EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
DB	**v**	**(1) Financial Services Compensation Scheme Ltd**[1] **(2) Mr Craig McRobert** **(3) Ms Sabah Carter** **(4) Ms Lisa Faulkner**

Heard at: London Central
On: 24 February to 3 March 2025

Before: EJ G Hodgson
Ms S Aslett
Ms E Ali

Representation

For the claimant: in person
For the respondent: Mr Ameer Ismail, counsel

JUDGMENT

Claim one – 2216399/2023

1. All claims of race discrimination are dismissed.

Claim two – 2217762/2024

2. The claim of unfair dismissal is not well founded and is dismissed.

3. All claims of race discrimination fail and are dismissed.

[1] Financial Services Compensation Scheme Ltd is the sole respondent to claim one, 2216399/2023; all four respondents are named in case number 2217762/2024.

4. The claim of breach of contract (wrongful dismissal) fails and is dismissed.

REASONS

Introduction

1.1 Claim one, number 2216399/2023, was presented on 13 November 2023. The relevant conciliation period was from 4 September 2023 until 16 October 2023. In that claim, the claimant alleged that failure to promote him constituted direct race discrimination.

1.2 Claim two, number 221 7762/2024, was presented on 1 April 2024. The relevant conciliation period was from 23 February 2024 until 27 February 2024. He alleged unfair dismissal. He brought further complaints of race discrimination.

1.3 On 29 April 2024, Tribunal Judge Plowright ordered the two claims be heard at the same time.

The Issues

2.1 On 29 April 2024, Tribunal Judge Plowright sought to identify the issues, the issues failed to identify the claims adequately, and they were considered further and refined at this hearing.

2.2 They were finalised following the claimant's application to amend. The issues as set out below incorporate those which were handed to the parties for consideration and those allowed by amendment.

Claim one - 2216399/2023

Race discrimination

2.3 There is claim of race discrimination. The claimant states he is Indian and relies on the fact he was born in India. He holds dual Australian and British citizenship.

2.4 He brings the following claims of direct race discrimination:

2.4.1 Allegation one: by Ms Debbie Stimpson rejecting, on 25 March 2021, the claimant's application of 1 March 2021 for the position of head of transformation.

2.4.2 Allegation two: by Ms Debbie Simpson rejecting on 25 March 2021 the claimant's application of 1 March 2021 for the position of head of strategy.

2.4.3 Allegation three: by Ms Sarah Marin rejecting in or around May or June 2022 the claimant's application for the role of head of customer experience following his application on 18 February 2022.

2.4.4 Allegation four: by Ms Lisa Faulkner rejecting in or around April 2022 the claimant's application for the position of head of products following the claimant's application of 29 April 2022.

2.4.5 Allegation five: by failing to give the claimant a greater salary increase in 2023, it being his case he should have received a salary increase by April 2023. (It is the respondent's position that this allegation is not contained in the claim form)

2.4.6 Allegation six: by Mr Craig McRobert from August 2022 to May 2023 not responding to any of the claimant's emails. (It is the respondent's case that this is not in the claim form.)

2.4.7 Allegation seven - by Mr Craig McRobert failing to complete the performance review process , it being the claimant's case it should have been completed by March 2023.

Time points

2.5 Are all or any of the claims out of time, and if so would it be just and equitable to extend time?

Claim two - 2217762/2024

Unfair dismissal

2.6 The claimant alleges he was unfairly dismissed.

2.7 The respondent alleges the dismissal was fair. It alleges the claimant was dismissed for a reason related to his conduct.

2.8 It is the respondent's case the claimant contributed to his dismissal, and this matter will be considered as part of this hearing.

Race discrimination – claim two

2.9 The claimant brings the following complaints of race discrimination:

2.9.1 Allegation eight: by the respondent failing to adhere to ACAS guidelines in particular failing to enter mediation, failing to disclose the name of the complainant; failing to provide the claimant with a copy of the video recording; and failing to speak to the witnesses. (It is respondent's case that this allegation is not in the claim form as a claim of race discrimination.)

2.9.2 Allegation nine: by holding disciplinary meetings (on dates not specified) without the claimant's consent when he was sick. (It is the respondent's case that this claim is not pleaded.)

2.9.3 Allegation ten: by requiring the claimant to work on a public holiday, it being his case he was required to work on 8 May 2023.

2.9.4 Allegation eleven: by dismissing the claimant on 30 January 2024.

Time points

2.10 Are all or any of the claims out of time, and if so would it be just and equitable to extend time.

Wrongful dismissal

2.11 The claimant alleges he was wrongfully dismissed and he is entitled to notice pay.

Evidence

3.1 The claimant gave evidence and relied on two statements.

3.2 For the respondent we heard from: Mr Craig McRobert; Ms Sabah Carter; Ms Fiona Kidy; Ms Deborah Stimpson; and Ms Lisa Faulkner.

3.3 Ms Sarah Marin was not called to give evidence, but the respondent relied on her statement.

3.4 We received a bundle of documents.

3.5 The claimant produced further documents during the hearing. We did not have to rule on their admissibility, as he did not refer to any of those documents at any time during his evidence or during cross examination of the respondent's witnesses.

3.6 We received written submissions from the respondent. The claimant served written submissions when his applications for adjournment had been refused.

Concessions/Applications

4.1 On day one of the hearing, the tribunal sought to agree the issues. It was clear that the issues as drafted by Tribunal Judge Plowright were inadequate.

4.2 The tribunal explained that only those claims pleaded in each claim form could proceed. The tribunal considered the issues as identified by Tribunal Judge Plowright, and sought to clarify them where appropriate.

The respondent alleged that a number of the matters identified had not been pleaded, and could not proceed without amendment.

4.3 The tribunal drafted a list of issues and sent it to the parties, and asked the parties to clarify their positions.

4.4 On day one of the hearing, the tribunal confirmed that it would not consider evidence relating to remedy. However, it would consider contributory fault. The tribunal confirmed it would not consider, in the event of a finding of unreasonableness, whether the claimant would have been dismissed in any event, and if so by when. That would be a matter for any remedy hearing.

4.5 The tribunal noted on day one that there had been extensive redactions to the claimant's statement between paragraphs 61 and 64. There was also some further redaction to paragraph 74. Mr Ishmail confirmed there had been no order for redaction, and this redaction had been a unilateral act by the respondent as it considered the claimant had, inappropriately, referred to without prejudice negotiations. The tribunal noted that the respondent should not take unilateral action, but should apply. The tribunal explained the nature of without prejudice documentation and invited the claimant to consider whether he had, inappropriately, included reference to without prejudice discussions. It was noted that if the claimant wished to refer to without prejudice discussions, he must provide a full explanation, but the general position is that genuine negotiations should not be disclosed.

4.6 On day two, the claimant served a supplementary statement. This was admitted by consent.

4.7 On day three, the claimant submitted a written request to "add four allegations that are required to be included into the issues." The tribunal directed the claimant should raise the matter after cross-examination was finished. He referred to the application at the end of day three, and the tribunal directed the respondent consider its position so the matter could be dealt with on the morning of day four.

4.8 On day four we considered the application. The application consisted of a number of comments about the issues as drafted.

4.9 The claimant first referred to claim one. The claimant's application to amend was diffuse and difficult to understand. It appears to contain a number of general comments. It appears to assert that a number of claims had not been included. It sought to add some additional facts to existing allegations. The claimant failed to set out clear amendments to his original claim form.

4.10 We now set out our decision using the numbered allegations set out in the tribunal's original list of issues sent to the parties.

Claim one

4.11 Allegation one – the claimant sought to add facts. We allowed those additional facts. He alleged he applied for the role of head of transformation on 1 March 2021. The interview was on 24 March 2021.

4.12 Allegation two – the claimant sought to add a fact. We allowed the amendment. He alleged he was informed that he was not selected on 25 March 2022.

4.13 Allegation three – the claimant sought to add additional facts. We allowed the amendment. He applied for the role of head of customer experience on 18 February 2022.

4.14 Allegation four – the claimant sought to add additional facts. We allowed the amendment. The claimant alleged that he made his application on 29 April 2022.

4.15 Allegation five: the claimant sought to amend allegation five by stating he should have received a salary increase from April 2022. This was refused.

4.16 Allegation six: the claimant stated the following:

> **In the claim form page 7 the claim clearly says I followed up with HR, Lisa, Sabah for 18 months and also craig over the last 12 months**

4.17 This was not an application to amend. We will consider the content of the relevant part of the claim form as part of our consideration of allegation six.

4.18 Allegation seven: the claimant gave commentary on the allegation set out by the tribunal. There is no specific application to amend, and the tribunal was satisfied it had recorded the issue correctly.

4.19 There was a further application to amend claim one – the claimant identified an additional allegation. He referred to the promotion of Matthew Phillips to head of readiness in July 2022. There did not appear to be a claim of detrimental treatment of the claimant. In any event it was a wholly new matter and the balance of hardship was against allowing any amendment in relation to the role identified.

Claim two

4.20 The claimant made a number of comments on the issues as drafted. He did not identify any new claims.

4.21 The claimant stated that he wished to add the following allegations

> **Page 46, following is a exact wording from claim**

Allegation to be added.
Informed to my line manager about working in public holidays and losing work life balance and getting sick. This was ignored. Expecting me to work during public holidays is a racial discrimination

Page 46. The following mentioned in the claim

Allegation to be added
FSCS (Sabah Carter) conducted a final disciplinary hearing without my presence and decided to dismiss me while I was in a mental health treatment even though doctors certificate sent to the respondent is a clear proof of racial discrimination

4.22 The tribunal considered these matters. As to the first allegation, he had already brought an allegation relating to a specific public holiday. The remainder of the allegation was unspecified and failed to identify the specific treatment relied on. In particular it failed to identify the relevant dates, or the manner by which the manager informed him. These were not allegations which the respondent could adequately answer. At the time the amendment was sought, the allegations were clearly out of time. The balance of hardship was against allowing the amendment.

4.23 The essence of the second allegation is that the dismissal was race discrimination. That was a repetition of allegation 11. It was already included as an issue and there was no need to amend.

Day four

4.24 On day four, the respondent proposed to call three witnesses. The claimant was able to cross-examine the first two of three witnesses scheduled for that day.

4.25 Prior to the start of the hearing, the claimant had indicated he had suffered some form of fall or episode the previous day and had been unconscious for some time. He stated that he was able to proceed and wished to proceed. We confirmed that he would be granted appropriate breaks should he feel unwell or should he have difficulty during the morning.

4.26 After the second witness, Ms Faulkner, we took a break. When we returned, the claimant indicated that he did not wish to proceed that day, but he wished to adjourn to the following day. He stated he felt unwell and was having difficulty seeing the screen. He also stated that he was awaiting a call from his GP and he would need to follow the GPs advice. He was not able to clarify why he would be able to resume the next day.

4.27 The tribunal sought clarification as to condition and whether the claimant would benefit from a short break, as discussed in the morning. The claimant did not know whether he would be able to continue during that day, or whether he be able to continue the following day. He stated that the condition had occurred previously, but was unable to give any information as to when he may feel sufficiently recovered to continue.

4.28 The tribunal, of its own volition, adjourned for an early lunch break because it appeared the claimant may be able to recover in a short period. When the hearing resumed, the claimant failed to attend.

4.29 Ms Marin was the respondent's final witness. She had not been called. The respondent elected to rely on her written statement without calling her. It follows that the respondent's case closed without the need for further cross-examination.

4.30 On the previous day, we discussed the provision of submissions. The claimant made it clear that he wished to give written submissions, but did not wish to have the opportunity to give oral submissions.

4.31 Following discussion with the respondent, the tribunal adjourned for a further 45 minutes so that attempts can be made by the respondent and the tribunal to contact the claimant.

4.32 Those attempts were not successful.

4.33 After the adjournment, the tribunal considered how to proceed with the case.

4.34 The claimant had applied for an adjournment. That had not been granted initially, and the matter was to be considered when the hearing resumed at 12:30, after the first break following his application. A final decision was postponed until after the second break when we resumed at 13:45.

4.35 At the point the application was considered, the respondent's case had closed and the hearing had moved to the submission stage.

4.36 In the absence of any specific evidence from the claimant, including medical evidence, it was unclear when, or if, the claimant would be able to resume. In any event, the purpose of resuming the hearing would be to hear oral submissions, but the claimant had made it clear he did not wish to give oral submissions.

4.37 The respondent was content to give written submissions. Those submissions would be sent to the claimant and he would have an opportunity to file his own submissions and to answer the respondent's submissions. In the circumstances, the tribunal considered that the claimant was unlikely to suffer any disadvantage by the hearing not being resumed in person. The claimant would be given a reasonable period in which to file written submissions. He would be given the right to apply to extend the period.

4.38 The tribunal had limited medical evidence. The evidence in the claim demonstrated the claimant had found difficulty attending the disciplinary hearing, and that hearing had been delayed significantly. There was a real risk that the claimant would not resume the tribunal hearing and in those circumstances it may be inappropriate to adjourn indefinitely in

circumstances when resumption of the hearing was both uncertain and would be unlikely to materially benefit the claimant. The claimant suffered no material disadvantage by not resuming. A delay in considering and promulgating decision was likely to have a material adverse effect on the fairness of the hearing for both sides. Inevitably, the tribunal's recollection of events would decline which would undermine the fairness of the procedure and the appropriateness of the decision. The tribunal considered it inappropriate to delay for a significant period.

4.39 The tribunal therefore elected to do the following: to refuse the application to adjourn; to require the parties to give written submissions; to permit the possibility of sequential exchange of submissions; to permit the claimant to respond to the respondent submissions; to permit the respondent right of answer; to set time limits; and to give the claimant a right to apply to vary.

4.40 The claimant filed a subsequent application to adjourn. It was not supported by medical evidence. The tribunal refused that further request and the reasons for that decision have been dealt with in a separate decision dated 4 March 2025. A further application was then made and a decision given.

The Facts

Introduction

5.1 The respondent company, Financial Services Compensation Scheme Ltd (FSCS) administers compensation to customers of financial service firms that have failed. The FSCS was set up in 2001 under the Financial Services and Markets Act 2000.

5.2 The respondent employed the claimant as a change specialist on 12 May 2020. On 1 September 2021, his role changed to digital production manager, with a salary increase from £54,540, to £58,580.

5.3 On 8 May 2023, the claimant was involved in a Teams work call with external contractors from Capgemini. During the call, after approximately three minutes 26 seconds, the claimant stood to adjust a cable behind the computer and revealed he was wearing nothing from the waist down. His genitals were visible. This led to a complaint. This led to disciplinary process which culminated in his dismissal by letter of 30 January 2024.

5.4 We will consider the relevant facts relating to the dismissal below. The claimant has alleged he applied for a number of roles, but was not successful. He alleges failure to appoint him to various posts was race discrimination. We will first consider the facts relevant to each of the positions for which he applied.

The roles of head of transformation and head of strategy and insight

5.5 On 1 March 2021, the claimant submitted an application for both roles. Ms Deborah Stimpson, chief of staff, passed the applications to an external recruitment agency, Triangle Partners, the external recruitment agency was tasked with undertaking a sift to produce a shortlist for interview. On 17 March 2021, Ms Stimpson informed the claimant that she had decided to skip the screening assessment and instead to allow the claimant to proceed to the interview stage, as he was an internal candidate.

5.6 The interview took place on 24 March 2021. At the claimant's request, the interviews for both positions were dealt with on the same day. The claimant was unsuccessful. The respondent's position is the claimant's skill set was unsuitable for the roles, and he did not perform well in interview. Ms Stimpson met with him on 25 March 2021 to provide feedback.

Head of customer experience

5.7 The claimant applied for the role of head of customer experience on 18 February 2022. Penna plc, an external recruitment agency, was retained to shortlist candidates. Penna considered the claimant's application and categorised it as "marginal/not recommended." His application was not taken further. Penna's assessment recorded that the claimant's application lacked depth of experience in customer journey and insights when compared with other applicants. Penna identified a list of candidates for interview.

5.8 Ms Sarah Marin, chief customer officer, was not involved in the decision to reject his application. She was involved in giving the claimant feedback and she met with the claimant on 20 April 2022. She confirmed the reasons, as set out by Penna. On 25 April 2022, the claimant thanked Ms Marin for her feedback and stated he accepted her decision but was seeking advice around a career development plan.

Head of products

5.9 On 29 April 2022, the claimant applied for the role of head of products. He attached a covering letter, and a CV. He highlighted some feedback that he had received from the CIO.

5.10 Ms Sabah Carter, chief data, intelligence and technology officer, was recruiting for the head of product role. The external agency, Penna plc, was appointed to assist with the recruitment exercise, and undertook an initial sift of all applications to produce a shortlist of potentially suitable candidates.

5.11 Internal and external candidates were treated in the same manner. The closing date for application was 23 March 2022. Penna undertook the sift and made its recommendations on 28 March 2022.

5.12 On 29 April 2022, the claimant sent an email to Ms Carter stating he wished to apply for the head of product role. He attached a covering letter and a CV. His application was five weeks late. Ms Carter sent it to Penna to review. Ms Carter had discussions with Ms Claire McLeod at Penna. Penna did not recommend the claimant should be interviewed and confirmed this during a telephone conversation. Penna provided feedback to Ms Carter. The feedback, which revolved around lack of clarity in the claimant's CV and lack of relevant experience, was fed back to the claimant.

Salary review and bonus payment

5.13 On 25 April 2023, Ms Carter distributed details of the annual salary review and bonus. All employees would receive a bonus of 7.5%. Any employee whose salary was below 100% of the benchmark median would be moved to 100% of the benchmark median, others would receive an inflationary increase of 5%. This approach been agreed by the FSCS executive team for all employees. The claimant received a pay rise in accordance with that agreed policy resulting in an increase of his salary to £66,150 and a bonus of £4,503.

5.14 The claimant subsequently emailed his line manager, Mr McRoberts, on 25 April 2023 to state he should be benchmarked against a senior product manager role.

Email correspondence from Mr McRobert

5.15 It is not necessary to set out the full detail of the correspondence between the claimant and Mr McRobert. The bundle of documents contains numerous examples of Mr McRobert engaging with the claimant's email. A couple of illustrative examples will suffice. On 25 April 2023, the claimant emailed to say his role was "a senior product manager role" and should be benchmarked against this. Mr McRobert contacted the claimant to arrange a Teams meeting to discuss his concerns. The claimant sent a further email on 27 April 2023 and once again Mr McRobert engaged. It is accepted by the respondent that there were some emails which went unanswered. However, Mr McRobert gave evidence that all emails were discussed. There is clear evidence of extensive discussions continuing between Mr McRobert and the claimant. We accept Mr McRobert's evidence.

Failing to conduct a performance review in 2023

5.16 The claimant alleges that Mr McRobert failed to complete quarterly reviews, and in particular the March 2023 quarterly review.

5.17 By email of 6 December 2022, the claimant asked Mr McRobert to complete a "Q3 performance document." The respondent's policies did not require the completion of a quarterly performance document. Mr McRobert completed no quarterly performance review for any other

member of his team. He did not understand it to be part of the respondent's procedures. The process was requested by, and initiated by, the claimant. Mr McRobert discussed, during the one-to-one meetings, the claimant's performance.

5.18 On 31 January 2023, Mr Colin Eaton emailed the claimant attaching a 360° feedback. The feedback was mixed, as acknowledged by the claimant. Discussions about his performance continued at the one-to-one meetings.

5.19 On 14 March 2023, Mr McRobert started the process of achievement conversations with all his team. This precipitated the claimant, by email, requesting Mr McRobert recommend him for the senior product manager role. He repeated the request of 27 March 2023. Mr McRobert observed that the process was not provided for in the respondent's policies and sought HR advice. HR confirmed that all roles would be advertised, and the claimant would need to follow the standard process. He informed the claimant of this.

Disciplinary process

5.20 As noted above, on 8 May 2023, the claimant was involved in a Teams meeting during which it is alleged he exposed his genitals.

5.21 Capgemini provided outsource services to FSCS from its premises in India. On 8 May, the claimant was in Britain and the other participants in India. On 16 May 2023, the respondent received a complaint from two employees of Capgemini who had been on the call.

5.22 Mr McRoberts, the claimant's line manager, who had been appointed to the role of head of product, undertook the investigation. On 19 May 2023, Mr McRobert spoke with the claimant and told him that he had received a report the claimant had been on a Teams call on 8 May 2023 when he had been naked from the waist down. After the meeting, Mr McRobert sent an email to the claimant confirming an investigation would take place. The claimant responded by email of 19 May 2023 and stated:

> **That was a bank holiday and I did not realise when I folded the laptop camera was on and pointing to the floor and then immediately shut down the camera so that don't know what was seen in the floor. I normally by default record all the scrum meetings to ensure all discussed missing members hear it later. So deleted so that nothing in the floor view is not seen by others. It is just an accident and apologies.**

5.23 On 22 May 2023, Ms Karina Olver, HR partner, wrote to the claimant; she stated:

> **I write to inform you that FSCS have received complaints from two colleagues at Capgemini in relation to a serious concern about your conduct on Monday 8th May 2023, where it is alleged that you indecently exposed yourself on a work Teams call and were inappropriately dressed**

> **for work. The organisation has deemed it necessary to conduct a formal investigation into the complaints.**

5.24 She informed him the investigation would be conducted by his line manager, Mr McRobert, and he may have a colleague or trade union representative present.

5.25 Mr McRobert held the investigation meeting on 24 May 2023. He sent notes to the claimant for approval. The claimant gave further feedback and clarified that he had been attempting to fix his laptop's HDMI cable and that he did not always wear full dress at home.

5.26 Mr McRobert spoke to the claimant and to two Capgemini employees, both of whom wished to remain anonymous. The claimant had deleted the video from his computer and from the recycle bin. However, the video was recovered and Mr McRobert reviewed it. The video was available during the investigation, but it was not shown to the claimant, nor did he ask for it. Ultimately, the claimant did receive a copy of the video on 20 July 2024, when he requested it.

5.27 Mr McRobert completed his investigation report on or around 29 May 2023. He described the allegation as follows:

> **A complaint has been lodged by colleagues related to an incident on a Teams Scrum call on 08 May 2023, which states that the Respondent [ ] attended a team call inappropriately dressed and at a point during the meeting, moved his laptop lid and exposed that he was naked from the waist down, revealing his genitalia to all on the call.**

5.28 Mr McRobert considered the FSCS code of conduct which, amongst other things, stated it "requires all employees to dress appropriately for the day." He reached the following conclusion:

> **It would appear from the video evidence, that the incident whereby Muthu exposed himself being naked from the waist down on the call would appear to be accidental.**
>
> **However, this was a work situation and as such required certain standards to be met as an employee of FSCS.**

5.29 Mr McRobert recommended disciplinary action should proceed. He noted that gross misconduct included indecent conduct.

5.30 On 30 May 2023, Ms Olver sent the claimant a copy of the investigation report.

5.31 On 30 May 2023, the claimant, by email to Ms Olver, complained the investigation had taken place on a bank holiday. On 1 June 2023, he sent a further email to Ms Faulkner, head of HR, about his additional workload, and being unable to take rest on public holidays.

5.32 These emails led to a grievance investigation. The disciplinary procedure was paused whilst the grievance was attended to. Ms Karina Olver undertook the grievance investigation and concluded the claimant's complaint should not be upheld. She sent her outcome letter, rejecting the grievance, on 19 July 2023.

5.33 The claimant appealed and Ms Savage, head of employee experience, heard the appeal. On 9 August 2023, she sent an outcome letter rejecting the claimant's complaints. His complaints revolved around three broad areas: the respondent had not followed the correct procedure during investigation; he was not culpable for his actions because they occurred on a bank holiday; and the subsequent commencement of disciplinary action was too severe. She rejected his grievance. The appeal decision was final with no appeal process.

5.34 Following the conclusion of the grievance process, the disciplinary process resumed.

5.35 Ms Sabah Carter chaired the disciplinary hearing and reached the final decision.

5.36 From 13 September 2023 to 15 January 2024, there was considerable correspondence, and the claimant sought, and obtained, a number of adjournments of the disciplinary hearing. He was absent from work and he sent in various fit notes. He also received treatment in India.

5.37 The fit note of 6 December 2023 provided he should not work until 13 January 2023. The reasons were given as stress, low mood and insomnia.

5.38 On 11 December 2023, Ms Olver wrote to the claimant further to the correspondence of 23 October 2023 which had postponed the hearing of 24 October. She confirmed the disciplinary hearing would be rearranged, as the current fit note ended on 13 December 2023. It appears Ms Olver did not have this note when she wrote her letter; it is unclear when it was sent. In the meantime, a further fit note was sent for the period starting on 6 December 2023 to 13 January 2024. Ms Olver set out the various adjournments and recorded the various delays. She invited the claimant to a rearranged meeting on Monday, 18 December 2023 at 14:00 She referred to two previous occupational health appointments, both of which the claimant had failed to attend. She requested that the claimant consent to FSCS obtaining an occupational health report, so FSCS could receive advice on the claimant's current absence from work. It specified that if the claimant failed to cooperate, FSCS would only be able to rely on the information available.

5.39 The claimant was given an option of providing written representations, rather than attend on 18 December 2023. It specifically stated, "Should you fail to attend the meeting, it may proceed in your absence, and a decision made on the available evidence."

5.40 The claimant failed to attend the hearing on 18 December 2023; he failed to send any further medical evidence. Ms Olver wrote to the claimant again on 19 December 2023. She stated FSCS was prepared to reschedule the matter once more, and the disciplinary hearing would proceed on 16 January 2024. She set out details of all previous adjournments. She reiterated the request for an occupational health report.

5.41 On 15 January 2024, a relative of the claimant wrote requesting a further adjournment stating the claimant was "undergoing bed rest post emergency treatment." The email attached a discharge summary from an Ayurvedic hospital in India. This referred to pain in both knees, headache, blurred vision, and blackish discolouration on the thumb/finger. In addition, it had a certificate referring to the claimant taking prescribed medicines and rest for a period of 60 days.

5.42 Ms Olver responded and acknowledged the documents. She noted there was no current fit note and his current absence was unauthorised. She confirmed that the disciplinary hearing would proceed at 10:30 on 16 January 2024.

5.43 On 16 January 2024, the meeting commenced. The claimant did not attend. An email was sent to him and his family member responded and stated the discharge note confirmed he was not fit for work. It stated his severe symptoms continued and it sought a further postponement.

5.44 The disciplinary hearing proceeded, as confirmed by email of 16 January 2024.

5.45 Ms Sabah Carter decided to proceed and she gave the reasons in her statement as follows:

> **44. I decided, following discussion with and guidance from Martyn Beauchamp (Interim CEO), Karina Olver and Katherine Hoppins (People & Inclusion Manager), that it was reasonable to proceed in the claimant's absence given (1) the time that had elapsed since the May 2023 incident, (2) that as at 16 January 2024 the hearing had been arranged 8 times (3) the claimant had not provided current medical evidence to support that he could not attend a disciplinary hearing and (4) there was no date or time period forthcoming from the claimant as to when he would be able to attend the hearing; his position being that he would let us know when the hearing could be re-arranged. The matter had been going on for far too long with no agreed hearing date on the horizon; we were in an indefinite state of limbo that could not continue indefinitely. The claimant's race had no bearing on the decision to proceed in his absence.**

5.46 She considered the investigation report and the video. Following the disciplinary hearing she made further enquiries and interviewed Mr McRobert. The claimant provided no further evidence. On 30 January 2024 she wrote to the claimant confirming her decision to dismiss.

5.47 She considered the disciplinary policy which included reference to abusive disorderly or indecent conduct. She rejected the assertion the dress code did not apply on public holidays. She decided the claimant's action had damaged the respondent's reputation.

5.48 She considered the appropriate sanction and decided to dismiss, a warning or lesser sanction not being appropriate. She gives her reasons in a statement as follows:

> **49.6 A warning or lesser sanction was not appropriate because:**
>
> **49.6.1 The Claimant had not shown any remorse or apologised for his actions but rather than sought to blame the external contractors on the call. The Claimant not wearing any clothes could not be attributable to anyone but himself.**
>
> **49.6.2 The Claimant had not offered any reassurance to me that the incident wouldn't happen again.**
>
> **49.6.3 The Claimant had taken steps to double delete the video recording which in my view was akin to the deliberate destruction of evidence.**
>
> **49.6.4 The Claimant had not been transparent or forthright about the incident for example alerting his line manager. The FSCS only became aware of the incident via third party complaints.**
>
> **49.6.5 The Claimant's evidence provided during the disciplinary and grievance process was also inconsistent and in my view deliberately so. For example on one hand the Claimant had admitted to his genitals being visible but then changed his story to one in which he was wearing nude coloured underwear.**
>
> **49.6.6 All of the above led me to conclude that the Claimant had acted dishonestly and inappropriately and there was a complete breakdown in trust and confidence between the parties.**

5.49 The claimant was given a right of appeal.

5.50 The claimant appealed in February 2024 and sent a number of emails. The claimant's email of 6 February 2024 stated, "The entire process and outcome is nothing but racial discrimination, mental harassment, unfair dismissal." He set out a substantial narrative in support. Ms Fiona Kidy, chief financial and people officer, conducted the appeal. She considered all information provided by the claimant, including the further substantial grounds sent on 3 March 2024. She reviewed the relevant documentation including the investigation report and investigation notes, the meeting notes, the grievance, the disciplinary hearing notes, and the disciplinary outcome letter.

5.51 On 5 March 2024, the appeal hearing took place in person with the claimant present. The decision was taken by Ms Kidy. She identified

what appeared to be the various elements of the appeal and she sent her outcome letter on 21 March 2024.

5.52 Ms Kidy reached several conclusions. She did not accept the assertion that the disciplinary process had been tainted by race discrimination, and she gave reasons. She rejected the assertion the treatment had been unfair. She dealt with the detailed submissions from the claimant, including the allegation the claimant did not know who had complained. She rejected the assertion that meetings had been inappropriately arranged. She noted the respondent had adjourned and rescheduled the disciplinary hearing on numerous occasions. The disciplinary meeting had been rescheduled eight times following the claimant's requests. She rejected the claimant's assertion that the investigation process was biased and not evidentially based. She considered the claimant's reference to the ACAS Disciplinary and Grievance Code of Conduct 2015. She considered the respondent's own procedure. She was not satisfied there had been any material breach of any procedure which undermines the fairness of the decision. Ms Kidy supported the decision to dismiss.

The law

6.1 For claims of unfair dismissal, under section 98(1)(a) of the Employment Rights Act 1996, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held –

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. 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 and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 In considering the question of contribution, the tribunal must make findings of fact as to the claimant's conduct. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the award by such proportion as it considers just and equitable having regard to that finding.

6.7 Pursuant to section 207 Trade Union and Labour Relations (Consolidation) Act 1992 the ACAS Code on Disciplinary and Grievance Procedures 2015 ('the Code') is admissible in any employment tribunal proceedings, and the tribunal is obliged to take into account any relevant provisions of the Code. A failure to observe any provision of the Code shall not in itself render that respondent liable to any proceedings.

6.8 Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

> **(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of--**
>
> > **(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or**
> > **(*b*) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
> **(3) For the purposes of this section--**
>
> > **(*a*) conduct extending over a period is to be treated as done at the end of the period;**
> > **(*b*) failure to do something is to be treated as occurring when the person in question decided on it.**

> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--**
>
> > **(*a*) when P does an act inconsistent with doing it, or**
> > **(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

6.9 It is possible to extend time for a discrimination claim. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.10 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA).

6.11 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

6.12 The tribunal can take into account a wide rage of factors when considering whether it is just and equitable to extend time.

6.13 The tribunal notes the case of **Chohan v Derby Law Centre** 2004 IRLR 685 in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others** 1997 IRLR 336. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.14 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.15 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

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

6.16 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **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. (para 10)**

6.17 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.18 Section 23 refers to comparators in the case of direct discrimination.

> **Section 23 Equality Act 2010 - Comparison by reference to circumstances**
>
> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.19 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.20 **In considering t**he burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.**
>
> **(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.**
>
> **(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.**
>
> **(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.**
>
> **(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.**
>
> **(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.**
>
> **(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.**

> **(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.**
>
> **(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.**

6.21 If the employee is in repudiatory breach of contract, the employer may affirm the contract or the employer may accept the breach and treat the contract as terminated. In the latter case, the employee will be summarily dismissed. If the employee's breach is repudiatory and it is accepted by the respondent the employee will have no right to payment for his or her notice period.

6.22 In order to amount to a repudiatory breach, the employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract **Laws v London Chronicle (Indicated Newspapers) Ltd 1959 1WLR 698, CA.**

6.23 The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the court or tribunal to decide. In **Briscoe v Lubrizol Ltd 2002 IRLR 607** the Court of Appeal approved the test set out in **Neary and another v Dean of Westminster 1999 IRLR 288, ECJ** where the special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment." There are no hard and fast rules as to what can be taken into account. Many factors may be relevant. It may be appropriate to consider the nature of employment and the employee's past conduct. It may be relevant to consider the terms of the employee's contract and whether certain matters are set out as warranting summary dismissal. General circumstances including provocation may be relevant. It may be appropriate to consider whether there has been a deliberate refusal to obey a lawful and reasonable instruction. Clearly dishonesty serious negligence and wilful disobedience may justify summary dismissal but these are examples of the potential circumstances and each case must be considered on its facts.

Conclusions

Claim one -2216399/2023

7.1 We first consider the allegations of direct discrimination contained in claim one.

7.2 The claim was presented on 13 November 2023. The conciliation period was from 4 September to 16 October 2023. Time for bringing any claims for which the primary time limit expired during the conciliation period would be extended until 16 November 2023. It follows all claims prior to 5 June 2023 would be out of time.

7.3 Allegations one and two concern events in 2021. Allegations three concerns a rejection around June 2022. Allegation four concerns a rejection around April 2022. It follows for allegations one to four, the latest date of rejection for any of the posts was June 2022. These claim are brought around a year out of time.

7.4 Allegation five concerns events in April 2023, which are between one and two months out of time. Allegation six concerns events up to May 2023, and is brought out of time. Allegation seven concerns events in March 2023, and is also out of time.

7.5 We have considered whether time should be extended.

7.6 The claimant has given no reason for why he did not bring his claims in time. He confirmed he understood, at all material times, the concept of direct discrimination and he knew a claim could be brought. He formed the view that the various rejection and other actions of the respondent were acts of race discrimination at the point the alleged treatment occurred. He had known about the law for at least fifteen years. The length of the delay for the majority of the claims is significant. The respondent has produced evidence, albeit some of the primary evidence concerning the decisions made by the agencies is missing. There is no suggestion the respondent has failed to cooperate, or that any action of the respondent has led to any delay. The claimant has not acted promptly either in bringing the claims of seeking advice. Even where it is possible for a respondent to defend the claim, there is no automatic right to an extension. We find it is not just and equitable to extend the time in relation to any of the claims brought in claim one.

7.7 Lest we be wrong in refusing to extend time, we note we have heard the evidence and we should deal with the merits of each of the allegations briefly.

7.8 Allegation one and allegation two: for both positions the claimant was rejected following competitive interview. He was given a material advantage over other candidates by being allowed to proceed to the

interview stage without going through the relevant external sift. We accept Ms Stimpson's evidence that the claimant's application was poor and failed to reveal sufficient relevant experience. The position applied for was approximately twice the claimant's salary and FSCS was seeking relevant experience, particularly in heading departments. Whilst the claimant showed experience of some leadership roles, his experience was limited.

7.9 The claimant has pointed to no fact from which we could find that rejecting him for these roles was an act of direct discrimination.

7.10 It is the claimant's contention that he was demonstrably the best candidate. If this were the case, he may be able to argue that rejection of him was unexplained unreasonable conduct. A failure of explanation for unreasonable conduct can turn the burden. We do not accept the claimant has produced any evidence which demonstrates that he was the best candidate. All the evidence in relation to this post, and the other posts identified in this claim, runs to the contrary. The claimant lacked relevant experience. His CV lacked detail and was poorly set out. For the two posts for which he was interviewed, his interviews were poor. Proper feedback was given to the claimant and areas of weakness identified. Throughout his employment, those weaknesses remained. We find, on the balance of possibility, that he was not the best candidate, and he did not demonstrate basic suitability for the roles.

7.11 In any event, we accept the respondent has established, on the balance of probability, a reason for the treatment which in no sense whatsoever was because of race. The reason was the claimant failed to demonstrate appropriate suitability for those roles. Allegations one and two fail.

7.12 Allegation three: Ms Marin rejected the claimant for the role of head of customer experience because he was rejected on the sift by the external consultant, Triangle. If the reason for rejection on the sift was tainted by discrimination, the final rejection would also be discrimination as the decision was adopted. We have limited evidence on the reason for rejection. However, feedback was given and that feedback demonstrates the claimant's application was poor and failed to reveal relevant experience. The claimant has identified no fact from which we could find the reason for rejection was because of his race. It follows the burden does not shift. Even if it did, the reason must be established on the balance of probability. The respondent, in this case the FSCS, has established the reason on the balance of probability. The claimant was rejected because his application was poor and did not demonstrate that he met the relevant competencies.

7.13 Allegation four: his application for the role of position of head of products was rejected. We have limited evidence on the reason for rejection. However, as for allegation three, feedback was given and that feedback demonstrates the claimant's application was poor and failed to reveal

relevant experience. The claimant has identified no fact from which we could find the reason for rejection was because of his race. The burden does not shift. The respondent, in this case the FSCS, has established the reason on the balance of probability. The claimant's application was rejected because his application was poor and did not demonstrate that he met the relevant competencies.

7.14 Allegation five: this concerns an alleged failure to give the claimant a greater salary increase. The claimant received a salary increase pursuant to the same policies applied to all employees. It appears to be the claimant's case that he should have been given a greater salary increase because of his alleged overall contribution. He argues this justified his being treated more favourably that others.

7.15 There was no applicable policy which would have allowed the discretion argued for by the claimant. The claimant's performance was not exceptional. He received a significant pay increase in accordance with the policy. There is no fact which could turn the burden. We accept the respondent's explanation. The claimant received a pay rise in accordance with the applicable policy. There is no direct race discrimination

7.16 Allegation six: this claim fails factually. Mr McRobert responded to all the claimant's emails. He either did so in writing, or he discussed those emails with the claimant. In considering this allegation we have had full regard to the matters raised in the claim form.

7.17 Allegation seven: this allegation fails factually. The claimant may have had desires and expectations, but Mr McRobert did not fail to complete any process. Mr McRobert treated the claimant in the same way as he treated other members of staff. There is nothing to suggest that the treatment of the claimant was because of race. The claimant's complaint concerns the completion of quarterly performance reviews. Mr McRobert was not required to do that by the respondent's policies, he did it for no one else. The respondent establishes its explanation. There was no less favourable treatment. No treatment was because of race.

<u>Claim two – 2217762/2024</u>

7.18 We first consider the claim of unfair dismissal.

7.19 The respondent alleges the claimant was dismissed because of a reason related to the claimant's conduct.

7.20 The first question is whether the respondent has established its reason. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.

7.21 In this case, the key relevant facts are the claimant was on a Teams meeting on 8 May 2022 when he stood in front of the camera on his laptop

and because he was wearing nothing below the waist, he revealed his genitals. This, in the context of the respondent's policies, was taken to be an act of serious misconduct which justified dismissal.

7.22 We accept that Ms Carter, who dismissed the claimant, held an honest and genuine belief that the relevant conduct had occurred. That belief establishes the reason.

7.23 The next question is whether she had grounds for that belief. The burden is neutral. During the investigation and the subsequent disciplinary process, the claimant's position remained ambiguous. At times he appeared to deny that he was naked, on one occasion he referred to wearing flesh-coloured underwear. At other times, it appeared implicit that he accepted he had been naked.

7.24 There were two witnesses from Capgemini who gave accounts. The respondent had also recovered the video. The video clearly demonstrated that the claimant had exposed his genitals. Ms Carter had ample grounds on which to sustain her belief.

7.25 The third question is whether, at the time she formed that belief, there had been a reasonable investigation, being one which was open to a reasonable employer. The claimant has made a number of criticisms of the process and we will consider each of those criticisms.

7.26 We do not accept that it was necessary to reveal the identity of those individuals who complained. The claimant knew that there were four people on the call. The identity of the specific complainants added nothing. There was no reason identified for why their identities should be specified. For example the claimant did not identify any reason why any of the participants may be hostile to the claimant.

7.27 The incident was investigated by Mr McRobert. He reviewed the recovered video. Although the claimant did not initially see the video in the investigation, it had been the claimant's video and he could have viewed it before he deleted it. Further, he could have requested to view it in the investigation, but he chose not to. It was given to him as soon as he did request it in July. The failure to show it him during the investigation was not unreasonable.

7.28 The evidence of the complainants had limited importance. The circumstances were demonstrated by the video evidence, which could reasonably be seen as conclusive as to what occurred. It was the claimant's explanation that was most relevant. It was not necessary for the claimant to view the video in order to say whether he was wearing any clothes, or why he had chosen not to.

7.29 The claimant states that the wording of the allegation varied. We accept the exact wording employed to identify the allegation varied. However, each formulation of the wording identified the same allegation, and we do

not accept there could be any confusion. The claimant was accused of revealing his genitals on 8 May 2022 in a Teams meeting with representatives of Capgemini. At no time was the allegation unclear. At all times he knew what incident was the subject of both the investigation and the disciplinary proceedings.

7.30 Mr McRobert undertook a reasonable and thorough investigation. He identified the relevant primary information. Paragraph 5 of the ACAS Code of Practice 2015 requires the investigator to identify the relevant facts. He identified the relevant facts and recorded them in his report.

7.31 Ms Carter had access to the investigation report and all further information provided by the claimant. When she reached her conclusions, they were supported adequately by an appropriate investigation.

7.32 Finally, we must decide, here the burden being neutral, whether the dismissal was fair or unfair having regard to all the relevant circumstances. In doing so, we remind ourselves it is not for us to substitute our view. Generally, there is a band of reasonable responses where one employer may choose to dismissal another may not.

7.33 The claimant suggests that the respondent's code of conduct was out of date and should not have been applied. We do not accept that submission. Even if the code of conduct was due for review, it remained in force until reviewed. In any event, we do not accept that an employer needs a specific code to explain to employees that it is inappropriate to appear on a Teams meeting, either with colleagues or with any external agency, whilst being naked from the waist down.

7.34 We accept it may not have been his intention to reveal his genitals. It is possible that he had not intended his action. It is possible there was a momentary lapse of concentration, and in that sense his conduct was accidental. However, any reasonable employee should appreciate that there is an obvious potential risk associated with failing to dress properly. The fact that he was in a state of undress may be enough to establish his conduct was inappropriate.

7.35 The claimant suggests that he should not have been required to work on a bank holiday. First, we find he was not required to work on that bank holiday, he chose to. Second, even if he were required to work inappropriately, that is no reason for appearing in a state of undress.

7.36 We have considered Ms Carter's reasons for refusing to give a lesser sanction and we should summarise and consider those.

7.37 She refers to the claimant's lack of remorse or apology. We accept that in his first email responding to Mr McRobert, he did refer to an apology. However, thereafter he consistently prevaricated and sought to obscure or deflect blame. He did not consistently show remorse. He did not consistently apologise.

7.38 We accept the claimant offered no reassurance that he had learned from his mistake or that the incident would not happen again.

7.39 The claimant deleted the video and then deleted it again from the recycle bin. Ms Carter was not unreasonable in taking the view that the deletion was deliberate and was consistent with the claimant seeking to destroy evidence.

7.40 Ms Carter noted the claimant's failure to inform his manager of the incident.

7.41 Ms Carter found the claimant's account to be inconsistent. In particular, she noticed that on one occasion he referred to wearing flesh coloured underwear. She viewed this as a deliberate attempt to mislead, and it was reasonable for her to do so. We accept she concluded the claimant had acted dishonestly and inappropriately, and that she considered this undermined the trust and confidence.

7.42 In those circumstances, we accept that dismissing the claimant was within the band of reasonable responses. We find the allegation of unfair dismissal is not well founded.

7.43 We need to consider whether the claimant's action was culpable, both in the context of contributory fault and in the context of wrongful dismissal.

7.44 We find that the claimant chose not to wear either trousers or underwear on 8 May 2022, instead he deliberately chose to be naked from the waist down. This led to an obvious risk. If at any point he should need to stand, it was likely that he would reveal his genitals, if his camera was on. The claimant was an employee in a leadership role. He was dealing with external consultants. He should have realised that being naked was inappropriate, regardless of any policy. If he chose to wear no clothes from the waist down, he should have taken care to ensure that this fact did not become apparent. He could have taken the simple precaution of turning off his camera before he moved the laptop or stood.

7.45 The claimant's action caused embarrassment to the employer and was inconsistent with his position and role.

7.46 The claimant failed to provide a proper explanation. It would have been possible for the claimant to explain his action. However, before explaining his action, he needed to accept that he had not been appropriately dressed, and he failed to do so consistently. Such an explanation could include, where appropriate, medical evidence. Before this tribunal, the claimant has not accepted that he was naked on the call, or provided any explanation as to why he was not fully dressed. In all the circumstances, we find that the claimant's action was deliberate. For the purposes of contributory fault, we find his contribution was 100%.

7.47 For the purposes of wrongful dismissal, we find the claimant was in fundamental breach of contract and the respondent was entitled to accept that breach and thereby bring his employment to an end without notice. The claimant is not entitled to any notice pay.

7.48 Finally, we consider the allegations of direct discrimination in claim two.

7.49 Allegation eight: the respondent does not accept the matters referred to in allegation eight have been properly pleaded and identified as allegations of direct discrimination. We do not have to finally resolve that. In any event we find that they fail. The names of the complainants were not disclosed because the respondent followed its normal procedures. There is no fact from which we could find this was because of race. The explanation is established. The claimant was provided with the video when he requested it. It would have been made available to him during investigation had he asked. There is no less favourable treatment. There was no specific reason for the respondent to discuss the matter with all the individuals on the call on 8 May 2022. Two witnesses were spoken to. There is no fact from which we could find that the failure to speak to the other two was because of race. We accept the explanation which is the effect that it was not necessary or required.

7.50 Allegation nine: disciplinary meetings were set during periods when he was absent because of ill health. There is nothing in principle which prevents an employer from proceeding with a disciplinary hearing, even when there is a relevant fit note. Each case must be considered on its merits. In this case, the respondent adjourned the disciplinary hearing on eight occasions. Ultimately, it proceeded with the disciplinary hearing at a time when the claimant had not submitted a formal fit note. There is nothing unreasonable in the respondent's approach, and there is no unreasonableness that calls for an explanation. There is no fact from which we could conclude that any of the respondent's approach was because of race. We accept the respondent's explanation which is to the effect that it accommodated the claimant and ultimately, absent any specific medical evidence provided by occupational health or otherwise, deemed it appropriate to proceed.

7.51 Allegation 10: this allegation fails factually. The claimant was not required to work on a public holiday. He worked on that day because he chose to.

7.52 Allegation 11: we considered the reasons why the claimant was dismissed. There is no fact from which we could find that the respondent would have treated someone of a different race more favourably in the same circumstances by refusing to dismiss. There is no fact that would turn the burden. The respondent establishes its explanation on the balance of probabilities. It dismissed because it found the alleged conduct was made out and Ms Carter considered whether the claimant had shown any proper remorse or demonstrated that there would be no repetition.

7.53 It follows that all the claims of race discrimination fail. The claim of unfair dismissal is not well founded and is dismissed. The claim of wrongful dismissal fails and is dismissed.

_____
Employment Judge Hodgson

Dated: 1 May 2025

Sent to the parties on:

7 May 2025
.....

.....
For the Tribunal Office