. At 10:20pm on the evening before the hearing resumed, the Claimant's solicitor applied for the Respondent's Response to be struck-out, on the basis that:
- a) The manner in which the proceedings had been conducted by, or on behalf of the Respondent, has been scandalous, unreasonable or vexatious (as is now set out in Rule 38(1)(b) of the Employment Tribunal Procedure Rules 2024 (the **ET Rules**));
  - b) The Respondent had not complied with an Order of the Tribunal (Rule 38(1)(c)); and/or
  - c) The case has not been actively pursued by the Respondent (Rule 38(1)(b)).
152. The Claimant's application pursuant to Rule 38(1)(b) centred upon:
- a) The Respondent's late disclosure of three tranches of documents in the first part of the hearing, amounting to more than 100 pages, which the Claimant says meant the hearing could not conclude in its allocated time;
  - b) The Respondent's failure to provide its 'dates to avoid' on a timely basis in relation to the listing of the part 2 of the hearing;
  - c) The Respondent causing the listing of the part 2 to be protracted, due to non-availability of its preferred counsel and Ms Eastwell, one of the Respondent's witnesses;
  - d) The Respondent's failure to confirm its readiness for part 2 of the hearing in the second period required by EJ Ramsden, i.e., by 27 January 2025;
  - e) The Respondent's failure to tell the Tribunal and the Claimant about Ms Eastwell's unavailability on 3 February on a timely basis, which the Claimant said was designed to scupper the progress of the claim; and
  - f) The Respondent's failure to provide evidence of Ms Eastwell's medical appointment on 3 February 2025 by 1 February 2025 (as requested by EJ Ramsden).

The essence of the Claimant's application on this basis was that the hearing could not reasonably be held without hearing the remaining evidence of the Respondent's primary witness, Ms Eastwell, first, and any further adjournment of part 2 to facilitate that would cause unacceptable prejudice to the Claimant.

153. The Claimant's application pursuant to Rules 38(1)(c) and 38(1)(d) also centred upon these complaints.

154. The Respondent objected to the application, noting that:
- a) It is generally for a party to marshal the order in which its witnesses give evidence, and the fact it had opened with Ms Eastwell was not something that was required in order for the hearing to be fair;
  - b) Ms Eastwell was under oath, and while she could not attend on the first day of part 2 of the hearing, neither could she talk to anyone about the evidence the Tribunal would hear on that day;
  - c) The Respondent was not responsible for whether Ms Eastwell provided medical evidence to the Tribunal or not (Ms Eastwell having left its employment before even part 1 of the hearing commenced);
  - d) The Respondent was plainly still engaged with the case; and
  - e) A fair trial was still possible, albeit that the remaining evidence would be heard slightly out of the planned order.
155. While the Tribunal understood the Claimant's frustrations with the Respondent's conduct (accepting that it is not responsible for Ms Eastwell's), a fair trial was very much still possible, and the reordering of evidence did not come close to either rendering a fair trial impossible or causing unacceptable prejudice to the Claimant. Little, if any, prejudice seemed to result. The Claimant's application was rejected.
156. The Claimant applied for seven further documents to be admitted into evidence. This was most surprising, given the documents pertain to 2021 – they are not new – and given the Claimant's vehement criticism of the Respondent for late applications to admit evidence, but the Respondent did not object to their admission. The Tribunal accepted them, noting that it did not expect any further documents to be sought to be added into evidence by either party at this very, very late stage. These documents were emails showing the email permission for manual clocking by a single employee of the Respondent working out of the CFC (Graeme Reid) being sought and granted in the period October 2021 to June 2022.

### Submissions

157. The Orders made by EJ Ramsden in July 2024 (in between parts 1 and 2 of the hearing) set out that the remaining oral witness evidence would be completed within the first two days of the resumed hearing, with submissions made on the morning of the third. No objection was made to this by either party, and each party confirmed their readiness for the hearing to resume ahead of its doing so.
158. Upon discussion with the parties, it was agreed that submissions would be made on paper by the parties' Counsel, and sent to the Tribunal by 10:30 am on the morning of the third day of the resumed hearing, with each party having the ability to orally reply to their opponent's submissions at midday.

159. At 7:50 am on the third morning, Counsel for the Claimant wrote to the Tribunal to say that she had worked late into the night, and was then experiencing leg pains, and consequently needed an extra day to prepare her submissions. In light of the facts that:
- a) This was the second part of a hearing that had begun in November 2023, when the parties might be expected to commence the hearing with draft submissions prepared, having seen all the witness statements ahead of that hearing;
  - b) The hearing had then gone part-heard, with more than a year's gap between parts 1 and 2;
  - c) The Tribunal made Orders in July 2024 anticipating that submissions would be made on the third day of the resumed hearing; and
  - d) The Respondent was ready with its submissions,,  
the Tribunal extended the deadline for written submissions until 4pm that day. The Respondent provided its submissions to that deadline, the Claimant did not.
160. The Claimant sent partial submissions just over an hour after that deadline (which the Respondent did not object to the Tribunal accepting), and full submissions at 7:23 am on the fourth day of the hearing. The Tribunal determined to accept those submissions, noting that half of them were in similar terms to the partial submissions which the Respondent did not object to, and determining that each party could then have until 4pm on that fourth day to reply to the other's submissions. The Respondent, which had complied with the previous 10am deadline for submissions in reply to the Claimant's partial submissions, did not make any further reply, and the Claimant did not reply (having referred to the content of the Respondent's submissions in his "full" submissions).

## Law

### Unfair dismissal: The law on dismissal for conduct

161. The protection of employees from unfair dismissal is set out in section 94 of the Employment Rights Act 1996 (the **1996 Act**).
162. Section 98(1) sets out that that an employer may only dismiss an employee if it has a **fair reason** (or principal reason) for that dismissal:

*"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

163. The Supreme Court in *Royal Mail Group Ltd v Jhuti* [2020] ICR 731 held that:  
*“In searching for the reason for a dismissal... courts need generally look no further than at the reasons given by the appointed decision-maker”.*
164. Subsection (2) of section 98 identifies “*the conduct of the employee*” as a reason falling within subsection 98(1).
165. In the context of a dismissal for “conduct”, the employer must have reasonably believed the employee guilty of misconduct at the time of the decision to dismiss them. The seminal decision of *British Home Stores Ltd v Burchell* 1980 ICR 303, EAT, as refined in subsequent authorities such as *Singh v DHL Services Ltd* EAT 0462/12 and *Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, set out three questions to be answered when assessing the fairness of a conduct dismissal:
- a) Did the employer believe the employee guilty of misconduct at the date of dismissal?
  - b) Did the employer have reasonable grounds for that belief? and
  - c) At the stage when the employer’s belief was formed, had it carried out as much investigation into the matter as was reasonable in the circumstances?
166. As for the degree of thoroughness required for an investigation to be reasonable, that is, according to the EAT in the case of *ILEA v Gravett* [1998] IRLR 497:  
*“infinitely variable; at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase. At some stage, the employer will need to face the employee with the information which he has. That may be during an investigation prior to a decision that there is sufficient evidence upon which to form a view or it may be at the initial disciplinary hearing”.*
167. The requisite degree of thoroughness of an investigation is not only assessed by reference to the weight of initial evidence of what the employee is alleged to have done (e.g., whether they have been “*caught in the act*”), but also by the gravity of the charges and their potential effect upon the employee (*A v B* [2003] IRLR 405).
168. Subsection (4) of section 98 provides:  
*“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*  
*(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer*

*acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case.”*

169. In other words, when the employer has been shown to have a potentially fair reason for dismissal, a further enquiry follows as to whether, looked at ‘in the round’, the dismissal was fair or unfair.
170. The test in section 98(4) is an objective one, and when the employment tribunal considers the fairness of the dismissal, it must assess the fairness of what the employer in fact did, and not substitute its decision as to what was the right course for that employer to have adopted (*British Leyland v Swift* [1981] IRLR 91).
171. In many (though not all) cases, there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view, another quite reasonably take another. The correct approach is for the tribunal to focus on the particular circumstances of each case and determine whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted in light of those circumstances. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439).
172. Therefore, if all three of the *Burchell* questions are answered in the affirmative, a further question must be answered by the Tribunal – whether, in light of its genuine and reasonable belief in the employee’s misconduct, the sanction of dismissal was within the range of reasonable responses open to it on an objective basis (*Graham v Secretary of State for Work and Pensions (Jobcentre Plus)* [2012] EWCA Civ 903).
173. Section 98(4) (i.e., the fourth question referred to above) requires a tribunal to “*consider the fairness of procedural issues together with the reason for the dismissal and decide whether, in all the circumstances, the employer had acted reasonably in treating it as a sufficient reason to dismiss*” (*Taylor v OCS Group* [2006] EWCA Civ 702). As Smith LJ, giving the judgment of the Court, said in (paragraph 48 of) that case: “*it may appear that we are suggesting that employment tribunals should consider procedural fairness separately from other issues arising. We are not... the employment tribunal ... should consider the procedural issues together with the reason for the dismissal, as it has found it to be. The two impact upon each other and the employment tribunal’s task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.*”
174. If there has been a procedural flaw at the ‘decision to dismiss’ stage, but that stage is followed by an appeal brought by the employee against that decision, it is the entirety of the employer’s process (together with its reasons for dismissal)

that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).

175. Consequently, not every procedural defect will render a dismissal unfair. As Mr Justice Langstaff (President) stated, in the EAT case of *Sharkey v Lloyds Bank Plc* UKEATS/0005/15/SM:

*“It will almost inevitably be the case that in any alleged unfair dismissal a Claimant will be able to identify a flaw, small or large, in the employer’s process. It will be and is for the Tribunal to evaluate whether that is so significant as to amount to unfairness”.*

176. It is the entirety of the employer’s process (together with its reasons for dismissal) that should be assessed when considering whether the employer acted fairly in dismissing the employee (*Taylor*).
177. Moreover, the assessment of the fairness of the dismissal required by section 98(4) takes account of the particular factual circumstances, including the “*size and resources of the employer*”.

#### Unfair dismissal: The ACAS code

178. Section 207 of the 1992 Act provides that:

*“(1) A failure on the part of any person to observe any provision of a Code of Practice issued under this Chapter shall not of itself render him liable to any proceedings.*

*(2) In any proceedings before an employment tribunal or the Central Arbitration Committee any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provisions of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question.”*

These provisions apply to the Acas Code of Practice on disciplinary and grievance procedures (the **ACAS Code**).

#### The Polkey principle

179. If the tribunal concludes that there was a real chance that the employee could and would have been fairly dismissed by the employer notwithstanding the unfairness identified, the tribunal may conclude that it is just and equitable to make a reduction to the compensatory award that might otherwise be awarded to the claimant, having regard to the loss sustained by the claimant from the dismissal (as per the decision in *Polkey v AE Dayton Services Ltd* [1988] ICR 142).

#### Contributory conduct

180. Blameworthy or culpable conduct on the part of the claimant can reduce any award made to them if their dismissal is unfair – specifically, this can reduce either



or both of the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act).

### Direct discrimination

181. Section 13(1) of the 2010 Act describes the prohibited conduct of direct discrimination as follows:

*“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.”*

182. In other words, two conditions must be satisfied for a complaint of direct race discrimination, or direct discrimination on the basis of religion, to be made out:

1. The employer must have treated the claimant less favourably than it treated or would treat others; and
2. The reason for that difference in treatment is the protected characteristic.

183. The assessment of whether treatment is less favourable is an objective one, i.e., whether the tribunal finds it so, not whether the claimant perceived it as such (*Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390).

184. Section 13 involves the comparison of treatment afforded the claimant against a named or hypothetical comparator (*“than A treats or would treat others”*), and section 23(1) provides that:

*“there must be no material difference between the circumstances relating to each case”* (i.e., there must be no material difference between the circumstances of the claimant and the comparator).

185. Lord Hope, in the House of Lords decision in *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, held that, with the exception of the prohibited factor (be it sex, race or otherwise), *“all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator.”*

186. Their circumstances need not be entirely identical, though, as the EHRC Code reflects, at paragraph 3.23:

*“it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator”*.

187. Where there is no “real life” or “actual” comparator identified by the claimant, or where the claimant’s selected comparator does not meet the conditions in section 23(1), the tribunal must construct one to determine the complaint.

188. Linden J in the EAT decision of *Gould v St John's Downshire Hill* [2020] IRLR 863 described the process of constructing a hypothetical comparator for this purpose:

*“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 or has not taken the protected step. The question is then whether such a person would have been treated more favourably than the claimant in those circumstances.”*

189. When answering the second question, the examination of the reason why the decision-maker acted in the way that they did, the claimant need not show that the protected characteristic was the sole reason, but it needs to have been a “*significant influence*” (Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572). It is not necessary that the decision-maker was conscious of this significant influence.
190. It is, though, that person’s - the decision-maker’s - motivations which are to be examined by the tribunal, not another person’s with the respondent organisation (*Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010). As Lord Nicholls in *Nagarajan* observed that “*the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.*”
191. In some cases it will be obvious why the complainant received the less favourable treatment, and as noted by Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337:

*“employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

*The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable*

*treatment issue until after they have decided why the treatment was afforded to the claimant.”*

Harassment related to race of religious belief

192. ‘Harassment’ is defined in section 26, which includes, in subsection (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.”*

193. In other words, there are three elements to this test:

a. There has been unwanted conduct;

b. That has the proscribed purpose or effect; and

c. That unwanted conduct relates to a relevant protected characteristic.

194. As for “purpose or effect”, the requisite threshold is high – intending to or causing upset or offence is insufficient – the language used (e.g., “violating” and “degrading”) points to purposes/effects which are serious and marked (*Betsi Cadwaladr University Health Board v Hughes* EAT 0179/13). “*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment*” (Elias LJ in *Grant*).

195. Section 26(4) requires that:

*“In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken account-*

*(1) the perception of B;*

*(2) the other circumstances of the case; and*

*(3) whether it is reasonable for the conduct to have that effect.”*

196. This entails both subjective (the perception of B) and objective (whether it is reasonable for the conduct to have that effect) assessments of the effect of the conduct, as well as consideration of all the other circumstances of the case. The objective assessment is particular to the claimant – was it reasonable for the conduct to have the effect on that particular claimant?

197. The EHRC Code (at paragraph 7.18) indicates that the “*other circumstances of the case*” could be matters such as the personal circumstances of the claimant, such as their health, mental capacity, cultural norms, and previous experience of harassment, as well as the environment in which the conduct takes place.

198. The question of whether conduct “*related to*” a relevant characteristic is determined by the Tribunal, not by the claimant’s perception (*Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495, or by the respondent’s knowledge or perception of the claimant’s protected characteristic, or by their perception of whether the conduct “*relates to*” the claimant’s protected characteristic (*Hartley v Foreign and Commonwealth Office Services* [2016] ICR D17). It is an objective question.
199. When determining whether the act complained of “*related to*” a protected characteristic, the tribunal must consider:
- a) The relevant context (as Elias LJ put it in *Grant*, “*it will generally be relevant to know from whom a remark is made, in what terms, and for what purpose*”);
  - b) The wider connection test that applies to “*related to*” than applies to the “*because of*” test for direct discrimination. So conduct can be “*related to*” a protected characteristic even if it is not “*because of*” it; and
  - c) The mental processes of the alleged harasser will be relevant to whether the conduct “*related to*” the protected characteristic, but such evidence is not essential to determine the issue. The tribunal will need to reach its conclusion based on the evidence before it
- (*Bakkali v Greater Manchester Buses (South) Ltd (trading as Stagecoach Manchester)* [2018] ICR 1481).
200. Conduct can be “*related to*” a protected characteristic even if there is no discriminatory intent on the part of the actor, e.g., idle gossip that is not ill-meant may still be related to a protected characteristic (*Grant*).
201. The EHRC Code, at paragraph 7.9, observes that:
- “Unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic”.*
202. It gives the following example:
- “A female worker has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by continually criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker, but because of the suspected affair which is related to her sex. This could amount to harassment related to sex.”*
203. Section 212(1) of the 2010 Act provides that “detriment” does not, subject to subsection (5), include conduct which amounts to harassment – in other words, that the same act cannot be found to be both direct discrimination and harassment. (Subsection (5) provides that where the 2010 Act disapplies a prohibition on harassment in relation to a specified protected characteristic, the

disapplication does not prevent conduct relating to that characteristic from amounting to a detriment for the purposes of direct discrimination.)

### Immigration status

204. Discrimination on the basis of immigration status does not amount to discrimination because of, or on the grounds of, nationality (*Onu v Akiwivu; Taiwo v Olaigbe* [2016] ICR 756). While immigration status is a function of nationality, and being a British national confers an automatic right of abode, being a non-British national does not have an automatic immigration consequence: some non-British nationals have no status as all if they have entered illegally, others may have indefinite leave to remain, still others may have an initial or limited right to remain. On the facts of *Taiwo*, the Supreme Court concluded that the reason why the claimants were treated so badly was their particularly vulnerability arising, at least in part, from their particular immigration status – it had nothing to do with the fact that they were Nigerians.

### Inferring discrimination

205. As has been acknowledged in the case law:

*“it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that ‘he or she would not have fitted in’.”*

Neill LJ in the Court of Appeal decision in *King v Great Britain-China Centre* [1992] ICR 516)

206. As described by the EAT in *Qureshi v Victoria University of Manchester* [2001] ICR 863, in relation to disputed facts in discrimination cases:

*“The function of the tribunal in relation to that evidence was therefore twofold: first, to establish what the facts were on the various incidents alleged by [the claimant] and, secondly, whether the tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a racial ground for the acts of discrimination complained of.”*

207. This approach was confirmed in *Igen*: after the primary facts have been determined, tribunals must consider what, if any, inferences are appropriate to draw from those primary facts seen in their totality (*Qureshi*), so as to determine what facts it is proper to infer. After the primary facts have been determined and the consideration of whether it is proper to draw any inferences of secondary facts, the question of whether the claimant has established a *prima facie* case of discrimination can then be answered. If a *prima facie* case has been made out in relation to any of the complaints, the burden of proof then shifts to the respondent to demonstrate that the respondent’s actions were in no sense whatsoever on the protected ground.

208. Inferences must have a basis in the facts agreed by the parties or found by the tribunal. “*A mere intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion*” (*Chapman v Simon* [1994] IRLR 124).
209. Drawing inferences must be based on evidence, not by making use (without requiring evidence) of a verbal formula such as ‘institutional discrimination’ or ‘stereotyping’ (*Stockton on Tees BC v Aylott* [2010] ICR 1278).
210. Examples of matters that may be relevant to the consideration of whether inferences of discrimination can properly be drawn (as taken from the case law) include:
- a) Whether there is a non-discriminatory explanation for the behaviour, and if so, the weight of that explanation;
  - b) The tribunal’s assessment of the parties and their witnesses, and of the alleged discriminatory ‘actor’, including of their credibility, reliability and motives, tested by reference to objective facts and documents, possible motives and the overall probabilities;
  - c) The relationship between the parties (e.g., if it is one of hostility and there is nothing else to explain it);
  - d) If the respondent behaved badly towards the claimant, whether that is consistent with the respondent’s treatment of other people who do not have the claimant’s protected characteristic (the ‘generally-badly-behaving employer’);
  - e) Whether there is a pattern of behaviour;
  - f) If there is a surprising lack of documents in evidence on a matter;
  - g) If there has been adherence to or a failure to follow applicable policies and procedures; and
  - h) Whether the claimant’s response to the behaviour is reasonable. An justified sense of grievance cannot amount to a detriment for the purposes of less favourable treatment.

### **Application to the claims here**

#### **Complaint 1: Unfair dismissal (dismissal 20 May 2021)**

211. The Claimant avers that his dismissal was unfair, and makes 24 criticisms of the Respondent in relation to its dismissal of him.
212. As the case law makes clear, the first step in determining this complaint is for the Tribunal to determine the reason for the Claimant’s dismissal. As noted in *Jhuti*, the tribunal generally need look no further than the reasons given by the appointed decision-maker. Mr Basquil’s letter confirming the dismissal of the

Claimant identified that reason as misconduct, which is consistent with the oral explanation he provided to the Claimant in the disciplinary hearing of 20 May 2021. The Tribunal accepts that this was the Respondent's reason, as does the Claimant (although he says the Respondent was not justified in that conclusion, and that the response to the unjust finding of misconduct was more significant for him than comparators because of race or religion).

213. The test enunciated in the *Burchell* case, as refined by later authorities, identifies the questions for the tribunal to answer the question of the fairness of the dismissal in light of the fact that the Claimant was dismissed for conduct:
- a) Did the Respondent have reasonable grounds for its belief in the Claimant's misconduct?
  - b) At the time the belief was formed, had the Respondent carried out a reasonable investigation?
  - c) Did the Respondent otherwise act in a procedurally fair manner?
  - d) Was dismissal within the range of reasonable responses?
214. The Claimant's specific criticisms can be grouped under one or more of those questions, but the Tribunal needs to consider the fairness of the Claimant's dismissal in any event.

*Did the Respondent have reasonable grounds for its belief in the Claimant's misconduct?*

215. The Tribunal notes the specific Allegations made against the Claimant were that he:
- a) Authorised payment for additional working hours to Ms Tordai between April 2020 and January 2021 so as to inflate her salary when those hours were not worked by her (Allegation 1);
  - b) Provided a letter dated 22 October 2020 on behalf of Tesco PLC to support a mortgage application for Ms Tordai which included inflated salary information (Allegation 2); and
  - c) Made Ms Tordai fearful for her job and career with the Respondent - displaying coercive behaviour (Allegation 3).
216. As set out in the Facts section above:
- a) In relation to Allegation 1, the Respondent's records do not enable the person who authorised the exception coding for overtime, or the manual clockings, for the Claimant to be directly pinpointed. However, the Tribunal has already found on the balance of evidence that is available that:
    - (i) Ms Tordai was overpaid during the period when she was on placement at Elmers End;

- (ii) The Claimant was responsible for authorising the overpayments to Ms Tordai;
- (iii) The Claimant's averred approach – of (he says) accepting Ms Tordai's word for the hours she worked – was not sufficient to permit him to simply authorise any such claimed hours. The Claimant had a responsibility to verify those hours, which he could have done by asking Mr Peebles; and
- (iv) The Claimant intentionally authorised payment to Ms Tordai of hours he knew she did not work so as to inflate her salary.

The balance of evidence available to the Respondent – which is the same evidence shown to the Tribunal – supports the Respondent having reasonable grounds for concluding that Allegation 1 was made out.

- b) In relation to Allegation 2, the Claimant admitted to Mr Basquil that he had done as alleged. This provided reasonable grounds for the Respondent to conclude that Allegation 2 was made out.
- c) In relation to Allegation 3, Mr Basquil discussed in the disciplinary hearing:
  - (i) The fact that Ms Tordai had raised concerns because her earnings had dropped significantly since her relationship with the Claimant had ended; and
  - (ii) The text message conversation quoted in Ms Eastwell's investigation notes between the Claimant and Ms Tordai that Ms Tordai (which was showed to Ms Eastwell in her 13 April 2021 meeting by Ms Tordai) – where Ms Tordai noted that the Claimant appeared to be indicating that if she gave him something, she would get more pay and a promotion in return.

The Claimant's response was to say that business was slowing down, and it could not sustain payroll at the level it was during the pandemic. He also said that Ms Tordai still had the same opportunity as her colleagues to work overtime.

Mr Basquil listened to all the Claimant had to say in relation to Allegation 3, and explained that, while the allegation of coercive behaviour was hard to prove, the text conversation between Ms Tordai and the Claimant contributed to his conclusion that, on the balance of probabilities, Allegation 3 was made out against the Claimant.

The Tribunal agrees: The Claimant did not dispute that he knew of Ms Tordai's straitened financial circumstances. This, coupled with the fact that Ms Tordai's earnings were higher while she was in relationship with the Claimant, together with the text conversation shown to Ms Eastwell, was sufficient evidence to support putting Allegation 3 to the Claimant. In the disciplinary hearing Mr Basquil had given the Claimant an opportunity to



explain the earnings differences, and the text conversation between himself and Ms Tordai. While he offered an explanation for the former, he offered none for the latter. That text exchange was powerful evidence indicating a conscious rewarding of Ms Tordai for 'good behaviour' and a related threat that that reward would be withdrawn if the relationship ended. The Claimant's inability to explain that gave Mr Basquil reasonable grounds for believing in the Claimant's misconduct on the basis of Allegation 3.

217. The Tribunal therefore concludes that the Respondent had reasonable grounds for believing that the Claimant had committed misconduct on all three bases on which it relied for dismissing him.

*At the time the belief was formed, had the Respondent carried out a reasonable investigation?*

218. Dealing first with the Claimant's specific complaints about Ms Eastwell's investigation – the Claimant says that:

- a) Ms Eastwell investigated the Ms Tordai's alleged grievance and then also the disciplinary investigation.
  - (i) This is accepted by the Respondent, and there is nothing in the Respondent's disciplinary or grievance policies that indicates that this would be inappropriate.
  - (ii) There is a passage in the Respondent's grievance policy which reads: "*In all cases, if a grievance has been handled informally and you raise a formal grievance about the same matter, then a different manager will deal with it.*" Ms Tordai was never treated by Ms Tordai as having raised an informal grievance – the nature of the grievance meant that Ms Eastwell deemed it to be too serious to be considered as an informal matter – and this is a judgement call the Tribunal entirely agrees with, given the seriousness of the allegations for both Ms Tordai and the Claimant.
  - (iii) Furthermore, Ms Eastwell's evidence was that some thought was given among her and her HR colleagues about whether a different person should investigate Ms Tordai's complaints after they had initially been raised, but given the nature and sensitivity of the allegations they considered the fewer people who knew of them the better, and that if Ms Tordai's complaints of coercive behaviour had merit, she was a vulnerable person who needed to be handled sensitively, and she had chosen to come to Ms Eastwell. Again, the Tribunal does not consider any of this inappropriate. It was entirely appropriate, in our view, to protect the Claimant's confidentiality as well as Ms Tordai's that Ms Eastwell, who was capable of carrying out an impartial investigation, complete that investigation, both to

progress Ms Tordai's grievance and to consider whether to recommend that a disciplinary case be progressed against the Claimant.

- b) Ms Eastwell concluded that Ms Tordai's overtime had not been reduced upon the end of the relationship but despite this referred the Claimant for a disciplinary hearing in respect of allegation 3;
- (i) This is not correct – the investigation checklist produced by Ms Eastwell (effectively her summary of the evidence supporting and the evidence challenging each allegation, and recording her conclusion in respect of each), records in the evidence challenging Allegation 3 that "*Whilst Bianca's pay has dropped significantly, there had also been a New Year challenge on payroll within Croydon CFC. The decrease in overtime could therefore be the result of unfortunate timings.*" However, Ms Eastwell went on to conclude that she did believe coercive behaviour had been displayed.
  - (ii) This complaint of Ms Eastwell's investigation therefore is without foundation.
- c) Ms Eastwell invited the Claimant to attend a disciplinary investigation meeting on 29 April and 13 May 2021 when, at the time, Ms Tordai had made no formal grievance;
- (i) As noted in the Facts section above, the Tribunal finds that when Ms Tordai signed the record of her 13 April 2021 meeting with Ms Eastwell, she raised a formal grievance. This preceded the invitation sent to the Claimant to attend a disciplinary investigation meeting on either 29 April or 13 May 2021. This criticism is therefore without foundation.
- d) Ms Eastwell concluded that the Claimant needed to have declared his relationship with Ms Tordai when there was no requirement or policy requiring this;
- (i) This complaint is also misconceived.
    - In the 29 April investigatory meeting, Ms Eastwell asked the Claimant whether he thought it was appropriate for him not to have declared his relationship with Ms Tordai – she did not say that he was required to do so.
    - The section of the investigation checklist which recorded Ms Eastwell's conclusion on Allegation 1, looking at the evidence supporting and the evidence challenging it, states that: "*At the end of my first investigatory meeting with Abdi, I suggested that he has put himself into the*

*situation that he now faces. This is because he chose not to declare his personal relationship with Bianca, whilst continuing involvement within her career and wages” (and this summary accords with the notes of that meeting signed by the Claimant as being an accurate record of it). It is clear that it was the combination of the lack of declaration plus continued involvement in her career progression and wages which Ms Eastwell regarded as problematic.*

The Claimant’s criticism on this basis therefore cannot be sustained.

- e) The Claimant was not given a copy of Ms Tordai’s grievance investigation notes at any time before the conclusion of the disciplinary hearing;
  - (i) As noted in the Facts section, we find those notes were provided to the Claimant on 18 May 2021, ahead of the disciplinary hearing. The Claimant made no complaint of not having those notes when he discussed the Allegations with Mr Basquil. This criticism is unfounded and contradicted by clear evidence.
- f) No informal discussion was held with the Claimant as required by the Respondent’s grievance and disciplinary policy before sending the Claimant to a formal disciplinary hearing;
  - (i) The Respondent’s grievance policy states, under the heading “*What’s informal resolution?*” that: “*In many situations, your manager will aim to resolve your concerns*”, and its disciplinary policy, under the heading “*Does Tesco have an informal approach*”, states that: “*We believe that talking to each other honestly and respectfully is the best way of resolving the vast majority of problem at work*”. Neither of these commits the Respondent to try to resolve a grievance or disciplinary matter informally, they merely note that informal resolution may be appropriate in some circumstances. Indeed, the disciplinary policy expressly acknowledges that: “*The Formal Disciplinary procedure will be used when we don’t feel an informal approach is suitable*”.
  - (ii) Ms Eastwell gave cogent evidence as to why she did not consider informal resolution appropriate in this case. Ms Tordai had displayed considerable distress, and was complaining of being coerced by the Claimant into a sexual relationship with him. It was clearly not appropriate from her perspective, or the Claimant’s, given the seriousness of the allegations levelled at him, that this be considered for informal discussion first.

- (iii) Moreover, the line manager in question in relation to Ms Tordai's grievance would have been a person who was in turn line managed by the Claimant. It would not have been appropriate for that person to have attempted to broker an informal resolution of Ms Tordai's complaint with his line manager.
  - (iv) The Claimant's premise, that it was required, is incorrect, and nor would it have been appropriate on the facts in any event.
- g) Ms Eastwell investigated Ms Tordai's grievance and the Claimant's disciplinary contrary to grievance and disciplinary policies;
  - (i) As for a) above – the Tribunal finds this was not contrary to either policy.
- h) The Investigation Notes, alleged to be records of meetings held with Ms Tordai, and which were used in the dismissal process were all not signed by her;
  - (i) The 6 April 2021 note was a summary of the meeting between Ms Eastwell and Ms Tordai. Given Ms Eastwell had no note taker, was trying to manage a distressed person confiding very personal information, it was reasonable for her to proceed with the meeting without taking fulsome notes and to make a summary record at its end. This was particularly so given that the topics discussed were revisited in greater depth on 13 April 2021, when those notes were signed by Ms Tordai to confirm their accuracy.
  - (ii) Ms Eastwell has put the failure to ask Ms Tordai to sign the 22 April 2021 notes as an error. This is regrettable, but the substance of Ms Tordai's complaints against the Claimant were described in the 13 April meeting.
  - (iii) The Tribunal does not find that the Claimant was in any disadvantaged by the failure to obtain Ms Tordai's signature on the 6 April summary note or the 22 April 2021 full notes – the Claimant had ample opportunity to bring forth his own evidence to challenge Ms Tordai's allegations, and he had clear sight of what those were when he was shown those notes, and given copies of them on 18 May 2021.
- i) The Investigation Note relating to evidence allegedly given by Karolina Klejdyz and which was used against the Claimant was not signed;
  - (i) As noted in the Facts section above, Ms Klejdyz was interviewed twice, and signed one set of notes. The other carries the statement "AGREED VIA TEAMS", which the Tribunal accepts as a true statement. The Tribunal makes no criticism of the Respondent for agreeing those notes via Teams.

- j) Ms Eastwell wrongly concluded that providing two clocking cards given to Ms Tordai was contrary to practice;
  - (i) As noted in the Facts section above, the Claimant has failed to prove to the Tribunal's satisfaction that having two clocking cards was not contrary to practice.
- k) Ms Eastwell wrongly reached a conclusion that the Claimant would have an interest in manipulating the pay of Ms Tordai;
  - (i) Ms Eastwell noted, in the "*What have I seen/heard that supports the allegation?*" section of her investigation notes in relation to Allegation 1 that: "*Abdi has admitted that he was in an intimate relationship with Bianca and therefore there is reason to believe that he would have a personal interest/gain from manipulating her hours*". The conclusion section of this report in relation to Allegation 1 does not repeat that assertion, however the Claimant has also maintained that he personally gave Ms Tordai money when she needed it, so Ms Eastwell's supposition that the Claimant would have had a personal interest in manipulating her hours cannot have been wrong. If Ms Tordai's pay was inflated, there is reason to suppose that Ms Tordai, a person he cared about for a time, would be in a less financially precarious situation, and any pressures on the Claimant to provide financial support to her personally would be diminished. The Claimant's premise is incorrect – by the Claimant's own evidence he did have a personal interest in manipulating Ms Tordai's pay.
- l) Ms Eastwell wrongly concluded that the Claimant should not have accepted the hours of work Ms Tordai reported via phone when that was the common practice during covid;
  - (i) As noted in the Facts section above, the Tribunal disagrees with the Claimant's assertion here. The Claimant has failed to prove that it was common practice to accept the working hours reported by staff by telephone at this time.
- m) Evidence that the Claimant allowed someone to clock out on Ms Tordai's behalf was used against the Claimant, whereas Claimant was following management's written instruction to all lead managers to manually clock colleagues in and out when required;
  - (i) As noted in the Facts section above, Allegation 1 was that the Claimant had authorised payment for additional working hours to Ms Tordai which she had not worked. The act of manual clocking Ms Tordai's hours was not the issue.
- n) Evidence that could help the Claimant's case was used against the Claimant, evidence that could prove that allegations made against the

Claimant were untrue were not considered or given enough weight, and where no evidence existed against the Claimant Ms Eastwell generated wrong evidence and used it against the Claimant (for example, not providing exception coding sheets);

- (i) This complaint was poorly articulated by the Claimant. The Tribunal is satisfied that the lengthy disciplinary and appeal hearings involved Mr Basquil or Mr Connell (as applicable) considering the evidence the Claimant brought. Indeed, Mr Basquil's evidence that some of the evidence the Claimant showed him satisfied him that Ms Tordai had worked some of the hours which Ms Eastwell had considered Ms Tordai had not worked – but that the Claimant could not explain all the apparently unworked hours.
  - (ii) The Claimant has not pointed to a single piece of evidence that Ms Eastwell was said to have “generated”, or that was wrong. What is clear is that Ms Eastwell looked at multiple data sources and endeavoured to understand the data that was shown to her. At one point, Ms Eastwell wrote handwritten calculations on the “Attendance Management Overtime + Absence Correlation” sheets – but that was not *generating* evidence, but looking to summarise the information that this document appeared to give her about additional overtime processed for Ms Tordai which that same document indicated she had not worked.
  - (iii) This complaint is not articulated or supported, and we find no basis for supporting the criticism the Claimant makes of the Respondent in this regard.
- o) The Investigation Manager allowed Ms Tordai's son, who was not a staff of the Respondent, to be present at the grievance hearing, and the investigation manager also took evidence from him;
  - (i) The Tribunal agrees that Ms Eastwell allowed Ms Tordai's teenage son, who was not employed by the Respondent, to be present at two meetings, one of which was a formal grievance investigation meeting. The Tribunal also agrees that Ms Eastwell took evidence from him – the minutes record that he gave statements of fact and opinion, and showed text messages to Ms Eastwell.
  - (ii) It is also equally clear that in Ms Eastwell's investigation summary she did not rely on any of those statements or text messages as either evidence supporting or evidence challenging the disciplinary allegations the Claimant faced. We cannot, therefore, find that the Claimant suffered any disadvantage by this.
- p) The Claimant was held responsible for the promotion of Ms Tordai to a manager position, whereas there was documentary evidence that the

investigation manager herself was part of the people responsible for Ms Tordai's promotion, and the Claimant was not involved;

- (i) The Tribunal has already concluded that the Claimant was involved in the promotion of Ms Tordai.

219. More generally, the Tribunal considers that the investigation conducted by Ms Eastwell was appropriately thorough and rigorous given the seriousness of the allegations levelled at the Claimant, the Claimant's 17 years of service, and the complex factual picture involved in Allegations 1 and 3, satisfying the principles referred to in the cases of *Gravett* and *A v B*. It certainly was at least a reasonable investigation. She met with Ms Tordai three times, the Claimant twice, she interviewed Mr Peebles, and eleven other members of staff based at the CFC besides the Claimant and Ms Tordai, some more than once. The documentary evidence did not present a clear or straightforward picture (save in relation to Allegation 2), and the investigation notes Ms Eastwell produced showed that she weighed the different pieces of evidence to consider whether, in her view, the balance of evidence supported a finding that the allegation should form the subject of a disciplinary process.
220. When it came to Mr Basquil's, and further, Mr Connell's, parts in the process, when the Claimant presented them with additional evidence, they engaged with it and considered it. Some of that new evidence was accepted by Mr Basquil as reducing the degree of overpayment he saw as having been made to Ms Tordai. This was a reasonable and appropriate approach.

*Did the Respondent otherwise act in a procedurally fair manner?*

221. The Claimant has complained, in addition to the matters already elucidated, of the following matters:
- a) At the start of the disciplinary hearing on 20 May 2021, the Disciplinary Manager Corner Basquil told the Claimant that he was sure that the Claimant will soon be dragging him before the Employment Tribunal, indicating that the decision to dismiss was premeditated;
    - (i) This is not supported by the minutes of that meeting signed as accurate by the Claimant. This criticism is not made out.
  - b) Evidence that the Claimant provided at the disciplinary hearing was not reviewed by Mr Basquil, all statements made against the Claimant by Ms Tordai were accepted contrary to the requirement of the Respondent's evidence checklist, and the notetaker attributed statements that the Claimant did not make to the Claimant;
    - (i) None of these assertions are supported by the evidence presented to the Tribunal – and in fact the evidence supports the opposite conclusions in all three instances.

- c) The Claimant was dismissed for taking the totality of Ms Tordai's earnings into consideration whilst writing a mortgage reference for her, whereas the Claimant was not trained on mortgage reference writing, the Respondent had no policy on mortgage reference writing where the Claimant worked, and the Claimant had written the reference as it was usually written by the Claimant's colleagues;
- (i) The Tribunal agrees that the Claimant had not been specifically trained on reference writing when he wrote the reference he did for Ms Tordai – but he accepted that he had acted inappropriately, and showed a careless disregard to ensure that the reference reflected her true earnings (saying, at one point, that her two other jobs with employers besides the Respondent would more than cover the discrepancy in the figures provided by the Respondent in the reference).
  - (ii) The Allegation levelled against the Claimant was that he had provided a reference letter on behalf of Tesco PLC to support a mortgage application for Ms Tordai which included inflated salary information for her – this was accepted by him. The Claimant, as a senior leader responsible for authorising overtime and exceptions codings, was well-aware of the difference between basic pay and the further pay that was payable due to overtime and other extra payments. He did not need to have had reference training to do so – a point he acknowledged when he 'held his hands up' to Allegation 2 in his disciplinary hearing with Mr Basquil.
  - (iii) Moreover, the Claimant was dismissed for the combination of Allegations 1, 2 and 3 being made out, not for Allegation 2 alone. Indeed, Mr Basquil's evidence to the Tribunal (though it appears this was not communicated to the Claimant at the time) was that he would not have dismissed the Claimant had only Allegation 2 been made out.
- d) The disciplinary manager did not analyse any of the evidence submitted by the investigation Manager, but copied and pasted all the findings of the Investigation Manager on the disciplinary checklist, and dismissed the Claimant with a one-page letter without giving any reason for his decision;
- (i) The Claimant's barrister questioned Mr Basquil about this point extensively. It is clear that Mr Basquil did analyse the evidence submitted to him, including the evidence presented by the Claimant on his laptop at the disciplinary hearing (which is why that hearing was so lengthy).
  - (ii) It is also clear that Mr Basquil significantly drew on the written material prepared by Ms Eastwell in her investigation report when he wrote up the letter confirming the Claimant's dismissal for



misconduct. He failed to explain – and the Claimant deserved an explanation - why the Allegations were found by him to have been made out. It may be that this was delivered orally – the disciplinary hearing notes are more “note-like” than “transcript-like” at this point, so the Tribunal cannot be confident that Mr Basquil’s oral explanation was much better than his written one.

- (iii) However, what is clear is that Mr Connell’s appeal process did thoroughly examine whether there was sufficient evidence to support the conclusions Mr Basquil reached that all three Allegations were made out. The Tribunal is confident that the significant procedural flaw of failing to explain why the Respondent concluded the Allegations were made out on the balance of evidence that was present at the time of Mr Basquil’s disciplinary decision was corrected by Mr Connell at the appeal stage. As per the *Taylor* case, this is sufficient to ‘correct’ the procedural flaw present at the disciplinary hearing stage.
- e) All the questions raised by the Claimant during the appeal process were ignored, and not answered;
  - (i) The Claimant has not identified a single question that he asked at the appeal stage that was not answered by Mr Connell. This criticism is unfounded.
- f) The Appeal Manager sent an appeal decision to the Claimant on 30 June 2021, and in it criticised Ms Tordai, Ms Eastwell, Mr Basquil and the disciplinary process, but on 5 July 2021 the Appeal Manager changed the decision, and deleted all the criticism that he made against Ms Tordai, Ms Eastwell, Mr Basquil and the process;
  - (i) As noted in the Facts section, Mr Connell sent an email with the notes he used to orally deliver his appeal decision to the Claimant at the conclusion of the appeal hearing on 30 June 2021. Mr Connell then, in accordance with good practice, then confirmed the outcome of the appeal by written letter a few days later. The oral outcome acknowledged some points which could be improved in the process followed based on some of the Claimant’s criticisms. These acknowledgements were reflected in the emailed notes. They were not reflected in the written appeal letter.
  - (ii) The Claimant has amplified this as somehow representing a change of position by Mr Connell, but that is not the case. In both the oral decision (as reflected in the emailed notes) and the letter sent subsequently, Mr Connell rejected all of the Claimant’s points of appeal and upheld the decision to summarily dismiss, finding all three Allegations proven on the balance of probabilities.

- (iii) The points for improvement were not, in truth, relevant to the Claimant, given the decision confirmed his summary dismissal, but Mr Connell orally explained to him that he had fed back that, for example, Mr Basquil's decision had not been explained as it should have been. None of these improvement points altered Mr Connell's conclusion on the appeal outcome. They did not need to be included in the letter sent to him. The fact that they were not replicated in it does not, in the Tribunal's view, alter the fairness of the dismissal process at all.
  - g) All evidence pointing to dishonesty, and bad character given against Ms Tordai by her colleagues were ignored;
    - (i) The Claimant has not pointed us to any such evidence, let alone that it was presented to any of Ms Eastwell, Mr Basquil or Mr Connell. (Ms Cazacu's witness statement was critical of Ms Tordai, but it described her resistance to feedback or criticism, and deplored her attitude – it did not aver that she was dishonest or had a bad character.)
  - h) The Claimant was the only member of staff who was dismissed for allegedly overpaying a colleague, issuing a mortgage letter in the format that the Claimant gave it to Ms Tordai, and being in a relationship with Ms Tordai, whereas all other staff members that did the same acts with some staff deliberating overpaying themselves, were not dismissed.
    - (i) The Claimant has not identified any other member of staff who did this combination of things, or shown that they were treated differently. As noted in the Facts section above, the Overpayment Comparators are either not appropriate comparators or, in the case of Mr Dellow, the Tribunal is not prepared to accept the Claimant's assertion that 15 years ago Mr Dellow overpaid himself and was not dismissed.
    - (ii) In terms of the Relationship Comparators, there will be further discussion regarding those below, but the Claimant was dismissed because all three Allegations were made out. He has not pointed to a single other person who was in appropriately analogous circumstances in relation to all three Allegations.
    - (iii) The Claimant's criticism on this point is unsustainable.
222. The Tribunal is satisfied that, having conducted a reasonable investigation, the Respondent reasonably concluded that the Claimant was guilty of misconduct. The misconduct was of a very serious nature, and having followed a fair dismissal process (with the one flaw identified at the disciplinary hearing stage corrected at the appeal stage - *Sharkey*), the Tribunal finds that dismissal was within the range of reasonable responses open to the Respondent.

Complaint 2: Direct race discrimination: Asking the Claimant whether he declared his relationship with Ms Tordai (29 April 2021 onwards)

223. This allegation can be broken down into the following questions:
- a) Did the Respondent ask the Claimant whether he declared his relationship with Ms Tordai?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somali origin?
  - c) If the Claimant was treated less favourably, was that because of race?
224. The Claimant has named the following as the relationship comparators upon which he relies:
- a) Jon Thatcher (White British) and Lisa Fulkes (White British)
  - b) Danny Lake (White British) and Andrew (Black Caribbean);
  - c) Alexandra Bozern (South American) and Radomir Koczr (Polish, White European); and
  - d) Dave Parker (White British) and Cheryl Samuel Todd (Black British).
225. It is clear that the Respondent did ask the Claimant whether he declared his relationship with Ms Tordai – Ms Eastwell asked this in the first investigation meeting on 29 April 2021.
226. The Claimant says that his treatment, of being asked whether he declared his relationship with Ms Tordai, was less favourable. The Tribunal finds it was not. Whether it was is a matter for objective assessment (*Grant*) and, as a senior manager within the Respondent's organisation, it is inconceivable that the Claimant did not understand the significance of an unmanaged conflict of interest, and so this was a reasonable question to ask, and not one that should properly be viewed as a disadvantage – it was a consequence of the privileged senior management position he held. Moreover, asking him whether he had declared his relationship was important so as to understand the steps that followed – for example, if he had declared his relationship, it may have been that his continued involvement in Ms Tordai's career progression and wages should have been the subject of a 'second set of eyes' so as to protect him and Ms Tordai from speculation from colleagues about any inappropriate decisions, and a failure to put that structure in place may have meant that criticism should be ascribed elsewhere, e.g., with the Claimant's own line manager. Because we find this was not less favourable treatment, this Complaint 2 fails.
227. Furthermore, as is clear from the statute (section 23(1) of the 2010 Act and the case law relating to it, such as *Macdonald*), in order to be an appropriate real

comparator, “*there must be no material difference between the circumstances relating to*” the Claimant and the comparator, and all the characteristics of the comparator and the Claimant “*which are relevant to the way his case was dealt with*”, with the exception of race (for the purposes of this complaint), “*must also be found*” in the comparator.

228. The action here – of asking the Claimant whether he declared his relationship with Ms Tordai – was done, as is clear from the contemporaneous evidence (critically, the investigation notes summarising Ms Eastwell’s thoughts on whether to put the Allegations forward for disciplinary hearing) and Ms Eastwell’s evidence (which the Tribunal accepts) because:

- a) The Claimant was Ms Tordai’s indirect line manager;
- b) The Claimant continued to be involved with Ms Tordai’s career progression and her wages; and
- c) The Claimant was in an intimate relationship with Ms Tordai at a time when a) and b) applied.

The Claimant has not shown the same factors to be present in any of the eight people he names as Relationship Comparators, and so he has failed to show that they are appropriate real comparators, or that their treatment could help us determine whether a hypothetical comparator would have been treated more favourably than the Claimant.

229. We find that the reason why the Claimant was asked the question by Ms Eastwell was because of the three features described at a), b) and c) above, and that question would have been asked by Ms Eastwell, or any other investigator within the Respondent where an equivalent allegation to Allegation 1 was made against that person if the same three features had been present. There is nothing to support the Claimant’s contention that race had any influence in Ms Eastwell’s action in asking whether the Claimant had declared his relationship with Ms Tordai, so even if asking him the question was unfavourable treatment, race was not the reason the Claimant was asked.

230. Complaint 2 therefore does not succeed.

Complaint 3: Direct race discrimination: Dismissing the Claimant on 20 May 2021 in part on the basis that he overpaid Ms Tordai

231. Similarly to Complaint 2, this complaint can be broken down into the following questions:

- a) Did the Respondent dismiss the Claimant in part on the basis that he overpaid Ms Tordai?
- b) If so, was that less favourable treatment compared to the treatment of the Claimant’s named comparators, or a hypothetical comparator who

circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somalian origin?

- c) If the Claimant was treated less favourably, was that because of race?
232. The Claimant has named the following as the overpayment comparators upon which he relies:
- a) Justyna Madejczyk (who is white); and
- b) David Dellow (who is also white).
233. The Respondent did dismiss the Claimant in part on the basis that he overpaid Ms Tordai, but significantly:
- a) Allegation 1 was not simply that the Claimant had overpaid Ms Tordai, but that he had *consciously* inflated her salary; and
- b) The Claimant was dismissed as a response to all three Allegations having been found to have been made out. He was not dismissed on the basis of Allegation 1 alone.
234. The evidence before the Tribunal is that:
- a) Ms Madejczyk *unconsciously* overpaid colleagues who had been shielding during the Covid-19 pandemic because of their cancer diagnoses, not that she had deliberately done so. There was no suggestion to the Tribunal that Ms Madejczyk was in an intimate relationship with any of the people she inadvertently overpaid, and nor did she write a financial reference for them, nor make them fearful for their jobs or careers with the Respondent; and
- b) Mr Dellow overpaid *himself* rather than anyone else, and we have heard nothing about him writing a financial reference for himself or anyone else, or about him making a colleague fearful for their job or career, or displaying coercive behaviour to a junior employee.
235. Again, as per the *Shamoon* case, the reason for the Claimant's treatment shows plainly that Complaint 3 cannot succeed. The Claimant was dismissed because a clear conflict of interest was not managed (relevant to Allegations 1 and 2), and because the failure to declare and manage that blatant conflict of interest led to a situation where the Claimant was able to make Ms Tordai fearful for her job and career with the Respondent – displaying coercive behaviour. That should not have been possible had that blatant conflict of interest (blatant to the Claimant, who knew of the relationship, but not to others who did not know of it) been declared and managed. The Claimant's race had nothing whatsoever to do with it.
236. Complaint 3 therefore fails.

Complaint 4: Direct race discrimination: On 5 July 2021 Mr Connell substituted his decision of 30 June 2021 with a fresh decision, removing his criticism of Ms Eastwell, Ms Tordai and Mr Basquil from that substituted appeal outcome

237. This complaint can be broken down into the following questions:

- a) Did Mr Connell substitute his decision, and remove his previous criticism, as alleged?
- b) If so, was that less favourable treatment compared to a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somali origin?
- c) If the Claimant was treated less favourably, was that because of race?

238. The Claimant has not named any comparators in respect of this complaint.

239. We find that Mr Connell did not substitute his decision – his decision was the same both orally on 30 June 2021 (as reflected in the emailed notes) and in written letter on 5 July 2021: the appeal was rejected on all grounds and the decision to summarily dismiss was upheld.

240. Mr Connell did take out his learning points that he had expressed to the Claimant orally, and which were shown in the emailed notes, from the transposition of those notes into the written letter sent on 5 July 2021 – but that did not “remove” criticism – it removed development points which were not of relevance to the Claimant as a person no longer employed by the Respondent. We find that the reasons why the development points were removed were as follows:

- a) They had already been communicated orally and in the emailed notes;
- b) They represented development points for the Respondent – things that could be done better in the future, and the Claimant was no longer part of that future, as the appeal outcome confirmed;
- c) The focus of the letter was to explain why he rejected the Claimant’s appeal points on all grounds – and the letter did that fully without the inclusion of the development points; and
- d) It is natural, in the process of formally communicating an outcome, to focus on answering the questions put – i.e., responding to the grounds of appeal – and not saying more than that, especially about points for improvement. While Mr Connell had wanted to acknowledge to the Claimant that there were lessons the Respondent would take forward, those did not affect the appeal outcome, and so did not need to be included in the formal outcome letter.

241. There is no indication whatsoever that Mr Connell was consciously or unconsciously influenced by race in removing those development points.

242. Complaint 4 does not succeed.

Complaint 5: Direct race discrimination: The Respondent dismissed the Claimant on 20 May 2021 in part on the basis of a mortgage reference he wrote for Ms Tordai which took the totality of Ms Tordai's earnings into account, having taken the Claimant into a room on 29 April 2021, given him a booklet on reference writing, told him to copy the answers from the Booklet onto an answer sheet, and placed that sheet on the Claimant's file as if the Claimant had been trained for reference writing

243. This complaint can be answered by considering the following questions:

- a) Did the factual matters alleged occur, i.e.:
  - (i) Was the Claimant dismissed, in part on the basis of the mortgage reference he wrote for Ms Tordai;
  - (ii) Was the Claimant taken into a room on 29 April 2021, given a booklet on reference writing, and told to copy the answers from the Booklet onto an answer sheet, and was that sheet then placed on the Claimant's file as if the Claimant had been trained for reference writing; and
  - (iii) When the Claimant was dismissed, when considering Allegation 2 did the Respondent take into account that he had received training on reference writing at the time he wrote the reference for Ms Tordai?
- b) If so, was that less favourable treatment compared to a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somali origin?
- c) If the Claimant was treated less favourably, was that because of race?

244. The Claimant has not named any comparators in respect of this complaint.

245. On the factual points relevant to Complaint 5:

- a) The Claimant was dismissed in part because of the mortgage reference he wrote for Ms Tordai;
- b) We have found that the Claimant was taken into a room on 29 April 2021, given a booklet on reference writing, and told to copy the answers from the Booklet onto an answer sheet, and that sheet was then placed on the Claimant's file; and
- c) When the Claimant was dismissed, Mr Basquil accepted the Claimant's admission that he had done what was alleged as part of Allegation 2. Mr Basquil's thinking on that point did not go further, as is plain from the notes of the disciplinary hearing, which record that Mr Basquil understood that the Claimant had accepted Allegation 2, and held his hands up to that

allegation, and Mr Basquil expressed admiration for the Claimant's saying he would learn from it.

246. The essence of this allegation is the Claimant's contention that Mr Basquil took account of what might over-generously be termed 'training' the Claimant was given after he had written the reference for Ms Tordai when deciding to dismiss him, and the reason he did so was the Claimant's race. However, Mr Basquil plainly never got that far in his thinking – he did not have to because the Claimant admitted Allegation 2. In cross-examination the Claimant's barrister asked Mr Basquil whether he was aware that the Claimant was sent on a course where he was told to copy and paste answers into a training booklet, and whether Mr Basquil made enquiries about the training the Claimant had undertaken. Mr Basquil responded "*No [it is not clear to which of the two questions asked of him at once by Ms Omar this related, but that did not matter because of what followed:], in that meeting the Claimant very openly admitted he had written the reference and accepted it was wrong – he wanted to almost move on from that point.*"
247. It is clear that the reason why Mr Basquil found Allegation 2 made out, and why that was a factor in the decision to dismiss the Claimant, was the Claimant's admission of that allegation. The quality of the training the Claimant had had on reference writing or when that had occurred was not a feature of Mr Basquil's thinking because the Claimant had admitted Allegation 2.
248. Complaint 5 does not succeed because the factual premise on which is based is not supported by the evidence. In addition, the Claimant has not put a case to Mr Basquil or to the Tribunal that Mr Basquil accepted that the Claimant had been adequately trained in financial reference writing because of his race.

Complaint 6: Direct race discrimination: On 13 May 2021 Ms Eastwell said that money was the underlying theme in the relationship between the Claimant and Ms Tordai, whereas the relationships of the Claimant's white colleagues were not described as such

249. This allegation can be broken down into the following questions:
- a) Did Ms Eastwell say that money was the underlying theme in the Claimant's relationship with Ms Tordai?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somalian origin?
  - c) If the Claimant was treated less favourably, was that because of race?
250. The Claimant has named the following as the relationship comparators upon which he relies:



- a) Jon Thatcher (White British) and Lisa Fulkes (White British)
  - b) Danny Lake (White British) and Andrew (Black Caribbean);
  - c) Alexandra Bozern (South American) and Radomir Koczr (Polish, White European); and
  - d) Dave Parker (White British) and Cheryl Samuel Todd (Black British).
251. It is clear from the notes of the meeting between Ms Eastwell and the Claimant on 13 May 2021 that Ms Eastwell read out her investigation summaries. The summary in relation to Allegation 1 included “*Money is an underlying theme through Bianca and Abdi’s personal relationship*”, and “*Money is a clear theme throughout their conversations during the time they were in a relationship*”.
252. The Claimant’s Relationship Comparators are not appropriate real comparators, for the reasons set out above in relation to Complaint 2, and nor do the treatment of those Relationship Comparators assist the Tribunal in determining how a hypothetical comparator would have been treated.
253. The reason Ms Eastwell said that money was an underlying theme of the relationship between the Claimant and Ms Tordai was because she accepted Ms Tordai’s evidence on this in light of:
- a) The text messages exchanged between Ms Tordai and the Claimant;
  - b) The evidence from the other witnesses at the CFC that the Claimant held significant control over the payroll of Nights staff;
  - c) The Claimant’s seniority and therefore his understanding of the expectations and responsibilities of his role; and
  - d) The Claimant’s decision not to declare his personal relationship with Ms Tordai while continuing to be involved with her career and wages.
254. This is an entirely reasonable conclusion, and we are not persuaded that it was in any way whatsoever influenced by race – it was reached on the basis of evidence heavily weighted in favour of that conclusion.
255. The Tribunal finds that there was no less favourable treatment in relation to Complaint 6 – an appropriately drawn hypothetical comparator (being an employee of the Respondent who is in an intimate relationship with a junior colleague who they indirectly manage and over whom they have control in relation to the more junior employee’s progression and pay) would have been treated in the same way. Complaint 6 does not succeed.

Complaint 7: Direct race discrimination: On 19 May 2021 Mr Oral or Ms Eastwell required the Claimant to produce a British Passport when the Respondent’s records contained a copy of the Claimant’s indefinite leave to remain in the United Kingdom

256. This complaint can be subdivided into the following:

- a) On 19 May 2021 did Mr Oral require the Claimant to produce a British passport, as alleged?
  - b) If so, was that less favourable treatment compared to a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somalian origin?
  - c) If the Claimant was treated less favourably, was that because of race?
257. The Claimant has not named any comparators in respect of this complaint.
258. As noted in the Facts section above, we find that Mr Oral did not require the Claimant to produce a British passport, but rather asked him for proof of his right to work in the UK. We have also found that that was asked because Mr Oral was conducting an audit of CFC staff rights to work in the UK, and therefore a hypothetical comparator would have been treated in the same way had their right to work documentation not been on their personnel file.
259. The Claimant avers that Mr Oral, knowing the Claimant had indefinite leave to remain, asked him for his British passport (or, as he put it in his appeal, his right to work) so as to disconcert him ahead of his disciplinary hearing with Mr Basquil, and that he would not have done so to a comparator with a British passport. But on the Claimant's own case this makes no sense – why would the Claimant be disconcerted if Mr Oral knew the Claimant had the right to work and that it was clear on his file - what could Mr Oral hope to achieve by it if he had seen the Claimant's indefinite leave to remain on his file? Far more plausible is the Respondent's contention that, for some reason, the indefinite leave to remain was not plain on the face of the Claimant's file, and Mr Oral asked for it as part of an audit.
260. The reason Mr Oral asked the Claimant for proof of his right to work in the UK was the audit, and this was not race or nationality discrimination given that immigration status is not defined by race or nationality (*Taiwo*). The reason for Mr Oral's request was not the Claimant's race or nationality, but it was a legitimate enquiry in light of the Respondent's legal duties as an employer and the serious risks it faced were it to employ someone without the requisite right to work. Complaint 7 does not succeed.

Complaint 8: Direct race discrimination: On 13 May 2021 the Claimant's relationship with Ms Tordai was described as inappropriate, whereas Ms Tordai's subsequent relationship with Paul Edward (who is Black British of Jamaican origin) was described as a 'personal affair' by Mr Oral

261. This allegation can be broken down into the following questions:
- a) Did the Respondent describe the Claimant's relationship with Ms Tordai as inappropriate?

- b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparator, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Black African of Somalian origin?
  - c) If the Claimant was treated less favourably, was that because of race?
262. The Claimant has named Mr Edward (who is Black British of Jamaican origin) as his comparator for the purpose of this complaint.
263. The Claimant has said that this description of Ms Eastwell's occurred in the 13 May 2021 investigatory meeting (in his Amended Grounds of Complaint), but in fact Ms Eastwell posed a question, in their meeting of 29 April 2021: "*Do you think it was appropriate to be in a relationship with BT?*". Ms Eastwell never pronounced on the propriety or otherwise of the Claimant's relationship with Ms Tordai, but *did* pronounce on the Claimant's failure to manage the conflict of interest that it created in her conclusion on Allegation 1 in her investigation notes. In those, Ms Eastwell is critical of the Claimant's being in an intimate relationship with her "*whilst continuing involvement within her career and wages*".
264. The Claimant points by way of comparison for this Complaint 7 to Mr Oral's description of the relationship between Ms Tordai and Mr Edward as a 'personal affair', but this is not an appropriate comparison given that the Claimant has not shown that Mr Edward had involvement in Ms Tordai's career or her wages. In fact, the evidence was that the Claimant was the person who had overall control, and day-to-day control over manual clockings and exception coding for the Nights staff – far more so than any of the managers in the intermediary management level between the Claimant and Ms Tordai.
265. The evidence resoundingly shows that Ms Eastwell's assessment was that *the unmanaged conflict of interest* was not appropriate, and the Claimant has not shown that race was any kind of influence on that assessment. There is no direct comparator, and no reason to consider that any hypothetical comparator would have been treated in any way other than identically to the Claimant.
266. Complaint 8 fails.

Complaint 9: Direct religious discrimination: Ms Eastwell and Mr Freeman refused to interfere in the (subsequent) relationship between Ms Tordai and Mr Edward, describing it as a 'personal affair', whereas the Claimant's relationship with Ms Tordai was described as inappropriate, based on money and required to be declared

267. Complaint 9 can be assessed by considering the following questions:
- a) Did Ms Eastwell and Mr Freeman:
    - (i) Refuse to interfere in the (subsequent) relationship between Ms Tordai and Mr Edward, describing it as a 'personal affair'; and

- (ii) Describe the Claimant's relationship with Ms Tordai as inappropriate, based on money and as requiring a declaration from the Claimant?
- b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Muslim?
- c) If the Claimant was treated less favourably, was that because of religion?
268. The Claimant has named Mr Edward as the comparator upon whose treatment he relies.
269. The Tribunal finds that:
- a) The Claimant has offered no evidence that Ms Eastwell and Mr Freeman refused to interfere in the relationship between Ms Tordai and Mr Edward, or that they described that as a 'personal affair'.
- b) As above, Ms Eastwell asked the Claimant if he considered his relationship with Ms Tordai to be appropriate in their meeting of 29 April 2021, but Ms Eastwell did not characterise it as inappropriate. Ms Eastwell's focus was on the unmanaged conflict of interest created by the Claimant having an intimate relationship with Ms Tordai while continuing to have involvement with her career and wages.
- c) Ms Eastwell did comment that money was an underlying theme of the relationship between the Claimant and Ms Tordai in her investigation summaries.
- d) Ms Eastwell did not say that the relationship between the Claimant and Ms Tordai *required* a declaration, but her investigation summary expressed her view that because of the combination of his being in an intimate relationship with her and his continuing involvement with her career and wages "*he has put himself into the situation which he now faces*".
- e) There is no evidence at all of how Mr Freeman described the Claimant's relationship with Ms Tordai.
270. It is for the Claimant to prove the facts his complaints rely upon, and he has failed to do so. Complaint 9 does not succeed.

Complaint 10: Direct religious discrimination: Mr Connell described the Claimant as 'lacking in integrity' for being in a relationship with Ms Tordai, whereas the Respondent refused to interfere in all other relationships between non-Muslim staff members

271. This allegation can be answered by addressing the following questions:
- a) Did:

- (i) Mr Connell describe the Claimant as 'lacking in integrity' for being in a relationship with Ms Tordai; and
    - (ii) The Respondent refuse to interfere in all other relationships between non-Muslim staff member?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator who circumstances are materially the same as those of the Claimant, save that the comparator is not a Muslim?
  - c) If the Claimant was treated less favourably, was that because of religion?
272. The Claimant names the following relationships as comparators for this purpose:
- a) Ms Tordai and Mr Edward; and
  - b) Ms Eastwell and Simon Knott,
- all of whom are non-Muslim.
273. The appeal outcome sent by Mr Connell to the Claimant via email on 30 June 2021 contained the following:
- "The proof that you overpaid her is not Absolute but it is reasonable in my view that given the balance of evidence that you were in fact responsible for overpaying BT for hours she did not do, you were in a secret relationship and continued to conduct line manager task in relation to her pay and performance and this shows a complete lack of intelligence and application of policy at best or a real lack of integrity at worst, the fact you have been doing this job so well for a long period of time suggests that intelligence or application of policy is not the issue here."*
274. The formal appeal outcome letter that followed on 5 July 2021 was in similar terms:
- "It is my reasonable belief that you knowingly overpaid Bianca. You were in a relationship with her, and you continued to conduct Line Manager tasks in relation to both her pay and performance. This shows a complete lack of intelligence and application of policy at best, or a real lack of integrity at worst. The fact you have been doing this job so well for a long period of time suggests that intelligence or application of policy is not the issue here."*
275. It is plain that the integrity that Mr Connell considered the Claimant to lack was not because of his relationship with Ms Tordai, or because of the Claimant's religious beliefs, but because whilst in that relationship, which the Claimant chose to keep secret, he continued to conduct line management tasks in relation to her pay and performance. There is no indication at all that that assessment was in any way influenced by the Claimant's religion, and every indication that it was because Mr Connell considered the evidence to support a finding that Ms Tordai

was paid for work she did not perform whilst working at Elmers End and that the Claimant was responsible for that.

276. The comparators pointed to by the Claimant are irrelevant – the Tribunal has not been shown any evidence that Mr Edward carried out line management tasks in relation to Ms Tordai while in a relationship with her, or that either Ms Eastwell or Mr Knott did in relation to the other.
277. The Tribunal finds that the reason Mr Connell concluded that the Claimant lacked integrity was because he considered, based on the evidence, that the Claimant had continued to make line management determinations about Ms Tordai's pay and performance whilst in an undeclared intimate relationship with her. Religion played no part in that conclusion – it was based on the evidence of Ms Tordai's pay and work during her placement at Elmers End, and the evidence of who likely authorised the overpayments that then occurred.
278. Complaint 10 fails.

Complaint 11: Direct religious discrimination: That Ms Eastwell asked the Claimant whether the Claimant had declared his relationship with Ms Tordai, whereas all other inter-racial non-Muslim and white non-Muslim relationships were not required to be declared

279. The Tribunal has addressed its mind to this complaint by assessing:
- a) Did Ms Eastwell ask whether the Claimant had declared his relationship with Ms Tordai?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Muslim?
  - c) If the Claimant was treated less favourably, was that because of religion?
280. The Claimant names the following relationships as comparators for this purpose:
- a) Ms Tordai and Mr Edward;
  - b) Ms Eastwell and Mr Knox;
  - c) Jon Thatcher and Lisa Fulkes;
  - d) Danny Lake and Andrew;
  - e) Alexandra Bolzern and Radomir Koczr;
  - f) Spencer Potter and Maya;
  - g) Dave Parker and Cheryl Samuel-Todd; and
  - h) Sasa Guynho and Andre Guynho.

281. As already noted above, Ms Eastwell *did* ask the Claimant whether he declared his relationship with Ms Tordai in the first investigation meeting on 29 April 2021, but Ms Eastwell did *not* require the Claimant to declare that relationship, and nor did Mr Basquil or Mr Connell.
282. The reason Ms Eastwell asked this was because the Claimant continued to influence Ms Tordai's pay and career development while he was in an intimate relationship with her, i.e., because a blatant conflict of interest existed, and she was looking to understand whether any steps had been taken by the Claimant to manage it. There is no evidence that:
- a) The same is true of any of the people the Claimant has named as comparators; or
  - b) Religion influenced her asking that question.
283. Consequently, Complaint 11 fails.

Complaint 12: Direct religious discrimination: Dismissing the Claimant on 20 May 2021 in part for overpaying Ms Tordai, whereas Dave Dellow, a white non-Muslim who overpaid himself by several thousands of pounds was not dismissed by the Respondent

284. The Tribunal breaks this allegation down to the following questions:
- a) Was:
    - (i) The Claimant dismissed in part for overpaying Ms Tordai;
    - (ii) Did Mr Dellow overpay himself by several thousands of pounds; and
    - (iii) How did the Respondent respond to Mr Dellow's overpayment, if so?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Muslim?
  - c) If the Claimant was treated less favourably, was that because of religion?
285. The Claimant compares his treatment to that of Mr Dellow.
286. On the factual assertions related to this Complaint 12:
- a) The Claimant was dismissed in part for overpaying Ms Tordai;
  - b) The Claimant has asserted that Mr Dellow overpaid himself by several thousands of pounds and the Respondent has offered no evidence to counter that. The Claimant also says that the Respondent did not dismiss Mr Dellow, and the Respondent has again not answered that. However the

Tribunal is not prepared to accept the Claimant's statements that 15 years ago Mr Dellow overpaid himself and was not dismissed. The Claimant's honesty is very much in question in light of several matters referred to in the Facts section above. Absent more than the Claimant's bare contention that this is what Mr Dellow did and this is how Mr Dellow was treated, the Tribunal is not prepared to find that it was so.

287. Moreover, the Tribunal has already found that Mr Basquil did believe the Claimant guilty of misconduct, and that he had reasonable grounds to do so after a reasonable investigation. It was Mr Basquil's belief in that misconduct, including that the Claimant had consciously overpaid Ms Tordai, that was the reason for the Claimant's dismissal. There is no indication at all that Mr Basquil was influenced to any degree by considerations of religion, whether the Claimant's or otherwise.
288. Complaint 12 fails.

Complaint 13: Direct religious discrimination: Ms Eastwell said that the theme of the relationship between the Claimant and Ms Tordai was based purely on money, whereas no other non-Muslim relationships had ever been described as such

289. This can be deconstructed into the following questions:
- a) Did Ms Eastwell say that the theme of the relationship between the Claimant and Ms Tordai was based purely on money?
  - b) If so, was that less favourable treatment compared to the treatment of the Claimant's named comparators, or a hypothetical comparator whose circumstances are materially the same as those of the Claimant, save that the comparator is not a Muslim?
  - c) If the Claimant was treated less favourably, was that because of religion?
290. The Claimant compares his treatment to that of:
- a) Ms Tordai and Mr Edward;
  - b) Ms Eastwell and Mr Knott;
  - c) Mr Thatcher and Ms Fulkes;
  - d) Mr Lake and Andrew;
  - e) Ms Bolzern and Mr Koczr;
  - f) Mr Potter and Maya;
  - g) Mr Parker and Ms Samuel-Todd;
  - h) Ms Guynho and Mr Guynho.
291. Ms Eastwell did not say that "*the*" theme of the relationship between the Claimant and Ms Tordai was money, or that that relationship was based "*purely*" on money,



but she did find that “*Money is an underlying theme through Bianca and Abdi’s personal relationship*”, and “*Money is a clear theme throughout their conversations during the time they were in a relationship*” in her investigation notes.

292. The Claimant has offered no evidence that Ms Eastwell ever investigated any non-Muslim relationships, or what Ms Eastwell said in relation to those.
293. The Tribunal has already found that the Respondent had reasonable grounds to believe the Claimant guilty of misconduct after a reasonable investigation, where that investigation was largely conducted by Ms Eastwell (albeit that the Claimant presented evidence to Mr Basquil and Mr Connell that each considered). As two of the three allegations of misconduct centred upon money – consciously overpaying Ms Tordai, and displaying coercive behaviour relating to money and career prospects - the Tribunal has already in effect found that Ms Eastwell’s conclusions on these points were reasonable ones.
294. There is simply no evidence before us that Ms Eastwell’s conclusions were in any way influenced by religion. There is no reason to suppose that any appropriate comparator would have been treated any differently. The Claimant has made no case for discrimination on the basis of religion.
295. Complaint 13 does not succeed.

Complaint 14: Harassment related to race: Ms Eastwell commenced an investigation into the Claimant without any formal grievance being submitted against the Claimant in accordance with the Respondent’s policy. That investigation ultimately resulted in the Claimant’s dismissal

296. To answer this, the Tribunal can break the allegation down into the following questions:
  - a) Did Ms Eastwell commence an investigation into the Claimant without any formal grievance being submitted against him?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
297. As noted in the Facts section, the Tribunal finds that, by her signing the notes of the meeting of 13 April 2021, Ms Tordai raised a formal grievance. This preceded Ms Eastwell’s first invitation to the Claimant to an investigation meeting sent on 27 April 2021.

298. Complaint 14 does not succeed, as its factual premise is not made out by the Claimant.

Complaint 15: Harassment related to race: The Claimant was asked about the appropriateness of his relationship with Ms Tordai, whereas relationships between staff members were not queried within the Respondent's organisation

299. The merits of this complaint can be transposed into the following questions:

- a) Was the Claimant asked about the appropriateness of his relationship with Ms Tordai?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
300. As noted in relation to Complaint 8, Ms Eastwell did ask the Claimant "*Do you think it was appropriate to be in a relationship with BT?*" in their meeting on 29 April 2021. This is accepted by the Respondent.
301. This was unwanted by the Claimant, but the Claimant has failed to demonstrate that the making of the comment was in any way related to race. As was clear from Ms Eastwell's evidence, the question was evidently related to the fact that the Claimant had just confirmed to Ms Eastwell that he had been in an intimate relationship with a subordinate employee of his team at a time when he had not declared that relationship, and when he continued to authorise overtime for her, instruct the Wages Clerks to input certain manual clockings for her, and to advocate for her temporary promotion (which contributed to her placement in Elmers End in an 'acting up' role). This context is significant in determining whether the question Ms Eastwell asked was related to race (*Grant*), and this determination is a matter of fact for the Tribunal. We find it was clearly related to the Claimant's confirmation of the relationship and the unmanaged conflict of interest. We are not persuaded that it was in any sense whatsoever related to race.
302. Moreover, its purpose was not to violate the Claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant – its purpose was to explore the Claimant's assessment of the conflict of interest and whether it had been appropriately managed as part of Ms Eastwell's disciplinary investigation. Asking the question provided the Claimant with an opportunity to explain his thinking and perspective, which was undoubtedly relevant not only to whether Allegations 1 and 3 were made out, but

also to inform Ms Eastwell's thoughts on any recommendations she may make in respect of them. For example, the Claimant could have acknowledged an error of judgement, and could potentially have offered an explanation that Ms Eastwell could have found satisfactory (e.g., asking another manager to check and confirm clockings for Ms Tordai, even if that person did not know of their relationship). The question was an appropriate one to ask, and it did not have the proscribed purpose.

303. Nor, if it did have the proscribed effect, was it reasonable for it to do so. As is clear from the terms of section 26(4), when considering whether the conduct had the proscribed effect, the Tribunal *must* take account of:

- a) The Claimant's perception – here, the Claimant's clear perception was that it was not);
- b) The other circumstances of the case - the key one being that he was a senior manager with authority and influence over the pay and progression of a person he was in an intimate relationship with, where that intimate relationship had not been declared to his employer; and
- c) Whether it is reasonable for the conduct to have that effect. – Here, the Claimant performed a senior management role, and should have taken the responsibilities of that role seriously. He should not have put himself, or Ms Tordai, in the position that her true hours of work were open to question because of the blatant conflict of interest he had in approving of manual clockings for which he had inadequate evidence. He should have appreciated, and the Tribunal considers he did appreciate, that he either should have declared the relationship or he should have altered reporting or authorisation lines so that he was not involved in these matters for Ms Tordai. He also should have appreciated the relevance, and reasonableness, of Ms Eastwell's question in establishing the key facts for the purpose of the investigation both of the disciplinary process against the Claimant and the grievance process involving Ms Tordai.

It was not reasonable for the question posed by Ms Eastwell to have had the proscribed effect.

304. For these reasons, Complaint 15 fails.

Complaint 16: Harassment related to race: In the period 29 April 2021 onwards the Claimant was singled out and blamed for not declaring his relationship with BT, and subsequently dismissed whereas there was no policy requirement for staff to make such disclosure

305. This allegation may be sub-divided as follows:

- a) In the period 29 April to 20 May 2021, was the Claimant singled out and blamed for not declaring his relationship with Ms Tordai, and subsequently

dismissed, when there was no policy requiring staff to make such disclosure?

- b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
306. The Tribunal has already found that:
- a) The Claimant was not singled out. It was legitimate and appropriate for Ms Eastwell to ask the Claimant whether he had declared his intimate relationship with Ms Tordai so as to investigate the disciplinary allegations against him and Ms Tordai's grievance. There is no indication that there was another employee in an analogous situation of one partner in a couple both of whom worked at the Respondent having pay and progression matters determined by the other partner in that relationship. There is no evidence to support the Claimant's contention that he was singled out.
  - b) The Claimant was criticised for the combination of his failure to declare his relationship with Ms Tordai *whilst* he continued to have authority to determine or influence her pay and progression. He was not criticised for failing to declare the relationship *on its own*.
  - c) The Claimant was dismissed (this is a matter of agreement between the parties).
307. As for whether there was a policy requiring the disclosure of that relationship, the Respondent has adduced its Group Conflicts of Interest Policy, which the Claimant says was not brought to his attention. That policy requires that a conflict which cannot be avoided should be discussed with the employee's line manager, which the Claimant agrees he did not do. The Tribunal need not determine whether this policy did, in fact, apply to the Claimant, because several of the other multiple factual premises of this Complaint are not made out.
308. Moreover, as for Complaint 15, there is no indication that either Ms Eastwell's investigation of the Claimant, or her decision to refer the Allegations for a disciplinary hearing, was "*related to*" race, and nor is there any indication that Mr Basquill's conclusions in relation to the Allegations or the appropriate disciplinary sanction, or Mr Connell's determination of the Claimant's appeal, was "*related to*" race. The Tribunal heard clear evidence that those decisions were "*related to*" Mr Basquill's and Mr Connell's conclusions on the evidence pertaining to those Allegations in light of the Claimant's senior position and considerable knowledge of the Respondent's policies and procedures.

309. Nor is there any evidence that any of those three individuals' actions had the proscribed purpose. While they may well have had the proscribed effect (e.g., the creation of a humiliating environment for the Claimant), it was not reasonable for it to have that effect. Similarly to Complaint 15, the Claimant was a senior manager who should have accepted and appreciated the need for the conflict of interest that existed because of his intimate relationship with a subordinate employee whose pay and progression he controlled or influenced to be managed.
310. Complaint 16 does not succeed.

Complaint 17: Harassment related to race: In the period 29 April 2021 onwards the Claimant was not given a copy of the grievance allegedly raised by Ms Tordai to enable the Claimant to defend himself in the investigation and disciplinary processes that followed, which culminated in his dismissal

311. As for the other Complaints, Complaint 17 may be answered by considering the following matters:
- a) In the period 29 April 2021 to 20 May 2021, did the Respondent fail to give the Claimant a copy of the grievance allegedly raised by Ms Tordai?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
312. Complaint 17 fails because the Tribunal has found that the Claimant was given a copy of Ms Tordai's grievance on 18 May 2021.
313. Moreover, there is no indication the decision as to when to give it to him was "*related to*" race. The fact that the Claimant apparently perceives the decision as being so is not determinative (*Aslam*).

Complaint 18: Harassment related to race: No informal discussion was held with the Claimant as required by the Respondent's policy before sending the Claimant to a formal grievance hearing and dismissing him (20 May 2021)

314. This allegation can be broken down as follows:
- a) In the period 29 April to 20 May 2021, did the Respondent fail to have an informal discussion with the Claimant, in breach of the Respondent's policy?
  - b) If so, was that unwanted conduct?

- c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
315. This is a misconceived complaint - there was no requirement under the terms of the Respondent's policy (either its Grievance or Disciplinary policies) for such an informal discussion to take place. Complaint 18 therefore does not succeed.

Complaint 19: Harassment related to race: Ms Eastwell handled both the informal and formal grievances, contrary to the Respondent's policy (6 April 2021 onwards)

316. Again, this Complaint can be approached by answering the following questions:
- a) Did Ms Eastwell handle both the informal and formal grievances of Ms Tordai, in breach of the Respondent's policy?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
317. The Respondent accepts that Ms Eastwell handled both the informal and formal grievances raised by Ms Tordai (because Ms Eastwell treated their initial discussion on 6 April 2021 as informal, and their follow-up discussions on 13 and 22 April 2021 as formal).
318. The explanation offered by Ms Eastwell for this is threefold:
- a) While she knew both the Claimant and Ms Tordai, Ms Eastwell was significantly removed from the CFC, and was therefore an evidently neutral person who could investigate the matter;
  - b) The nature of the complaints made by Ms Tordai – being (as described by Ms Eastwell) allegations of sexual harassment, a severe case of bullying – meant it was appropriate for there to be as small a circle as possible of people who knew about them, both for Ms Tordai's sake and for the Claimant's; and
  - c) Ms Tordai was extremely distressed, and what she had described was intimate and personal, and Ms Eastwell did not think it appropriate to require Ms Tordai to discuss those matters with a different person.

319. The Tribunal accepted those explanations. We are entirely unpersuaded that that decision was in any way “*related to*” race.
320. The decision for Ms Eastwell to continue to investigate the grievance when it was raised formally did not have the proscribed purpose – if anything, it had the opposite purpose of violating the Claimant’s dignity, as one of its purposes was to limit the number of managers who knew of the allegations against the Claimant.
321. Nor did it have the proscribed effect. The complaints had to be investigated, and the decision for the person doing so being the same person who already knew of them because of the informal complaint did not have the effect of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (which language the case law is clear that the Tribunal should not diminish – the effect must be serious and marked – *Betsi Cadwaladr*) – again, if anything, it had the opposite, as the Claimant’s privacy was better-preserved by this matter being known by fewer people.
322. Complaint 19 fails.

Complaint 20: Harassment related to race: The Respondent alleged that (a) the Claimant issued two clocking cards to Ms Tordai, and (b) such a practice was unusual in the Respondent’s organisation, whereas all-night staff and hundreds of other staff in the Respondent’s employment have two clocking cards

323. Addressing this involves consideration of the following matters:
- a) Did the Respondent allege that:
    - (i) The Claimant issued two clocking cards to Ms Tordai;
    - (ii) In circumstances where issuing two clocking cards to a person was unusual,  
when it was not fact unusual for staff of the Respondent to have two clocking cards?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
324. The Respondent *did* allege that the Claimant issued two clocking cards to Ms Tordai (which he accepts he did), and that it was unusual for people at the CFC to have two clocking cards. The Claimant has not persuaded the Tribunal that it was not, in fact, unusual for staff of the Respondent to have two clocking cards. As described in the Facts section, the witness statements gathered by Ms

Eastwell from staff as the CFC (from Ms Klejdysz and Mr Oral) indicated that it was an unusual practice, and Mr Joseph's evidence to the Tribunal indicates that whilst he does not consider that practice unusual, *using* two clocking cards was, as Mr Joseph's experience indicated that a second clocking card was only issued when the first was lost. The Claimant maintained that *both* having and using two clocking cards was not unusual, and his position is contradicted by the other evidence on the matter, including from his own witness.

325. The Respondent's allegations were unwanted, but there is nothing to indicate that they were "*related to*" race (and indeed, there is evidence to support the Respondent's contentions that the Claimant's admitted approach of authorising a second card for Ms Tordai was unorthodox, regardless of her or the Claimant's or anyone else's race), or that they had the proscribed purpose. The allegations – which the evidence supports as correct – were not made to violate the Claimant's dignity, etc. – they were made in the context of raising Allegation 1 and giving the Claimant an opportunity to present his response to that Allegation.
326. Nor was it reasonable for the allegations to have that effect. The Respondent needed to 'put its case' to the Claimant with sufficient detail to enable him to respond to it.
327. Complaint 20 does not succeed.

Complaint 21: Harassment related to race: Two of the three Allegations of misconduct levelled at the Claimant were not part of Ms Tordai's complaint and were raised by Ms Eastwell, yet Ms Eastwell treated those as part of Ms Tordai's grievance, investigated those and referred the Claimant to a disciplinary process (18 May 2021)

328. This Complaint may be assessed by breaking it down into the following components:
- a) When Ms Eastwell referred the Claimant to a disciplinary process on 18 May 2021, did she treat all three Allegations as having been raised by Ms Tordai's grievance, when in fact only one had been?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
329. There is nothing to suggest that, when Ms Eastwell sent her investigation notes to Mr Basquil, or wrote to the Claimant to invite him to a disciplinary hearing, she presented the three Allegations as having been raised by Ms Tordai.



330. This Complaint 21 does not succeed on that basis alone, but in any event, the Respondent was perfectly entitled, when faced with evidence relating to serious potential misconduct, to investigate that and refer it to a disciplinary process if it was reasonable to do so. There is nothing to suggest that Ms Eastwell's decision to do so was "*related to*" race, and plenty of surrounding circumstances which strongly indicate it was not, including Ms Eastwell's purpose in investigating the matter and referring it for a disciplinary process (*Bakkali*).
331. Ms Eastwell's purpose was to investigate and uncover the truth about serious allegations – it was not the proscribed purpose. In addition, it was not reasonable for it to have had that effect – there was sufficient evidence to support referring the matter for a disciplinary process, and the Claimant should reasonably have appreciated that, as a senior manager familiar with the Respondent's practices and procedures in disciplinary matters.

Complaint 22: Harassment related to race: The Investigation Manager, Ms Eastwell, alleged that the Claimant would have a personal interest in manipulating the wages of Ms Tordai because the Claimant was in a relationship with Ms Tordai, whereas there was evidence that Ms Tordai was at work, and worked for all the payments that she received during the relevant periods

332. To answer this, the Tribunal can break the allegation down into the following questions:
- a) Did Ms Eastwell allege that the Claimant would have a personal interest in manipulating the wages of Ms Tordai because he was in a relationship with her, in circumstances where there was evidence that Ms Tordai worked for all the payments she received in the relevant periods?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
333. The Tribunal has already determined that the Respondent, after a reasonable investigation, reasonably concluded that the Claimant was guilty of misconduct in relation to Allegation 1 (and Allegations 2 and 3). The factual basis of this Complaint is not made out and so it does not succeed.

Complaint 23: Harassment related to race: The Claimant was dismissed on 20 May 2021 for following Mr Oral's instruction to all Lead Managers to manually clock colleagues

334. The relevant sub-questions to answer this allegation are as follows:

- a) Were any or all of the acts the Respondent believed the Claimant had done, as described in the Allegations, matters which he had been instructed to do by Mr Oral?
- b) If so, was that unwanted conduct?
- c) Did it relate to race?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect?

335. The Tribunal has already found that none of the acts that formed the basis for any of the Allegations were acts that conformed to instructions issued by Mr Oral. Complaint 23 is, accordingly, not made out.

Complaint 24: Harassment related to race: During the investigation relating to the Claimant (in the period 6 April 2021 to 18 May 2021), (a) evidence that could help the case of the Claimant was used against the Claimant, (b) evidence that could prove that allegations made against the Claimant were untrue was not considered or not lent enough weight, and (c) where no evidence existed Ms Eastwell generated wrong evidence against the Claimant

336. This Complaint may be broken down as follows:

- a) In the period 6 April to 18 May 2021, did Ms Eastwell:
  - (i) Use evidence that could help the Claimant's case against the Claimant;
  - (ii) Fail to consider evidence that could prove the allegations against the Claimant were untrue, or fail to give that evidence appropriate weight; and/or
  - (iii) Create incorrect evidence?
- b) If so, was that unwanted conduct?
- c) Did it relate to race?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect?

337. The Tribunal is not persuaded that the Respondent considered evidence in an inappropriate way.
338. As for the criticism that there was a failure to consider evidence brought by the Claimant, the only evidence mentioned by the Claimant in this regard were the spreadsheets he had created and took along to the disciplinary and appeal hearings. Mr Basquil talked about the fact that he and the Claimant discussed those at length in the disciplinary hearing. Having considered what those showed, Mr Basquil accepted that some of the time recordings for Ms Tordai that Ms Eastwell considered were not explained could be explained by the Claimant's spreadsheets, but critically not all of them. However, the fact that he *did* consider those spreadsheets means the Claimant has failed to identify any other evidence that he says was not considered. The lengthy time spent discussing his spreadsheets with Mr Basquil at the disciplinary hearing, a process repeated at the appeal hearing with Mr Connell, supports those witnesses' contentions that they *did* engage with and consider that evidence.
339. Complaint 24 therefore does not succeed.

Complaint 25: Harassment related to race: The Disciplinary Manager, Mr Basquil, did not analyse any of the evidence submitted by the Investigation Manager (Ms Eastwell), but copied and pasted the Investigation Manger's findings against the Claimant, and dismissed the Claimant on 20 May 2021 without adducing any reason for his decision

340. This can be divided into the following questions:
- a) On 20 May 2021, did Mr Basquil:
    - (i) Fail to scrutinise any evidence submitted by Ms Eastwell; and/or
    - (ii) Copy and paste Ms Eastwell's findings against the Claimant into his decision letter?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
341. As set out in the Facts section above, the Tribunal has found that Mr Basquil did scrutinise the evidence submitted by Ms Eastwell, and the further evidence presented to him by the Claimant at the disciplinary hearing.
342. The Tribunal has also found that Mr Basquil's oral and written record of why he concluded as he did was cursory (albeit that that was all that required in relation to Allegation 2, which the Claimant admitted).

343. Mr Basquil's cursory approach to explaining why he concluded as he did in relation to the Allegations was unwanted, but we have no idea why the Claimant says that that was "*related to*" race – he has entirely failed to put any case as to why he says it was.
344. Moreover, Mr Basquil's explanation – effectively that he considered that Ms Eastwell had done such an excellent job that there was little he could add to her assessment – provides an explanation for why he did draw so heavily on Ms Eastwell's investigation report (albeit it that it was a very poor approach not to explain *why* he considered those conclusions justified), and that reason does not satisfy the proscribed purpose.
345. The Tribunal can see that its effect could reasonably be said to violate the Claimant's dignity – he deserved more, especially in light of his dismissal and his years of service – but the complaint still fails given that we can see no basis, from either what the Claimant says or from the surrounding circumstances, for determining that it was "*related to*" race.

Complaint 26: Harassment related to race: The Investigation Manager, Ms Eastwell, allowed Ms Tordai's son, who was not a member of staff of the Respondent, to be present at the grievance hearing on 6 and 13 April 2021, and the Investigation Manager also took evidence from him against the Claimant

346. This Complaint may be divided into the following sub-questions:
- a) On 6 and 13 April 2021, did Ms Eastwell:
    - (i) Allow Ms Tordai's son to be present at the grievance hearings; and
    - (ii) Take account of evidence provided by him against the Claimant?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
347. Ms Eastwell did allow Ms Tordai's son to be present at the first two meetings about Ms Tordai's grievance, and she listened to his oral evidence and read messages on his mobile 'phone from the Claimant – she took evidence from him.
348. While Ms Eastwell listened to what Ms Tordai's son had to say, and read the messages on his 'phone, her investigation report makes no mention of his evidence, either directly (e.g., quoting from those text messages) or indirectly (e.g., by using a description Ms Tordai's son used). The Claimant has failed to satisfy the Tribunal that Ms Eastwell took account of that evidence.

349. While the Tribunal accepts that Ms Eastwell's allowing Ms Tordai's son to be present now appears to be unwanted conduct from the Claimant's perspective, we have heard no explanation from the Claimant as to why he says that Ms Eastwell's doing so "*related to*" race, and nor can we fathom why it would be.
350. Ms Eastwell said that Ms Tordai asked to be accompanied by her son, which Ms Eastwell allowed, initially because she did not understand what the first meeting was going to be about, and when she did (and in the case of the second meeting) given the personal subject-matter and Ms Tordai's distress. That explanation has no connection to race.
351. Nor is it clear why Ms Eastwell could have had a proscribed purpose in doing so. Ms Eastwell's proffered reason is far more plausible.
352. The Claimant's relationship with Ms Tordai was, by her and his evidence, over. Ms Tordai and the Claimant had, by both accounts, a poor relationship, and so it is not clear to the Tribunal how Ms Eastwell's permitting Ms Tordai's son to accompany her at these meetings could have had the proscribed effect. Even if it did so (a matter which the Claimant has entirely failed to articulate), Complaint 26 still fails because he has not demonstrated that it was "*related to*" race.

Complaint 27: Harassment related to race: At the start of the disciplinary hearing on 20 May 2021, the Disciplinary Manager, Mr Basquil, told the Claimant that he was sure that the Claimant will soon be dragging him before the Employment Tribunal

353. The Tribunal has already concluded that this did not occur as a matter of fact, and so this complaint does not succeed.

Complaint 28: Harassment related to race: At the disciplinary hearing on 20 May 2021, the Disciplinary Manager: (a) failed to review evidence that the Claimant provided, (b) accepted all statements made against the Claimant by Ms Tordai, contrary to the requirement of the Respondent's evidence checklist, and (c) (or the notetaker) attributed statements that the Claimant did not make to the Claimant

354. To answer this, the Tribunal can break the allegation down into the following questions:
- a) On 20 May 2021, did Mr Basquil:
    - (i) Fail to review evidence the Claimant provided to him;
    - (ii) Accept Ms Tordai's statements, contrary to the requirement of the Respondent's evidence checklist; and/or
    - (iii) Allow the note-taker in the meeting to attribute statements to the Claimant which he had?
  - b) If so, was that unwanted conduct?

- c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
355. None of the three factual assertions upon which this Complaint relies are found by the Tribunal to have occurred. Complaint 28 does not succeed.

Complaint 29: Harassment related to race: All the questions that the Claimant raised during the appeal process were ignored and not answered (2 June to 5 July 2021)

356. To answer this, the Tribunal can break the allegation down into the following questions:
- a) In the period 2 June to 5 July 2021, was there a failure on the part of the Respondent to answer all of the questions raised by the Claimant?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
357. The Claimant has not identified a single question that he raised that Mr Connell did not answer. This Complaint does not succeed.

Complaint 30: Harassment related to race: On 5 July 2021 Mr Connell substituted his decision of 30 June 2021 with a fresh decision, removing his criticism of Ms Eastwell, Ms Tordai and Mr Basquil from that substituted appeal outcome

358. This Complaint may be expressed by the following series of questions:
- a) On 5 July 2021, did Mr Connell substitute his decision of 30 June 2021 with a new decision, which removed his criticism of Ms Eastwell, Ms Tordai and Basquil?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?

359. The Tribunal has already concluded that Mr Connell's decision on the Claimant's appeal was the same orally, in the emailed notes, and in his written letter – the Claimant's appeal was rejected on all grounds.
360. Mr Connell did not include his reflections on the points for improvement to the process from the letter that was sent to the Claimant on 5 July 2021, but that did not represent “*a fresh decision*” – it just did not include the internal observations on the way things could be done differently in the future, none of which affected the outcome of the appeal for the Claimant.
361. This was unwanted conduct, as the Claimant wanted to see those points for improvement in the formal letter, but there is no indication that Mr Connell's decision not to include those was “*related to*” race, or that his doing so had the proscribed purpose. Nor can any argument be maintained by the Claimant that failing to include those points violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant – he had been summarily dismissed, and the substantive decision on his appeal confirmed that outcome. The removal of the points for improvement did not create any kind of environment for the Claimant, or violate his dignity. The thing that distressed him was that he had lost a senior position he had held, and a role in an organisation for which he had worked for 17 years, and had been described as lacking in integrity when that decision was confirmed.
362. Complaint 30 therefore fails.

Complaint 31: Harassment related to race: On 19 May 2021 Mr Oral or Ms Eastwell required the Claimant to produce a British Passport when the Respondent's records contained a copy of the Claimant's indefinite leave to remain in the United Kingdom

363. As with the other allegations, this can be broken down as follows:
- a) On 19 May 2021, did Mr Oral require the Claimant to produce a British passport, at a time when Mr Oral knew that the Respondent's records contained a copy of had Claimant's indefinite leave to remain?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?
  - d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
364. The Tribunal has already found that Mr Oral did not require the Claimant to produce a British passport. He did require the Claimant to provide a copy of his right to work in the UK, which was unwanted conduct, but as per the decision in Taiwo, was not “*related to*” race, but was related to his immigration status.

365. Complaint 31 also does not succeed.

Complaint 32: Harassment related to race: The Claimant was the only staff that was dismissed (on 20 May 2021) for (a) overpaying a colleague, (b) issuing a mortgage letter in the format that the Claimant gave it to Ms Tordai, and (c) being in a relationship with Ms Tordai, whereas all other staff member that did the same acts (with a staff member even deliberately overpaying himself) were not dismissed

366. To answer this, the Tribunal can break the allegation down into the following questions:

- a) On 20 May 2021, when dismissing the Claimant for:
  - (i) Overpaying Ms Tordai;
  - (ii) Issuing a mortgage letter in the format the Claimant gave it to Ms Tordai; and
  - (iii) Being in a relationship with Ms Tordai,was the Respondent treating him differently to other staff members?
- b) If so, was that unwanted conduct?
- c) Did it relate to race?
- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- e) If not, did it have that effect?

367. The Claimant was dismissed on 20 May 2021 for consciously overpaying Ms Tordai and issuing a mortgage letter to Ms Tordai, but also for making Ms Tordai fearful for her job and career with the Respondent – displaying coercive behaviour towards her. The Claimant was not dismissed for being in a relationship with her.

368. The Claimant has failed to show that any other staff member did the same things as the Respondent considered he had done in the Allegations. Nor has the Claimant shown that that staff member was not dismissed.

369. In any event, this complaint is a comparison of treatment complaint, rather than a complaint of harassment.

370. Even if the complaint is reframed to remove the comparison, the Claimant has failed to recognise that he was not dismissed for being in a relationship with Ms Tordai, and that one of the key reasons he was dismissed was that Allegation 3 was found by the Respondent to be supported by the evidence and was upheld.

371. The Claimant's dismissal was evidently unwanted by him, but he has not shown that the decision was "related to" race. The Tribunal, in dismissing Complaint 1,



has shown itself satisfied that the Claimant was dismissed for misconduct, and that dismissal was within the range of reasonable responses to that misconduct. There is no basis for finding that the conclusion that the misconduct occurred, or the decision to dismiss because of it, was “*related to*” race.

372. Complaint 32 therefore is dismissed.

Complaint 33: Harassment related to race: Ms Eastwell and Mr Freeman refused to interfere in the (subsequent) relationship between Ms Tordai and Mr Edward, describing it as a ‘personal affair’, whereas the Claimant’s relationship with Ms Tordai was described as inappropriate, based on money and required to be declared

373. This Complaint can be considered as set out below:

a) (The factual premises:)

(i) Did Ms Eastwell and Mr Freeman refuse to interfere in Ms Tordai’s relationship with Mr Edward, describing it as a ‘personal affair’; whereas

(ii) The Claimant’s relationship with Ms Tordai was described as inappropriate, based on money, and one which was required to be declare?

b) If so, was that unwanted conduct?

c) Did it relate to race?

d) Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

e) If not, did it have that effect?

374. No evidence has been presented to the Tribunal that either Ms Eastwell or Mr Freeman refused to interfere in Ms Tordai’s relationship with Mr Edward. The evidence presented to the Tribunal is that Mr Oral considered that relationship to be a personal affair, and Mr Oral was not the disciplinary manager or appeal manager in relation to the Claimant.

375. As for Complaint 32, a complaint of harassment does not require less favourable treatment, and so is not dependent on a comparison such as that described.

376. If the complaint is reframed as one that complains that the description of the Claimant’s relationship with Ms Tordai was described as inappropriate, based on money, and of a kind that required a declaration:

a) The Claimant’s relationship with Ms Tordai was not described an inappropriate. All three of Ms Eastwell, Mr Basquil and Mr Connell considered *the unmanaged conflict of interest* that existed because of the

combination of the Claimant's relationship with Ms Tordai *while* he had control or influence over her pay and progression as inappropriate.

- b) Ms Eastwell did not say that the Claimant's relationship with Ms Tordai was "*based on*" money, but described money as "*an underlying*" and "*a clear*" theme of their relationship.
  - c) Ms Eastwell, Mr Basquil and Mr Connell regarded the Claimant's relationship with Ms Tordai while he had control or influence over her pay and progression as a conflict of interest that required managing, and one way to discuss appropriate management of that conflict would have been to declare it, but none of them has said that it was the only way to do so.
377. None of these actions have been shown by the Claimant to be "*related to*" race. The Claimant's approach has appeared to be to present the Respondent's finding of his misconduct and his dismissal as so outrageous a response as to show that it must be related to race – but the Tribunal entirely disagrees. The evidence, after a reasonable investigation, reasonably supported the conclusions of misconduct alleged, and dismissal was well within the range of reasonable responses open to the Respondent. This is not an outcome which defies reasonable explanation – very far from it.
378. Complaint 33 does not succeed.

Complaint 34: Harassment related to race: The Respondent dismissed the Claimant on 20 May 2021 in part on the basis of a mortgage reference he wrote for Ms Tordai which took the totality of Ms Tordai's earnings into account, having taken the Claimant into a room on 29 April 2021, given him a booklet on reference writing, told him to copy the answers from the Booklet onto an answer sheet, and placed that sheet on the Claimant's file as if the Claimant had been trained for reference writing

379. This Complaint can be answered by considering the following questions:
- a) Did the Respondent:
    - (i) On 20 May 2021 dismiss the Claimant, in part because of a mortgage reference he wrote for Ms Tordai which took the totality of Ms Tordai's earnings into account;
    - (ii) Take the Claimant into a room on 29 April 2021, give him a booklet on reference writing, tell him to copy the answers from the Booklet onto an answer sheet, and place that sheet on the Claimant's file as if the Claimant had been trained for reference writing?
  - b) If so, was that unwanted conduct?
  - c) Did it relate to race?

- d) Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
  - e) If not, did it have that effect?
380. The Respondent did:
- a) Dismiss the Claimant on 20 May 2021, in part because the mortgage reference the Claimant wrote for Ms Tordai took account of the totality of Ms Tordai's earnings when the Respondent considered those earnings to be unusual for Ms Tordai and inappropriate in light of the fact that it also found the Claimant had artificially inflated them; and
  - b) Take the Claimant into a room on 29 April 2021, give him a booklet on reference writing, tell him to copy the answers from the Booklet onto an answer sheet, and placed that sheet on the Claimant's file as if the Claimant had been trained for reference writing.
381. However, the dismissal of the Claimant did not place reliance on the Claimant having completed that training. Allegation 2 was upheld by Mr Basquil because the Claimant admitted it.
382. There is no indication whatsoever that:
- a) In finding Allegation 2 made out;
  - b) In the decision to dismiss the Claimant; or
  - c) In taking the Claimant into a room on 29 April 2021 and giving him a booklet on reference writing, telling him to copy the answers from the Booklet onto an answer sheet, and placing that sheet on the Claimant's file as if the Claimant had been trained for reference writing,
- the Respondent's actions were "*related to*" race. Allegation 2 was upheld because of the Claimant's admission, and on appeal, because Mr Connell focused on the Claimant's seniority and experience, and concluded he should have and did know better than to write such a reference. The decision to dismiss the Claimant (and to reject his appeal and uphold that dismissal) was, as the Tribunal has already found, based on the Respondent's conclusion that he had committed serious misconduct. The 29 April 2021 exercise was not relied upon in relation to the disciplinary process or its outcome, or the appeal and its outcome. The 29 April exercise appears to have been a misguided attempt to train the Claimant in reference writing upon discovery that he had not yet received that "training". None of these matters were "*related to*" race.
383. Complaint 34 therefore does not succeed.

## Conclusions

384. For all of the above reasons, each of the Claimant's complaints are dismissed.

Employment Judge Ramsden

Dated: 5 March 2025

## APPENDIX: List of Issues

### Overview

The Claimant brings claims of:

- (a) Unfair dismissal
- (b) Direct discrimination - race
- (c) Direct discrimination – religion; and
- (d) Harassment related to race.

### Jurisdiction

#### 1.1 Jurisdiction

- 1.1.1 Was the claim form submitted more than 3 months after some of the conduct complained of? The claim form was submitted on 21 September 2021.
- 1.1.2 If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?
- 1.1.3 If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted

### Unfair Dismissal (Complaint 1)

- 2. What was the reason or principal reason for the dismissal?
- 3. If misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant
- 4. Did the Respondent genuinely believe that the Claimant had committed misconduct
- 5. Whether there were reasonable grounds for the belief:
- 6. At the time the belief was formed had the respondent carried out a reasonable investigation having regard to the nature and extent of the allegation
- 7.

8. The Claimant relies on the below alleged acts, and procedural failings of the Respondent:
- (a) AE investigated the BT's alleged grievance and then also the disciplinary investigation.
  - (b) AE concluded that BT's overtime had not been reduced upon the end of the relationship but despite this referred the Claimant for a disciplinary hearing in respect of allegation 3.
  - (c) AE invited the C to attend a disciplinary investigation meeting on 29<sup>th</sup> April and 13<sup>th</sup> May 2021 when at the time BT had made no formal grievance.
  - (d) AE concluded that the Claimant needed to have declared his relationship with BT when there was no requirement or policy.
  - (e) The Claimant was not given a copy of BT's grievance investigation notes at any time before the conclusion of the disciplinary hearing.
  - (f) No informal discussion was held with the Claimant as required by the Respondent's grievance and disciplinary policy before sending the Claimant to a formal disciplinary hearing [ 5(g)].
  - (g) AE investigated the BT's grievance and the C's disciplinary contrary to grievance and disciplinary policies.
  - (h) The Investigation Notes alleged to be records of meetings held with BT, and which were used in the dismissal process were all not signed [5 (i)].
  - (i) The Investigation Note relating to evidence allegedly given by Karolina Klejdyz and which was used against the claimant was not signed [5(j)]
  - (j) AE wrongly concluded that providing two clocking cards given to BT was contrary to practice.
  - (k) AE wrongly reached a conclusion that the Claimant would have an interest in manipulating the pay of BT.
  - (l) AE wrongly concluded that the C should not have accepted hours of BT via phone when that was the common practice during covid,
  - (m) Evidence that the Claimant allowed someone to clock out on BT's behalf was used against the Claimant, whereas Claimant was following management's

written instruction to all lead managers to manually clock colleagues in and out when required. [5(l)].

- (n) Evidence that could help the Claimant's case was used against the Claimant, evidence that could prove that allegations made against the Claimant were untrue were not considered or lend enough weight, and where no evidence existed against the Claimant AE generated wrong evidence and used it against the Claimant [5(n) to 5(ii)], e.g not providing exception coding sheets
- (o) The Investigation Manager allowed BT's son who was not a staff of the Respondent to be present at the grievance hearing, and the investigation manager also took evidence from him [5(jj)].
- (p) The Claimant was held responsible for the promotion of BT to manager position, whereas there was documentary evidence that the investigation manager herself was part of the people responsible for BT's promotion, and the Claimant was not involved [5(kk)].
- (q) At the start of the disciplinary hearing on 20 May 2021, the Disciplinary Manager Corner Basquil (CB) told the Claimant that he was sure that the Claimant will soon be dragging him before the Employment Tribunal indicating that the decision to dismiss was premeditated [5(ll)]
- (r) Evidence that the Claimant provided at the disciplinary hearing was not reviewed by CB, all statements made against the Claimant by BT were accepted contrary to the requirement of the Respondent's evidence checklist, and the notetaker attributed statements that the Claimant did not make to the Claimant [5(mm) to 5(oo)].
- (s) The Claimant was dismissed for taking the totality of BT's earnings into consideration whilst writing a mortgage reference for BT, whereas the Claimant was not trained on mortgage reference writing, the Respondent had no policy on mortgage reference writing where the Claimant worked, and the Claimant had written the reference as it was usually written by the Claimant's colleagues [5(bb); 5(cc)].
- (t) The disciplinary manager did not analyse any of the evidence submitted by the investigation Manager, but copied and pasted all the findings of the Investigation Manager on the disciplinary checklist, and dismissed the Claimant with a one-page letter without giving any reason for his decision [5(pp)].
- (u) All the questions raised by the Claimant during the appeal process were ignored, and not answered [5(jj)]

(v) The Appeal Manager sent an appeal decision to the Claimant on 30/06/2021, and in it criticised BT, AE, CB and the disciplinary process, but on 05/07/2021 the Appeal Manager changed the decision, and deleted all the criticism that he made against BT, AE, CB and the process. [5(ii); 5(kk) to 5(qq)].

(w) All evidence pointing to dishonesty, and bad character given against BT by her colleagues were ignored [5(tt)].

(x) The Claimant was the only staff that was dismissed for allegedly overpaying a colleague, issuing a mortgage letter in the format that the Claimant gave it to BT, and being in a relationship with BT whereas all other staff members that did the same acts with some staff deliberately overpaying themselves, were not dismissed [5(rr); 5(ss);5(uu)].

9. Was the dismissal for a fair reason, i.e. conduct? *The Respondent relies on the potentially fair reason of conduct.*

10. Was the procedure fair in accordance with s98(4) of the ERA?

11. Was the Claimant's dismissal within the band of reasonable responses?

12. Did the Respondent have a reasonable belief that the Claimant committed the act?

## **Discrimination**

### **Comparator(s)**

13. The Claimant relies upon following relationship comparators:

(a) Jon Thatcher (White British) and Lisa Fulkes (White British)

(b) Danny Lake (White British) and Andrew (Black Caribbean);

(c) Alexandra Bozern (South American) and Radomir Koczr (Polish, White European);

(d) Dave Parker (White British) and Cheryl Samuel Todd (Black British)

14. The Claimant avers that all comparators are not Muslims.

15. The Claimant relies upon the following overpayment comparator:

(a) Justyna Madejczyk (White Non-Muslim)

(b) David Dellow (White Non-Muslim)

16. The Claimant avers that the overpayment comparator is not Muslim.

17. Were the circumstances of the real comparators relied upon by the Claimant materially the same as the Claimant's?

18. If not, the Claimant relies on a hypothetical comparator whose circumstances are materially the same as the Claimant's.

## **Direct discrimination - race – s.13 Equality Act 2010**

19. The Claimant relies on the protected characteristics of colour, nationality, or ethnic origin. The Claimant is Black African of Somalian origin.
20. Was the Claimant treated less favourably than the real comparator(s) (or, if applicable, a hypothetical comparator) was or would have been? The Claimant relies on the following alleged less favourable treatment compared to the real comparator(s) (or, if applicable, a hypothetical comparator):
- (a) Asked the Claimant whether he declared his relationship with BT, whereas no other white colleagues of the Claimant who were in similar relationships were required to declare their relationships (**Complaint 2**). The comparators are Jon Thatcher who is in a relationship with Lisa Fulkes, Danny Lake who is in a relationship with Andrew, Alexandra Bolzern who is in a relationship with Radomir Koczr, Spencer Potter in a relationship with Maya, Dave Parker who is in a relationship with Cheryl Samuel-Todd, and Sasa Guynho who is in a relationship with Andre Guynho [6(c)].
  - (b) Dismissed the Claimant on the allegation that the claimant overpaid BT, whereas all other Claimant's White colleagues that overpaid other staff during the pandemic, and another who overpaid himself by thousands of pounds were not dismissed (**Complaint 3**). The Claimant's comparators are Justyna Madejczyk (JM) White of Polish origin, and David Dellow who is White British [6(d); 6(e)].
  - (c) On 5 July 2022, the Appeal manager substituted his decision of 30/6/2021 with a fresh decision, and in the new decision removed all the criticism that he made against the claimant's white colleagues AE, BT, CB, and the disciplinary process, and indicted the Claimant throughout [6(a); 6(f); 6(g)] (**Complaint 4**).
  - (d) Whilst the Claimant was being investigated, the Claimant was put in a room, given a booklet on reference writing, told to copy the answers from the Booklet onto an answer sheet, and it was placed on the Claimant's file as if the Claimant had been trained for reference writing. The Claimant was thereafter dismissed for taking the totality of BT's earnings into consideration whilst writing a mortgage reference for BT, whereas the Claimant's colleague Phil Samuel-Todd (PS) a Caucasian of British origin who admitted giving mortgage references in a similar manner as the claimant was not treated in the same manner as the Claimant. PS was not investigated and was not dismissed [6(h); 6(l)] (**Complaint 5**).
  - (e) AE said that money was the underlying theme in the relationship between the Claimant and BT, whereas the relationships of the Claimant's white colleague were not described as such (**Complaint 6**). The comparators being relied on by the claimant are Alexandra Bolzern a Lead Picking Manager who is in a Relationship with Radomir Koczr a Delivery Compliance Manager, Spencer



Potter a manager is in a relationship with Maya who is a team leader, Dave Parker a Lead Manager is in a relationship with Cheryl Samuel-Todd a Compliance Manager, Sasa Guynho a Delivery Manager is in a relationship with Andre Guynho a Picking Manager, Jon Thatcher a Centre Manager who is in a relationship with Lisa Fulkes a Quality Control Manager, Danny Lake who is another Centre Manager is in a Relationship with Andrew a Goods-In-Colleague [6(k)].

- (f) The Claimant had indefinite leave to remain in the United Kingdom which was stamped on the Claimant's Somalian Passport held on the Claimant's record with the Respondent, and it was confirmed as seen on the Claimant's file held by Steve Freeman (SF), but AE required the Claimant to produce a British Passport [(6j)] (**Complaint 7**).
- (g) BT got into another relationship with Paul Edward (PE) who is Black British of Jamaica origin and who is a Team Leader on night with BT, Tamara Williams (TW) who was PE's partner, approached AE and Steve Freeman (SF) to complain about how BT had gone into a relationship with PE who was her partner of 14 years, and who was a Team Leader on night with BT, and were bullying her at work but TW was told that it was a personal affair, whereas the Claimant's relationship with BT was described as inappropriate, based on money, and needed to be declared (**Complaint 8**).

4.2 If so, was the reason for the treatment the Claimant's race?

**Direct discrimination - religion – s.13 Equality Act 2010**

21. The Claimant relies on the protected characteristics of religion. The Claimant is a Muslim.

22. Was the Claimant treated less favourably than the real comparator(s) (or, if applicable, a hypothetical comparator) was or would have been? The Claimant relies on the following alleged less favourable treatment compared to the real comparator(s) (or, if applicable, a hypothetical comparator):

- (a) AE and SF refused to interfere in the relationship between BT non-Muslim white and PE a non-Muslim Black British of Caribbean origin when TW reported that BT was in a relationship with PE who was Team Leader on BT's shift and was TW's partner of 14 years. AE and SF said it was a personal affair, whereas the Claimant's relationship with BT was described as inappropriate, based on money, and required to be declared [7(a)] (**Complaint 9**).
- (b) The Appeal Manager described the Claimant as lacking in integrity for being in a relationship with BT whereas the Respondent refused to interfere in all other

relationships between other non-Muslim staff members in the Respondent's employment (**Complaint 10**). The comparators are BT a non-Muslim white and PE a non-Muslim Black British of Caribbean origin, AE (Investigation Manager) a White non-Muslim and Simon Knott a non-Muslim of mixed race (Caucasian and Black Caribbean origin), and these White non-Muslim relationships: Jon Thatcher and Lisa Fulkes, Danny Lake and Andrew, Alexandra Bolzern and Radomir Koczr. Spencer Potter and Maya, Dave Parker and Cheryl Samuel-Todd, and Sasa Guynho and Andre Guynho [7(d)].

- (c) AE asked the Claimant whether the Claimant had declared his relationship with BT, whereas all other Inter-racial non-Muslim, and White non-Muslim relationships were not required to be declared (**Complaint 11**). The comparators are BT a non-Muslim white and PE a non-Muslim Black British of Caribbean origin, AE a White non-Muslim and Simon Knott a non-Muslim of mixed race (Caucasian and Black Caribbean origin), and these White non-Muslim relationships Jon Thatcher and Lisa Fulkes, Danny Lake and Andrew, Alexandra Bolzern and Radomir Koczr. Spencer Potter and Maya, Dave Parker and Cheryl Samuel-Todd, and Sasa Guynho and Andre Guynho [7(b)].
- (d) Dave Dellow a White non-Muslim who overpaid himself by several thousands of pounds was not dismissed from the Claimant's employment, whereas the Claimant was dismissed for allegedly overpaying BT [7(c)] (**Complaint 12**).
- (e) AE said the theme of the relationship between the Claimant and BT was based purely on money, whereas no other non-Muslim relationships had ever been described as such (**Complaint 13**). The Claimant relies on both non-Muslim interracial and monoracial non-Muslim Relationships as comparators. The comparators are BT a non-Muslim white and PE a non-Muslim Black British of Caribbean, AE (Investigation Manager) a White non-Muslim and Simon Knott a non-Muslim of mixed race (Caucasian and Black Caribbean origin), and these White non-Muslim relationships: Jon Thatcher and Lisa Fulkes, Danny Lake and Andrew, Alexandra Bolzern and Radomir Koczr. Spencer Potter and Maya, Dave Parker and Cheryl Samuel-Todd, and Sasa Guynho and Andre Guynho [7(e)].

23. If so, was the reason for the treatment the Claimant's religion?

**Harassment related to race s.26 Equality Act 2010**

24. Did the Respondent engage in the following acts of alleged harassment related to race:

- (a) The Claimant was investigated without any formal grievance being submitted

against the Claimant in accordance with the Respondent's policy, and the Claimant was dismissed [8(b)] (**Complaint 14**).

- (b) The Claimant was asked of the appropriateness of his relationship with BT, whereas relationships between staff members are not quarried in the Respondent's organisation [8(c)] (**Complaint 15**).
- (c) Claimant was singled out and blamed for not declaring his relationship with BT, and subsequently dismissed whereas there was no policy requirement for staff to make such disclosure [8(d)] (**Complaint 16**).
- (d) The Claimant was not given a copy of the grievance allegedly raised by BT to enable the Claimant to defend himself, yet the Claimant was put through Investigation, Disciplinary, and subsequently dismissed [8(f)] (**Complaint 17**).
- (e) No informal discussion was held with the Claimant as required by the Respondent's policy before sending the Claimant to a formal grievance hearing and dismissed [ 8(g)] (**Complaint 18**).
- (f) The Investigation Manager (AE) handled both the informal and the formal grievances contrary to the Respondent's policy [8 (h)] (**Complaint 19**).
- (g) The Claimant was alleged to have issued two clocking cards to BT, and it was alleged that it was unusual in the Respondent's organisation, whereas all-night staff and hundreds of other staff in the Respondent's employment have two clocking cards[8(j); 8(k)] (**Complaint 20**).
- (h) Allegations 1 and 2 were not part of BT's complaint. AE raised those allegations on her own, treated them as part of the grievance, investigated the Claimant on the allegations, and referred the Claimant to disciplinary (8hh) (**Complaint 21**);
- (i) The Investigation Manager alleged that the Claimant would have a personal interest in manipulating the wages of BT because claimant was in a relationship with BT, whereas there was evidence that BT was at work, and worked for all the payments that BT received during the relevant periods [8(n)] (**Complaint 22**).

- (j) The Claimant was dismissed for following the Respondent's manager's instruction to all lead managers to manually clock colleagues [8(l)] (**Complaint 23**).
- (k) During Investigation, evidence that could help the case of the claimant was used against the Claimant, evidence that could prove that allegations made against the Claimant were untrue was not considered or not lend enough weight, and where no evidence existed AE generated wrong evidence against the Claimant [8(m) to 8(kk)] (**Complaint 24**).
- (l) The Disciplinary Manager did not analyse any of the evidence submitted by the Investigation manager, but copied and pasted the Investigation manger's findings against the Claimant, and dismissed the claimant without adducing any reason for his decision [8(00)] (**Complaint 25**);
- (m)The Investigation Manager allowed BT's son who was not a staff of the Respondent to be present at the grievance hearing, and the investigation manager also took evidence from him against the Claimant [8(ii)] (**Complaint 26**).
- (n) At the start of the disciplinary hearing on 20 May 2021, the Disciplinary Manager (CB) told the Claimant that he was sure that the Claimant will soon be dragging him before the Employment Tribunal [8(kk)] (**Complaint 27**).
- (o) Evidence that the Claimant provided at the disciplinary hearing was not reviewed by CB, all statements made against the Claimant by BT were accepted contrary to the requirement of the Respondent's evidence checklist, and the notetaker attributed statements that the Claimant did not make to the Claimant [8(ll) to 5(00)] (**Complaint 28**)
- (p) All the questions that the claimant raised during the appeal process were ignored and not answered [8(qq)] (**Complaint 29**)
- (q) The Appeal Manager sent an appeal decision to the Claimant on 30/06/2021, and in it criticised BT, AE, CB and the process, but on 05/07/2021, the Appeal Manager changed the decision and deleted all the criticism that he made against BT, AE, CB and the process, and blamed the Claimant throughout in the fresh decision. [8(pp) to 8(tt) to 8(ww); 8(bbb)] (**Complaint 30**);

- (r) The Claimant had indefinite leave to remain in the United Kingdom, which was pasted on the Claimant's Somalian Passport, a copy of the indefinite leave to remain was held on Claimant's file with the Respondent, and was also confirmed as seen on the Claimant's File by the Respondent, but AE required the Claimant to produce a British Passport [8(e)] (**Complaint 31**).
  
- (s) The Claimant was the only staff that was dismissed for overpaying a colleague, for issuing a mortgage letter in the format that the Claimant gave it to BT, and for being in a relationship with BT, whereas all other staff member that did the same acts with a staff even deliberating overpaying himself, but were not dismissed [8(xx)] (**Complaint 32**).
  
- (t) When BT entered into a relationship with PE who was a Team Leader on the Night Shift where BT works, and TW who was PE's partner of 14 years raised the inappropriateness of the relationship with AE and Steve Freeman (SF), they said it was a personal affair of PE and BT, and refused to interfere, whereas the Claimant's relationship with BT was deemed inappropriate, and needed to be declared [8(aaa)] (**Complaint 33**).
  
- (u) Whilst the Claimant was being investigated, the Claimant was put in a room, given a booklet on reference writing, told to copy the answers from the Booklet onto an answer sheet, and it was placed on the Claimant's file as if the Claimant had been trained for reference writing, and the Claimant was dismissed for allegedly giving a wrong mortgage reference to BT [8(bb)] (**Complaint 34**).

25. Was the Respondent's conduct capable of breaching s.26 Equality Act 2010 by:

- i) Being unwanted conduct.
- ii) Being related to race.

26. Did that conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) effect of:

- (i) violating the Claimant's dignity; and/or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

## **Remedy**

### **Unfair Dismissal**

27. If the Claimant was unfairly dismissed:

- (a) What basic award is he entitled to under s.119 ERA 1996; and
- (b) what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the Claimant under s123 ERA 1996?

28. In particular:

- (a) Has the Claimant reasonably mitigated his losses?
- (b) Should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed in any event; and
- (c) should any basic and/or compensatory awards be reduced by reason of the Claimant's own culpable or blameworthy conduct pursuant to s.122(2) and/or s.123(6) ERA 1996?
- (d) Is it appropriate for the Tribunal to award an uplift of 25% on any compensation to take into consideration any breaches of the ACAS code?

### **Discrimination**

- 29. If the Tribunal finds that the Respondent unlawfully discriminated against the Claimant, is the Claimant entitled to an award for injury to feelings, and if so, at what level?
- 30. Is the Claimant entitled to award for personal injury
- 31. Is it appropriate for the Tribunal to award a sum for aggravated damages?
- 32. Is it appropriate for the Tribunal to award an uplift of 25% on any compensation to take into consideration any breaches of the ACAS code?