



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE F SPENCER
MEMBERS: MR D KENDALL
MR J BALLARD

CLAIMANT MR P THAKKAR

RESPONDENT GALLARDO SECURITIES LIMITED

ON: 24-28 January and 7th February and (in chambers) 23rd February 2022

Appearances:

For the Claimant: Mr M Singh, counsel
For the Respondent: Ms G Churchhouse, counsel

This hearing was carried out on CVP (Cloud Video Platform). The parties did not object to it being conducted in this way. It was not possible to conduct the hearing in person and all issues could be resolved using CVP

JUDGMENT

The Judgment of the Tribunal is that the Claimant's claims of unfair dismissal, race discrimination and harassment related to race are not well founded and are dismissed.

REASONS

1. The Claimant worked for the Respondent, an interdealer broker from 3 April 2017 until 27 February 2020 although the circumstances of his departure are in dispute between the parties. He is of Indian origin.
2. The Claimant brings claims of direct race discrimination, harassment related to race, and unfair dismissal. The agreed issues are set out in the schedule to this judgment for ease of reference.

3. Applications. At the start of the hearing the Respondent made a number of applications to strike out the claim based (i) on the Claimant's conduct on 28 November 2021 (ii) on the grounds that claim was scandalous or vexatious or had no reasonable prospect of success or (iii) for non-compliance with orders of the Tribunal. For reasons which we delivered orally on the 2nd day of the hearing we declined to strike out the claim without having heard it, despite the improper conduct of the Claimant on 28th November 2021. There was also an application to excise paragraphs of the Claimant's witness statement which was agreed.
4. Evidence The Tribunal had a bundle of documents running to some 586 pages. We heard evidence from the Claimant and, on his behalf, from Mr S Rollo, who was formerly employed by the Respondent. For the Respondent we heard from
 - a. Mr G Campolieti, CEO and director of the Respondent
 - b. Mr Marc Levy, a director and the Claimant's line manager
 - c. Mr Dominic Brindle, Senior Broker and Compliance Officer
 - d. Mr Florian Josef, Senior Broker.
5. The Claimant had submitted a witness statement on 9 July 2021. However, on 22 December 2021 less than a month before the full hearing the Claimant sought permission to replace that with a longer witness statement (more than double the length of the first witness statement). The Respondent did not object to this but has referred to the first witness statement to raise credibility issues. The Respondent's witnesses (Mr Campolieti, Mr Levy and Mr Brindle) also submitted supplementary witness statements to deal with new allegations raised in the Claimant's second witness statement, and to deal with the Claimant's conduct of 28 November 2021 (which was the subject of the preliminary application).

Credibility

6. The factual allegations relied on by the Claimant are all denied by the Respondent. This is a case which turned very much on the findings of fact. We have had no hesitation in preferring the evidence of the Respondent's witnesses. The Claimant's case is set out separately as we do not accept his account of events.
7. The Claimant's credibility was severely damaged by a number of factors as follows:
 - a. In evidence the Claimant did not appear to give careful thought to questions that were being put to him. Instead, he aired a number of grievances at length, including that he had been unfairly questioned about his absences, had been "tricked" into signing a new less-favourable contract, and had received lower bonuses than he should have done. He provided no evidence of what bonus he should have received.

- b. He admitted in evidence that he had lied to his employers when he told them that he was off work because he was having an operation and appeared to think it entirely acceptable to have done so.
- c. The Claimant had no contemporaneous written evidence to support any of his claims. Given the extreme nature of the alleged conduct we find it surprising that the Claimant was not able to provide any emails (either to the Respondent, or to friends or family), despite the Claimant having said that he had complained twice a month every month to Mr Campolieti during his time with the Respondent and had complained “on numerous occasions” to Mr Levy about Mr Campolieti’s treatment of him. When asked about this in cross-examination he said “of course I won’t have evidence of abusive remarks. No one in their right mind would put it in an email.” This was unconvincing, given the frequency of the alleged complaints and the relaxed manner in which he communicated with his line manager. Although the Respondent is a small employer and had no formal HR Department Mr Brindle was the Compliance officer and there were channels for complaint.
- d. In cross-examination the Claimant was asked to explain why his second witness statement was some 9 pages longer than his first witness statement. The Claimant told the Tribunal that this was because he had evidence and information in his old laptop; but he had forgotten his password and been locked out of it. It was only when he finally got access to his old laptop, he was able to provide the additional detail. However, none of the additional material in the second witness statement had come from his laptop (the only new documents being text messages from his phone) and there was no additional documentation produced to support the new allegations in his second witness statement.
- e. The Claimant told the Respondent that he had been recording the shouting and swearing that had taken place in the office, but no such recordings have been provided. It was also the Claimant’s evidence (in his witness statement) that he had recorded a telephone call that took place on 28 February 2020, but again this recording was not provided. When asked the Claimant said that it had become corrupted, but we were unconvinced.
- f. The Claimant’s explanation for his failure to provide sick certificates was also unconvincing. “I did not provide a medical certificate as I did not feel comfortable contacting my local GP to be referred to a therapist.” He said that his absences, lateness and changes in attitude and performance were due to his deteriorating “mental health” caused by the Respondent, but

no medical evidence of any deteriorating mental health was provided.

- g. Text messages passing between the Claimant and Mr Levy (recorded in the bundle) suggest a line manager who was slow to question the Claimant and slow to reprimand.
8. Mr Rollo gave some evidence in support of the Claimant, but we were not persuaded. His short witness statement just says that he had heard some of the remarks which were set out in the Claimants particulars of claim, though he gave no context to those statements. In cross-examination, he said that he saw daily “grotesque harassment and that he was amazed how the CEO could harass an employee like the claimant who was working and doing his best”. We did not consider Mr Rollo was a reliable witness. He is engaged in considerable litigation against the Respondent in Italy and has his own axe to grind with the Respondent.
9. On the other hand, we considered that the Respondent’s witnesses gave truthful evidence. Mr Levy came across as mild-mannered and we accept his evidence that it was not in his nature to shout. His text messages to the Claimant indicate a relaxed style of management. The other witnesses came across as truthful and consistent.
10. We set out below our findings of fact. Page numbers refer to the electronic page numbers in the bundle.

Findings of relevant fact

11. The Respondent is an inter-dealer broker. At the time of the hearing it employed 15 people working on an open-plan trading floor. The trading floor was noisy with voices raised to communicate process to the other dealers. The Claimant began to work for the Respondent as a Junior Broker on 3 April 2017 on a salary of £18,000 plus a discretionary bonus. He was promoted to an Equity Derivatives Broker in August 2017 on £24,000 plus a share of profits. The latter was subject to his having generated revenues each quarter of the greater of 3x his quarterly salary or £15,000. (129) Mr Levy was his line manager. It was a small operation with no separate HR, but Mr Brindle was its Compliance Officer. The Team was international, mostly European, but the Claimant was of Indian origin and the IT Manager, Athar, was of Pakistani heritage.
12. The Respondent does not seem to have kept any formal personnel records as to attendance, sickness or performance and there was no appraisal process, although we understand that Athar kept a record of late arrivals. However, we had a printout of messages passing between the Claimant and Mr Levy which evidenced the Claimant’s irregular attendance at work.
13. Mr Campolieti and Mr Levy say that from about June 2018 they began to have concerns about the Claimant’s professionalism and about his

unreliability and frequent unauthorised absences from work. Text messages in the bundle evidence many occasions where the Claimant is texting Mr Levy to say that he is running late.

14. On 8 May 2019 Mr Campolieti spoke to the Claimant informally and asked him about the reasons for his apparent change in behaviour. The Claimant told Mr Campolieti and Mr Levy that he suffered from PTSD due to an earthquake, which had happened in his childhood. He said that raised voices on the trading floor caused him some concerns. Mr Campolieti told Mr Josef about this. We do not accept, as the Claimant alleges, that Mr Campolieti told the whole office and that this led to “the office mocking and teasing me through means of derogatory terms and laughing at the idea of suffering from PTSD.” We also do not accept, as the Claimant alleges, that on 8 May 2019 that he told Mr Campolieti that he had been mistreated and discriminated at work or said that it was this that triggered his PTSD. The Respondent’s witnesses all denied that the Claimant ever said that he was unhappy about the way he was treated at work.
15. On Wednesday, 17 July 2019, while the Claimant was on holiday, Mr Levy texted the Claimant to check that he would be back on Friday. The Claimant said that he would not - he had missed his flight and would catch the flight on Saturday. However, on Monday morning (22nd July) the Claimant texted Mr Levy to say that he had only just landed, his flight was delayed and asked if he could come in on Tuesday. (The Claimant had not called Mr Levy before he left the US to tell him that his rebooked flight had been delayed; the Claimant said that this was because he did not have his mobile phone’s call-roaming setting on.) Mr Levy texted back that they needed him in the office to do the report from Friday. The Claimant said that he would be in for midday, but texted at 4.50 to say that he would not come in as he had gone home and fallen asleep. In evidence the Claimant did not accept that the Respondent needed him in the office. He said “They expected me to come onto the office to do a junior broker’s job. They just wanted to make my life difficult”.
16. In early August following a late notification from the Claimant that he was not well and would not be in that day Mr Levy texts “it’s not party time and you can’t come in every other day or late in the day. The way you have been recently is terrible. I would strongly suggest that you change your approach.”
17. In August 2019 Mr Campolieti asked the Claimant to sit next to him in order that Mr Campolieti could help the Claimant improve his performance, which he felt was deteriorating. His revenues were declining because of his frequent absences from work and, in the opinion of Mr Campolieti, because of a lack of motivation when he was in the office.
18. On 27th September 2019 the Claimant resigned with notice. We do not accept the Claimant’s evidence that he told Mr Campolieti that his behaviour and treatment towards the Claimant was affecting his health, causing him mental anguish and had left him with no choice but to resign

and seek other opportunities in Canada. In his resignation letter (586) he says that he had enjoyed his time at the Respondent and was grateful for the opportunity given. He told Mr Campolieti that he had got another job.

19. Mr Campolieti sought to persuade the Claimant to stay. He offered him a new contract for a fixed two-year term. This changed his remuneration package from a salary of £40,000 per annum to “drawings” of £60,000 a year plus a performance related profit share which generated additional income for the Claimant if he made revenues per quarter in excess of three times his quarterly remuneration. Mr Campolieti told the Tribunal he was keen to keep the Claimant as he had been good to start with and he thought the new contract would motivate him. The Claimant now says that he was “tricked” into accepting this as it reduced his bonus, but the Claimant did not complain to the Respondent at the time or say that the new contract was somehow less favourable than his old one or seek to renegotiate. The calculation of profit share in both contracts appears to be the same. (The Respondent refers to the Claimant being entitled to a discretionary bonus and not a profit share but the contracts that the Claimant signed in September 2017 and October 2019 do not refer to bonus but refer to a profit share dependent on having generated revenues of 3x the quarterly earnings). From the figures provided by the Respondent, the Claimant failed to meet the target for a profit share after Q2 2019.
20. The Claimant’s reliability and performance did not improve following the issue of the new contract. He had received a profit share/bonus in each quarter of 2018 and for the first two quarters of 2019 but did not receive a profit share/bonus in the second half of 2019 or in Q1 2020 because he had generated insufficient revenue (273).
21. Text messages between the Claimant and Mr Levy in the bundle (211 onwards) evidence the number of times that the Claimant texted Mr Levy to say that he was going to be late. Mr Levy’s responses appear to be relaxed in relation to all these various text messages, generally responding “OK” or “no probs”. In the period from 15th February 2019 to 28th February 2020 the Claimant missed 55 days of work including 31 days reported for unspecified sickness, 4 days of unauthorised absence and 2 days where the Claimant missed scheduled return flights.
22. In September the Claimant was off sick with what he said was a sinus infection. There are references in the text messages to hospital appointments and the Claimant told Mr Levy that he would need to have an operation on 16 January. On 9th October 2019 following a further sickness absence Mr Levy asked the Claimant to provide a medical certificate “*as you are off too often*”. Mr Campolieti also emailed the Claimant on 15th October, (226) after he had again reported that he was feeling sick, asking the Claimant to provide a medical certificate. The tone is polite “*If you don’t mind, we would need to see a medical certificate*”. No medical certificates were provided, and the Respondent did not insist.

23. In general, the tone of the Claimant's text messages to Mr Levy show a singularly casual attitude to work.
24. The Claimant had booked a day off for Diwali on Friday 25th October. On 28 October 2019 the Claimant did not attend work. He did not provide any explanation until 2.30 when he texted Mr Levy to say that he was not coming in because there had been a family Diwali party "and I overdrank, vomited and passed out and only woke up an hour ago, sorry" (206). On 11th December Mr Levy texts the Claimant at 12 o'clock "you don't let us know any more if you are turning up to work?" On 6 January 2020 he does not come in and texts "it was my birthday on Saturday I went away over the weekend, and I didn't make it in time yesterday so I won't be back this morning... Will be in tomorrow."
25. On 5 December 2019 Mr Campolieti emailed the Claimant as follows "I am not too sure about the reason for your irregular attendance at work, but it is not acceptable to come to work when you feel like. Your colleagues depend on you to show prices to your clients and there needs to be some sort of reliability on you side..... If these are holidays I can tell you that you have already gone way over your pro rata holiday allowance. If these are sick days, we would need to see a medical certificate if you think this pattern is likely to be ongoing." He sent the Claimant a link to a private healthcare insurance broker. On 10th December the Claimant failed to turn up to the Christmas dinner but did not inform anyone that he was not coming. (217)
26. In January the Claimant took 11 days sickness absence ostensibly for an operation. It appears that he told Mr Levy that his operation had taken place by 11 January 2020 (218) and he was then off work from 10th January to 27th January inclusive. On 20th January Mr Campolieti emailed the Claimant to say that they were not sure where he was, and that Mr Levy was not satisfied with his "vague explanations". He asked the Claimant to provide a letter from his doctor certifying his operation and that the time off was necessary for his recovery. The Claimant did not provide this letter and, as we now know, there was no operation. The Claimant was absent without giving a reason for a further 3 days in January and late on a further one day.
27. At this time the Claimant started coming to work in trainers and a baseball cap. The dress code at work was smart casual but we accept that wearing a baseball cap at work was considered unprofessional.
28. In cross examination the Claimant accepted that he had not had an operation. He said, "it was just an excuse to get away from all the bullying and harassment at work". The Claimant had not only lied to his employers, but it was a lie which had been planned. As early as September the Claimant was referring to having to get an operation done and that it would be on 16 January. He refers in December to having had some disappointing news from the doctors (217). His text messages in January repeatedly refer to being in pain. He says he is on antibiotics and in pain.

As we set out below we do not accept the Claimant's evidence about the conduct of the Respondent's witnesses at work or the bullying and harassment he alleges.

29. On 20th February the Claimant went to a client meeting in Amsterdam. He was due back in the office the following day but missed his flight. He texted Mr Levy that he was trying to get the next flight back (219). Mr Levy texted him "At the moment it is catastrophic what you are doing. No trade, late, talking back, missing your flight, not turning up. I hope you realise." The Claimant texted back defensively "well Marc in all honesty I obviously didn't miss the flight by purpose, am here at the airport trying to sort it out. I was out with these guys till 3 a.m." Mr Levy responds "I understand but we are short-staffed expi-week. You could have taken this a bit more seriously."
30. After the missed flight Mr Campolieti discussed matters with Mr Levy and looked into his attendance records. He decided that they would need to tackle this. On Thursday 27th February 2020 he called the Claimant into a meeting. Mr Campolieti had intended to talk to the Claimant, to find out what was wrong and to take action by giving him a formal warning. His revenues had been declining, his attendance was irregular and there were complaints from quite a few people in the office.
31. We find that during the meeting the Claimant started shouting at Mr Campolieti. He said they had been treating him differently because of his race. He said that he had got a lower percentage bonus than anyone else, and that this was because of his race. There was a discussion about the Claimant having to pay for the re-booked flight from Amsterdam. He told Mr Campolieti that he had been coming into the office with a voice recorder and that he had recordings of Mr Campolieti and Mr Levy insulting him. Mr Campolieti was affronted. He thought the recordings were a breach of privacy. He told the Claimant to go home and that Mr Levy would be in touch.
32. The following day (Friday) Mr Campolieti and the Claimant spoke briefly on the phone. Mr Campolieti was on the Heathrow Express as he had a flight to catch to Geneva and does not recall much of the conversation. It is evident however from the subsequent text messages (233) that the Claimant was aggrieved that Mr Campolieti had asked him to pay for the missed flight back from Amsterdam, and he complains that Mr Josef and Jack [Meikle] missed a flight but got reimbursed and he didn't. (Mr Josef told the Tribunal that none of his flights are reimbursed and that he pays his own expenses). He says that when Jack "went missing for months no one asked him for a sick note" but that when he missed a few days he was asked for sick note. He said he was discriminated against and victimised and that the Respondents were constantly shouting and swearing, and he had it all recorded. He says that Mr Levy "*blackmailed me because he said if you carry on asking how you calculate your bonuses you won't get a bonus next quarter*" and that he had it recorded. Not once in those text messages does the Claimant say that he had been called a cunt or that Mr

Campolieti had said to the Claimant “fuck off I don’t want you working here any more” or that he thought he had been dismissed.

33. On Monday 2nd March Mr Campolieti sent an email to the Claimant (sent to both his work and his home email). In that email he sent a calculation of what the Claimant’s bonus would have been had it been calculated using the formula used to calculate Mr Josef’s figures and explained that, because of the difference in the remuneration structure between the Claimant and Mr Josef, if Mr Josef had made the Claimant’s revenues he would have received a lower bonus than the Claimant had received. He also told the Claimant that “*despite the fact that you have almost as much experience as Jack and you are on a discretionary bonus, last quarter you received more than double his salary and 4x his bonus.*” He continued “*we are currently reviewing your behaviour for the last year or so and we will invite you for a disciplinary hearing within the next couple of weeks. In the meantime, you do not need to come to the office.*”
34. There was no response to this. On 11th March 2020 the Respondent sent a formal letter of suspension and a request to attend a disciplinary investigation with Mr Levy on 19th March 2020 to consider
1. *Your excessive levels of absence from work;*
 2. *Your persistent lateness for work;*
 3. *Your failure to provide medical certificates when you have been absent from work;*
 4. *You taking in excess of your annual holiday entitlement last year;*
 5. *You failing to report your absence following a meeting in Amsterdam on Thursday, 20th February 2020, and a resulting period of unauthorised absence from work; [and]*
 6. *You missing your return flight from Amsterdam on Friday 21st February despite your line manager’s specific instructions not to miss it ; [and]*
 7. *Repeated failure to follow your line manager’s directions*
 8. *Leaving the desk repeatedly and for long periods of time during busy market hours*
 9. *Failure to help your peers with small tasks when requested to do so.”*
35. On 18th March the Claimant’s solicitors responded on his behalf (231). That letter alleged direct discrimination and harassment by the Respondent. It alleged that on 27th February Mr Campolieti had called the Claimant to a meeting room and began to shout and swear calling him a “c***” and telling him to “get the fuck out of here I don’t want you working here anymore.” The letter said that the Claimant “hereby resigns his employment with notice in the face of the Respondent’s fundamental breach of contract” and that his last day of employment would be 18 May 2020. He would not attend any disciplinary investigation meeting, and considered that he was not bound by any post termination restrictions on employment. In the alternative it reserved the Claimant’s position to argue

that he was in fact expressly dismissed by the Respondent on 27th February 2020. It also alleged that the Claimant had not received nearly 50% of the bonus he should have received since January 2018, but no calculations were provided.”

36. A substantive response from the Respondent’s solicitors was not received until 26 May but the Respondent ceased to pay the Claimant after the end of March and took no further steps to compel the Claimant to attend the disciplinary investigation meeting.
37. The Claimant contacted ACAS on 17th April and presented his claim on 30th May 2020.

The Claimant’s case

38. The Claimant’s account of events is very different. We do not accept his account. We did not find that the Claimant was a truthful witness.
39. It was the Claimant’s case that throughout his time at the Respondent he was shouted and sworn at by Mr Campolieti and others. He says that preferential treatment was given to Jack Meikle. He said that when Mr Meikle made mistakes he would not be ridiculed and shouted at but would be nurtured into his role. On the other hand, the Claimant would be shouted at, ridiculed and sworn at “on a daily basis”. He says that from as early as December 2017 when he input a price incorrectly Mr Campolieti would shout and swear at him; and in particular saying “are you fucking blind or retarded?” He said he had raised this with Mr Campolieti orally almost twice a month every month during his time working for the Respondent. The Claimant said that Mr Meikle was absent far more than he was, without providing reasons for lateness or absence yet was never asked for explanations for his absences. Mr Meikle’s sickness absences are recorded in the bundle (531) and show he had fewer absences than the Claimant.
40. The Claimant said that while he was sometimes late” Mr Levy was often late and that the Respondent’s “alleged issues” with his timekeeping were are means of deflecting from their own conduct. He provided about 7 text messages which Mr Levy said he would be late in and one message where he said he would not be coming in, all of which were fairly standard courtesy emails provided by line manager to his junior identifying some occasions when he would be late in. Against that we have very many texts from the Claimant to Mr Levy evidencing the Claimant’s casual attitude to work.
41. Turning to the specific allegations made by the Claimant we note that the Claimant does not refer to the remarks set out in issue 1.1 in his witness statement saying only that he adopted the matters set out in his particulars of claim. The allegation at 1.1 is that Mr Campolieti swore at the Claimant on a weekly basis by shouting “you are so shit” and “you are such a prick, people are trading your markets”. Mr Rollo says he witnessed Mr

Campolieti saying “you are so shit, people are trading on your markets” roughly around in June 2019.” The Respondent’s witnesses deny this,

42. Issue 1.2 was an allegation that in June and again September Mr Campolieti said, “Indians are so sneaky”. These dates were provided by way of further particulars on 16th November 2020, (67) though in the witness statement the Claimant only refers to it having occurred on one occasion. He says that after he had been asked to sit next to Mr Campolieti, Mr Campolieti discovered that he had been defrauded and that when he found out, from searches at Companies House, that the directors of the company that had defrauded him were of Indian origin he said “Indians are so sneaky. Mr Rollo says that he witnessed this comment on 17 September 2019. Mr Campolieti denied this remark and says that he has never been defrauded by another company.
43. Issue 1.3 is an allegation that on 23 January 2019 Mr Levy shouted “fuck off Priyank” and that Mr Josef shouted “fuck you I’m not going to show your shitty prices to my clients and upset them”. (In the witness statement the word shitty is omitted) but he does say that after that Mr Josef had continued to shout and swear at him in front of the whole office, and that he had complained to Mr Levy about this. Mr Josef and Mr Levy deny this account.
44. Issue 1.4 is that on 13th March 2019 Mr Levy shouted and swore at the Claimant after some of the junior brokers had sent out a wrong confirmation saying “what the fuck cant you check your juniors confirmation”. In the witness statement this is slightly different the allegation being that he shouted “why the fuck are you not training them properly, why are you not delegating the task properly”. We do not make much of the difference in the precise words used but, as we have said, we consider for reasons set out elsewhere that the Claimant was not a reliable witness.
45. Issue 1.5 and 1.6 are allegations that the Mr Campolieti shouted at the Claimant in March 2019 in the presence of other employees and that in June he said “Priyank what the fuck are you doing, why are you just sitting there” and “your markets are trading away, other people are trading your markets” and “you’re so shit”. The Claimant does not refer to these remarks specifically in his witness statement – although he does say that in June Mr Campolieti’s behaviour in shouting and swearing at the Claimant became particularly obnoxious.
46. Issue 1.7 The Respondent accepts that In August 2019 Mr Campolieti asked the Claimant to sit next to him. We are satisfied that this was because the Claimant’s performance and attendance was deteriorating, and he was invited to sit next to Mr Campolieti to attempt to improve his attitude.
47. Issue 1.8 was that in August Mr Campolieti shouted at the Claimant “what the fuck are you doing? Why aren’t you focusing on work, do your

personal stuff in your own time.” He says that on that occasion he had been searching for potential clients on LinkedIn and was sworn at whereas Mr Brindle, who was two seats away from him and was reading an online newspaper and ordering items off eBay and Amazon. Mr Campolieti does not recall any such occasion. He does accept that he told the Claimant many times that he shouldn’t be using his mobile phone and should be focusing more on work, but he denies swearing. He says that if he did not say the same to Mr Brindle it was because Mr Brindle was a senior broker and a compliance officer and was performing well. If he had told the Claimant off, but not Mr Brindle, it would have been because Mr Brindle was not persistently making personal calls in the working day. We accept that explanation and we accept that Mr Campolieti did not swear at him

48. Issue 1.9 It is the Claimant’s case that on 11th September Mr Campolieti said to the Claimant “why are you on your phone, constantly fucking, sleeping and messing around muva fankulo”. In the Claimant’s witness statement (para 24) the Claimant does not refer to exactly this comment, although he complains that Mr Campolieti frequently raised issues about the regular use of his phone and would say “what the fuck are you playing at?”. The Claimant says that this was unfair. He says that the only time he would be on his phone was for emergency purposes and work.
49. We do not accept any of this evidence which has been denied by the Respondent We find that the Claimant has not been truthful.
50. In addition to the particular allegations about swearing at the Claimant it was also the Claimant’s case (raised for the first time in his second witness statement) that after the Claimant had relayed information about his PTSD to Mr Campolieti, Mr Campolieti breached his confidence and told others in the office and that *“this led to the office mocking and teasing me through means of derogatory terms and laughing at the idea of suffering from PTSD”*. The Claimant said that on one occasion when he went to the toilet he heard Mr Campolieti say loudly PTSD and then laughed and that, when the Claimant walked back in, the whole office went silent, and he knew they had been mocking him behind his back. As we say, we do not accept this either.
51. The Claimant said he was given back-office tasks, which the junior should have been doing or a complex task that Mr Josef should have been doing. He complains in August 2019 Mr Campolieti made him sit next to him and this made him feel singled out.
52. The Claimant also says that when he resigned in September 2019 he did so because of the constant discrimination and behaviour towards him and that he told Mr Campolieti that this was the reason why he was resigning, but he said that he signed the new contract because he relied on assurances by Mr Campolieti that his behaviour “would change”.
53. We do not accept that evidence. We do not find it credible that if the Claimant had been subjected to what he believed was continuous

swearing and shouting and discriminatory behaviours since the start of his employment he would have accepted the new contract. In contemporaneous text messages (374) sent by the Claimant on 3 September 2019 to his friend Amjad (who was not an employee of the Respondent) the Claimant says that he is resigning because he hates it, that he is not going to make a big bonus because of Brexit and there is no point in being tortured for “shit money”, but there is no reference to being sworn at or discriminated against. The Claimant says that he complains about this treatment constantly to Mr Levy who just shrugged it off and that he complained orally to Mr Campolieti almost twice a month every month, yet he did not consider any of this was sufficiently serious or important to have committed it to an email or text or otherwise in writing.

54. The Claimant is aggrieved because he considers he was “tricked” into signing a new contract. It was, however, apparent that from quarter 3 2019 the revenues which the Claimant generated had declined dramatically (264) so that from Q3 2019 he had ceased to be profitable for the Respondent. We do not accept that the reason that the Claimant’s revenues decreased was because Mr Campolieti cut out his clients repeatedly from trades. Mr Campolieti said that it would make no commercial sense for him to do that, and we accept this.
55. The Claimant also says that any absences without reason, lateness and changes in his attitude and performance were due to his deteriorating mental health aggravated by the toxic work environment, abusive and racist comments, and the failure to deal with issues when he raised concerns. He said that he did not provide a medical certificate as he did not feel comfortable contacting his local GP. We do not accept this. As we have said his text messages to Mr Levy indicate a casual attitude to work and a tolerant line manager who was slow to reprimand.
56. Issue 1.10. As to the circumstances of his departure from the Respondent the Claimant says that on 27 February 2020 Mr Campolieti had lost €20,000 on a trade and that this made him very angry. He says that Mr Campolieti then called him into the meeting and started swearing and shouting calling him a c*** and said to him “get the fuck out of here I don’t want you working here anymore.” He says that when the Claimant “reiterated once again” his issues about discrimination Mr Campolieti called it a “sob story”. He says that his dismissal was triggered by Mr Campolieti’s bad mood and the loss of €20,000.
57. He says that on the following day he phoned Mr Campolieti to tell him that he had unfairly dismissed him. He mentioned the discriminatory treatment and said that he had a recording of the call. He says it was “only at this point that he tried to retract the dismissal.”
58. As we have said, we prefer the evidence of Mr Campolieti as to the events of 27th February 2020. The Claimant tells the tribunal that the recordings that he had of the call and of the conversations in the office had been corrupted. The text messages he sent on 28th February do not support the

Claimant's version of events. The Claimant makes no reference to dismissal, nor do the texts suggest that the Claimant understood that he had been dismissed. Instead, he complains about having to pay for a flight when others did not, about being asked for sick note and complains about victimisation and discrimination.

The law

59. Section 39 of the Equality Act 2010 prohibits an employer discriminating against its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees.
60. Section 13 defines direct discrimination as follows: -
"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.
Race is a protected characteristic
61. Section 13 focuses on "less favourable" treatment. A claimant must compare his or her treatment with that of another actual or hypothetical person who does not share the same protected characteristic in comparing whether the employee has been treated less favourably than another. Section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13... there must be no material difference between the circumstances relating to each case." It is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words, for the comparison to be valid like must be compared with like.
62. Section 40 prohibits an employer from harassing its employees. Section 26 defines harassment as follows
 - (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
 - (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

63. An action that is complained of must be either direct discrimination or harassment, but it cannot be both. It must be one or the other. (Section 212). This is because the definition of detriment excludes conduct which amounts to harassment.
64. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, or harassment is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

Unfair dismissal

65. In order to establish a claim for unfair dismissal a claimant has to show that he has been either expressly or constructively dismissed. Did the employer by his words or actions, as they would reasonably have been understood by the employee, expressly dismiss the employee?
66. Equally was there a constructive dismissal as defined in section 95(1)(c) of the Employment Rights Act 1996? An employee who resigns may be treated as having been dismissed if does so “(with or without notice) in circumstances in which he is entitled to terminate [his contract] without notice by reason of the employer’s conduct”. Conduct giving rise to a constructive dismissal must involve a fundamental breach of contract by the employer; the breach must be an effective cause of the employee’s resignation; and the employee must not, by his or her conduct, have affirmed the contract before resigning.
67. Written submissions were provided on the facts and are not reproduced here.

Conclusions

Direct Discrimination and harassment

68. In summary, we do not accept the factual matters which are the basis of the Claimant’s claim. Of the numerous allegations the only one that is accepted as a matter of fact is that Mr Campolieti asked the Claimant to sit next to him in August 2019. We find that this was a perfectly reasonable request given the Claimant’s declining performance and did not amount to less favourable treatment because of his race nor did it amount to unwanted conduct related to race.
69. We do not accept that Mr Campolieti, Mr Levy and Mr Josef shouted and swore at the Claimant as he has alleged. Since those factual matters are

not accepted, we also do not accept that they amounted to less favourable treatment because of the Claimant's race or race-related harassment.

Unfair dismissal

70. It is axiomatic that an individual cannot bring a claim for constructive dismissal unless he was dismissed, either expressly or constructively.
71. We do not accept that the Claimant was either expressly dismissed or constructively dismissed by Mr Campolieti on 27th February. Mr Campolieti told the Claimant to go home, and that Mr Levy would be in touch. We find that he did not use the word suspend but that was the practical effect of the instruction. They spoke the following day in terms that indicated continuing employment. A letter was sent to him on the Monday telling him that he need not come to the office pending a disciplinary hearing.
72. Although the Claimant then purported to resign "with notice", he made it clear that he would not abide by the terms of his contract. In stating he would not attend the disciplinary investigation to which he had been invited he was in repudiatory breach of his contract, which the Respondent accepted. The Respondent treated the contract as having come to an end when they took no further steps to invite him to a disciplinary investigation meeting or to pay him beyond March 2020.
73. The Claimant was not dismissed.
74. All the claims are dismissed.

Employment Judge Spencer
16th March 2022

JUDGMENT SENT TO THE PARTIES ON
16/03/2022.

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FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

1. Factual allegations

- 1.1. Did Giammarco Campolieti swear at the Claimant by shouting “You are so shit” and “You are such a prick, people are trading your markets,” on weekly basis
- 1.2. In June 2019 and September 2019 did Giammarco Campolieti say to the Claimant “Indians are so sneaky.”
- 1.3. On 23 January 2019 did Marc Levy shout or say to the Claimant “Oh fuck off Priyank” and did Florian Josef shout or say to the Claimant “fuck you, I’m not going to show your shitty prices to my clients and upset them.”
- 1.4. On 13 March 2019 did Mr Levy shout or say to the Claimant “what the fuck, why can’t you check your junior’s confirmation. For fuck’s sake, make sure you fucking check going forwards.”
- 1.5. In March 2019 did Giammarco Campolieti shout at the Claimant in the presence of other employees?
- 1.6. Between 12 June 2019 and 20 June 2019 did Giammarco Campolieti walk across to the Claimant’s desk and shout say “Priyank, what the fuck are you doing, why are you just sitting there?” and “your markets are trading away, other people are trading your markets” and “you’re so shit.”
- 1.7. In August 2019 did Giammarco Campolieti ask the Claimant to sit next to him in order to monitor the Claimant
- 1.8. In August 2019 did Giammarco Campolieti shout at the Claimant “What the fuck are you doing? Why aren’t you focusing on work, do your personal stuff in your own time”
- 1.9. On 11 September 2019 did Giammarco Campolieti say to the Claimant “Why are you on your phone, constantly fucking sleeping and messing around, muva fankulo.”
- 1.10. On 27 February 2020 did Giammarco Campolieti call the Claimant a “cunt” shout /say to him “get the fuck out of here, I don’t want you working here anymore” and “speak to Marc [Levy], see if he wants you working here because I don’t want you working here anymore.”

2. Dismissal

- 2.1. Did Mr Campolieti dismiss the Claimant on 27 February 2020 by saying “get the fuck out of here, I don’t want you working here anymore” and “speak to Marc [Levy], see if he wants you working here because I don’t want you working here anymore.”
- 2.2. Alternatively, did the Respondent breach the implied term of trust and confidence:
 - 2.2.1. By conducting itself in the manner alleged at paragraphs 1.1 to 1.10 above.
 - 2.2.2. By suspending the Claimant by its letter dated 11 March 2020.
- 2.3. If so, did the Claimant affirm the contract before resigning?
 - 2.4. If not did the Claimant resign at least in part because of this?
 - 2.5. What was the effective date of termination?
3. **Unfair dismissal (section 94 and 98 ERA 1996)**
 - 3.1. If the Claimant was dismissed, what was the principal reason for the dismissal? The Respondent relies on the potentially fair reason of conduct, capability or SOSR.
 - 3.2. If so, was the dismissal fair or unfair by reference to the statutory test under section 98(4) ERA 1996 and, in particular, did the Respondent in all respects act within the band of reasonable responses?
4. **Direct discrimination (section 13 EqA)**
 - 4.1. The Claimant relies on the alleged conduct set out above at 1.1 to 1.10 and also on the alleged dismissal.
 - 4.2. Was that treatment less favourable treatment? In respect of allegation 1.8 the Claimant relies on an actual comparator namely, Mr Brindle; in respect of the other allegations, a hypothetical white British comparator is relied on.
 - 4.3. If so, was this because of the Claimant’s race? The Claimant relies on his Indian ethnic origin.
5. **Harassment (section 26 EqA)**
 - 5.1. Alternatively, the Claimant relies on the conduct set out at 1.1 to 1.10
 - 5.2. Was such conduct related to the Claimant’s race?
 - 5.3. If so, did the conduct have the purpose or effect (taking in to account the Claimant’s perception, the other circumstances of the case, and whether it is reasonable for the conduct to have had that effect) of violating the Claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6. **Jurisdiction (section 123 EqA)**

6.1. In respect of the allegations set out above at 1.1 to 1.9 (which would otherwise be out of time):

6.1.1. Are they part of the same course of conduct as 1.10?

6.1.2. If not, would it be just and equitable to extend time in respect of them?

7. **Remedy**

7.1. Should any basic award for unfair dismissal be reduced on account of the Claimant's conduct?

7.2. Should any compensatory award for unfair dismissal be reduced on account of the Claimant's conduct?

7.3. What is the appropriate injury to feelings award? Should there be aggravated damages?

7.4. The issues arising under any assessment of loss of earnings following unfair dismissal or discrimination are:

7.4.1. Mitigation of loss

7.4.2. The prospect of fair dismissal in any event

7.4.3. The Respondent's allegation that the Claimant was in breach of contract

7.4.4. Any adjustment for failure to follow the relevant ACAS Code of Practice.