Case Number: 2205956/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR G BISHOP**
MR D SHAW

BETWEEN:

MJS

Claimant

AND

Credit Agricole Corporate & Investment Bank

Respondent

ON: **10, 11, 12, 13, 14, 17, 18, 19, 20 and 21 January 2022**
(In Chambers on 19, 20 and 21 January 2022)
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms C Davis, one of Her Majesty's counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim for sexual harassment is out of time and the tribunal has no jurisdiction to hear that complaint.
2. The allegations of racial harassment numbered (b) and (c) and the claim for direct race discrimination numbered 7 are out of time and the tribunal has no jurisdiction to hear those complaints.
3. The claim for holiday pay is dismissed upon withdrawal.
4. All remaining claims fail and are dismissed.

REASONS

1. By a claim form presented on 15 September 2020, the claimant MJS brings claims of unfair dismissal, direct race discrimination, race related harassment, sexual harassment and victimisation, breach of contract and holiday pay.

2. The claimant worked for the respondent investment bank in an employed capacity from 27 June 2016 to 11 June 2020.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended the hearing on days 1 and 2. A member of the press attended on day 6 and again on the afternoon of day 7 and a member of the public attended during the morning of day 7.

5. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

6. A request was made by the member of the press to inspect any witness statements and documents was put in contact with the respondent's solicitor so that this could be provided. The member of the press asked on day 6 for copies of skeleton arguments. It was explained that these would be introduced when the tribunal reached submissions and copies were provided to the press on day 7. The members of the public were asked during the hearing if they required anything, but no other requests were made during the hearing.

7. The participants were told that it was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence and they confirmed that they had clean and unmarked copies of their statements and the bundle of documents.

Background

9. There were two preliminary hearings in this case, the first was on 19 January 2021 before Employment Judge Welch, when the claimant was represented by a solicitor.

10. The second took place on 5 October 2021 before Employment Judge Walker when the claimant acted in person. At that hearing Judge Walker explained to the claimant the way in which he needed to prepare his witness statement.

11. On 2 December 2021 Judge Walker made an Unless Order for the claimant to exchange witness statements. Judge Walker recorded the following in her Order:

The Claimant has a history of failing to comply with Tribunal orders. At a hearing on 5 October 2021, I made an order for exchange of witness statements on or before 26 November 2021. The Claimant has failed to exchange witness statements with the Respondent pursuant to that order and has failed to inform the Respondent of a date by which he will exchange witness statements. The Claimant has also failed to reply to the Tribunal's correspondence sent on 30 November 2021 at my instruction enquiring about this position. In the Order made on 5 October 2021, I noted that there was a real risk that the full merits hearing would not be able to proceed if the timetable was not kept. The Claimant has shown a disregard of Tribunal orders. In the event that the Claimant does not exchange witness statements by 7 December 2021, as required in this order, there is a very real risk that the hearing will be prejudiced.

12. The claimant's witness statement was served in accordance with that Order. It was surprisingly short when considering the long list of issues set out below, at 10 pages plus a signature page. A page and a half dealt with remedy. In an email dated 5 December 2021 (bundle page 1451) the claimant said that he had taken legal advice in relation to his witness statement.

13. In an opening note, the respondent queried the extent to which all the allegations set out below were relied upon. The claimant said he was relying on all the allegations. He was given the opportunity to swear to the truth of the allegations he relied upon in the List of Issues and his own comments to the List of Issues, which he chose to do.

14. On day 3 the claimant's cross-examination finished at 3:20pm to allow him time, at his request, to consider whether he wished to withdraw any of his victimisation allegations having just withdrawn 3 such allegations.

15. At the start of day 4 the claimant told the tribunal that he had chosen not to withdraw any further victimisation allegations. During cross-examination on day 4 the claimant did withdraw further allegations as set out in the list of issues below.

16. On day 6 the claimant was given time, at his request, to prepare cross examination for the final two witnesses, which he had not done in advance and we finished for the day at 3pm. Also on day 4, due to circumstances beyond anyone's control, we were obliged to finish at lunchtime, providing the claimant with further preparation time.

The issues

17. There was an Agreed List of Issues, which was confirmed with the parties at the outset of the hearing. The claimant had legal assistance from a solicitor in the preparation of the List of Issues. The issues were as follows:

Time limits/Jurisdiction

18. Whether the claimant presented his complaint to the Tribunal within three months starting with the date of the act to which the complaint relates, bearing in mind that:

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

    b. failure to do something is treated as occurring when the person in question decided on it; and

    c. in the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something either when that person does an act inconsistent with doing it, or if there is no inconsistent act, on the expiry of the period in which that person might reasonably have been expected to do it.

19. In the event that the claimant failed to bring his complaint within the period of three months identified above, whether he presented his complaint within such other period as the Tribunal considers just and equitable.

Sex Discrimination: Harassment (section 26(2) Equality Act 2010)

20. Whether the respondent engaged in unwanted conduct of a sexual nature that had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, taking into account his perception and the other circumstances of the case; and whether it was reasonable for the conduct to have that effect.

21. The claimant alleges that the matters listed immediately below occurred and amounted to unwanted conduct of a sexual nature:

    a. On or around 11 December 2016, Ms L touched the claimant's inner thigh several times and invited the claimant back to her hotel room.

Sex Discrimination: Victimisation (s.27 Equality Act 2010)

22. Whether the respondent subjected the claimant to a detriment either because he did a protected act, or because the respondent believed that the claimant had done, or might do, a protected act.

23. The claimant alleges that the following matters occurred and amounted to protected acts. Were the following protected acts?

    a. In December 2016 the claimant complained to his manager Mr Hemal Mistry that Ms L had touched him in an inappropriately sexual manner at the Middle Office Christmas Party and that this conduct was unwelcome.

b. In early 2017, the claimant notified Ms Gwenaël Rosec in HR of the incident with Ms L.
c. During a meeting on 27 February 2019 the claimant asked Mr Le Prado if HR had investigated or spoken to Ms L regarding the alleged sexual harassment towards the claimant.
d. During a meeting with Mr Nord on 30 September 2019 the claimant raised his concerns about Ms L's conduct. Mr Nord who smirked at the claimant and ignored his questions

24. The respondent's position is that none of these were protected acts because they were not done in good faith. The respondent accepts that in February 2019 the claimant made an allegation of sexual harassment and that he did so again on 10 January 2020 but that these were not done in good faith.

25. Did the matters below occur and did they amounted to detriments because of a protected act:

i. In January 2018 Mr Mark Nord, Mr Mistry and Mr Le Prado rated the claimant an "*underperformer*". The claimant was not aware of this rating until he was presented with an Investigation Report in October 2019. This was withdrawn against Mr Le Prado only at the start of day 4, the claimant accepting that Mr Le Prado was not employed by the respondent until April 2018.
ii. In April 2018, Mr Le Prado called the claimant's GP surgery where his sister worked and asked to speak to his sister regarding the claimant's doctor's notes. Mr Le Prado was unable to speak to the sister and instead spoke to her colleague and stated that the doctor's notes were either fake/ fraudulent
iii. On 20 April 2018 knowing that the claimant had become aware of Mr Le Prado's telephone call to the GP surgery, Mr Le Prado introduced himself to the claimant via email.
iv. On 14 May 2018 Mr Le Prado emailed the claimant at 1:57pm despite being aware that the claimant's doctor's note was being sent in so there was no need for Mr Le Prado to email the claimant.
v. On 8 August 2018, Mr Le Prado emailed the claimant copying Mr Nord stating that the claimant did not attend an OH appointment on 17 July at 09:30am. The claimant had not asked Mr Le Prado to book this appointment and Mr Le Prado arranged it without consulting the claimant and despite knowing the claimant was not mentally to travel. This was withdrawn on the afternoon of day 3.
vi. On 24 August 2018, Mr Le Prado emailed the claimant copying Mr Mistry saying he was disappointed with the claimant for not attending an Occupational Health appointment despite the claimant telling Mr Le Prado that he was depressed as his aunt had not long passed away in May 2018. This was withdrawn on the afternoon of day 3.
vii. On 11 September 2018 Mr Le Prado emailing the claimant to tell him not to attend work on 24 and 25 September but the respondent would pay him for those two days.
viii. On 12 September 2018, the claimant sent emails to Mr Le Prado, Mr

Mistry, and Ms Isobel "Izzy" Barlow regarding his 70% permanent health insurance but the claimant received no help from HR or management with regards to this issue leading to serious financial difficulties and severe depression.

ix. In October 2018 Mr Le Prado victimised the claimant with regards to payment on PHI with Zurich.

x. On 2 October 2018, the claimant was unfairly given an informal warning by Mr Le Prado.

xi. On 2 October 2018 the respondent failed to show the claimant the meeting minutes regarding the informal warning issued on 2 October 2018 and what was discussed between Mr Le Prado and Mr Mistry.

xii. On 9 October 2018, Mr Le Prado emailed the claimant about a disciplinary meeting telling the claimant he will be booking a room within the respondent's offices and for the claimant to attend to explain his absence from work.

xiii. On 15 October 2018 Mr Le Prado again emailed the claimant about a disciplinary meeting again asking me for an explanation as to why he was off work, despite knowing the reasons for his absence from work.

xiv. On 16 October 2018 Mr Le Prado unreasonably emailed the claimant about a disciplinary meeting.

xv. On 17 October 2018 the respondent failed to show the claimant the meeting minutes from the first written warning issued on 17 October 2018 and what was discussed between Mr Le Prado and Mr Mistry.

xvi. On 17 October 2019 Mr Le Prado unfairly gave the claimant a written warning.

xvii. On 29 January 2019, the claimant was unfairly given an informal warning by Mr Le Prado.

xviii. On 29 January 2019, the respondent failed to show the claimant the meeting minutes for the 2nd informal warning issued on 29 January 2019 and what was discussed between Mr Le Prado and Mr Mistry/Mr Nord.

xix. On 21 February 2019, the claimant was again unfairly given an informal warning by Mr Le Prado.

xx. On 21 February 2019, the respondent failed to show the claimant the meeting minutes for the 3rd informal warning issued on 21 February 2019 and what was discussed between Mr Le Prado and Mr Mistry/Mr Nord.

xxi. On 4 March 2019 the claimant was unfairly given another first written warning by Mr Le Prado.

xxii. On 4 March 2019, the respondent failed to show the claimant the meeting minutes for the 2nd first written warning issued on 4 March 2019 and what was discussed between Mr Le Prado and Mr Mistry and Mr Nord. This allegation was withdrawn during evidence on the middle of day 4.

xxiii. On 12 March 2019 the claimant was unfairly issued with a further informal warning based on the Investigation Summary of 16 October 2019.

xxiv. On 12 March 2019, the respondent failed to show the claimant the meeting minutes for the 4th informal warning issued on 12 March 2019 and what was discussed between Mr Le Prado and Mr Mistry and Mr

Nord.

xxv. On 30 September 2019 the claimant was summoned to an unscheduled meeting held with Mr Nord and Mr Mistry, whose alleged misconduct was totally fabricated by Mr Mistry and Mr Nord. The claimant referred to his concerns about Ms L in this meeting. Mr Nord smirked at the claimant and ignored his questions.

xxvi. On 30 September 2019, the respondent failed to show the claimant the meeting minutes for the fifth informal warning issued on 30 September 2019 and what was discussed between the claimant and Mr Mistry and Mr Nord.

xxvii. On 15 October 2019 an investigation meeting was organised between Mr Le Prado, Mr Nord and Mr Mistry which was victimisation based on context described against the claimant.

xxviii. On the 15 October 2019 the respondent failed to show claimant the note takers minutes by HR Advisor Cari Risk. This was withdrawn at the start of day 5.

xxix. On the 15 October 2019 the respondent failed to show the claimant the Interview minutes with AL and VP and what was discussed between Mr Le Prado, Mr Nord and Mr Mistry regarding the investigation of the claimant.

xxx. On 16 October 2019 the claimant was unfairly suspended by Mr Le Prado for 8.5 months.

xxxi. On 16 March 2020 Mr Le Prado emailed the claimant asking him to attend OH on 18 March 2020 during the Covid crisis. The claimant explained via telephone that this would further heighten his anxiety/mental health and that this would not be appropriate given the Government's lockdown rules.

xxxii. On 16 March 2020 the respondent/Ms Isobel Barlow failed to send the doctor’s confirmation over to the claimant to confirm the OH appointment for 18 March 2020 and the claimant received no contact from the HR Advisor. This allegation was withdrawn during cross examination on the morning of day 5.

xxxiii. On the 26 March 2020 the respondent emailed the claimant and accused him of not picking up his phone regarding a OH call from the 18 March 2020. The claimant had not received a call during 18 March 2020.

xxxiv. On the 26 March 2020 the respondent/Mr Le Prado emailed the claimant out of office hours at 7:23pm and stating that he hoped the claimant’s loved ones were safe and well at home. The claimant took this as a direct threat to his family as the respondent has never entered an email conversation with this nature outside of office hours before, thus making the claimant’s anxiety and condition worsen.

xxxv. On 13 March 2020, Mr Le Prado contacted the claimant’s ex-partner CR, who was not listed as one of the claimant’s emergency contacts, via phone call and email, without any justifiable reason.

xxxvi. On 24 April 2020 the respondent failed to send the claimant the minute meetings conducted on the 24 April 2020 with regards to his dismissal

xxxvii. Mr Le Prado booking OH on or near his family members birthdays, booking an OH appointment on 17 July 2018, on 17 August 2018 and then booked a disciplinary meeting on the 10 January 2020. This was

withdrawn in evidence on the afternoon of day 3.

xxxviii. Before 2018 Mr Mistry would allow the claimant to be paid for looking after his dependants. However from October 2018 until the claimant's suspension, any leave to look after his dependants was unpaid then suddenly blocked.

xxxix. Mr Mistry denied the claimant a slot to a mental health seminar without any justifiable reason.

xl. On 11 June 2020, the respondent dismissed the claimant.

26. At mid-afternoon on day 3 the claimant asked for an opportunity to review his allegations of victimisation to see whether he wished to rely on them all. He wished to inform the tribunal on day 4 of his position and we agreed to this. We made clear to the claimant that he was under no pressure to withdraw any of his allegations. On day 4 the claimant said that he wished to pursue the allegations, apart from the three withdrawn on day 3.

Direct race discrimination (s.13 Equality Act 2010)

27. Whether the respondent treated the claimant less favourably because of his race than it either treated or would have treated others. At the preliminary hearing on 21 January 2021 the claimant identified his racial group as black, mixed race of African heritage.

28. Did the following occur and did each amount to less favourable treatment because of race:

a. Failing to pay the claimant a bonus in March 2018, March 2019 and March 2020.
b. Upon the claimant's return to work in October 2018 he was left alone on the desk more than any of his colleagues leading up to his suspension in 2019. He says this had never happened previously before taking time off.
c. Excluded from all Team Meetings towards the later stages of 2019
d. On 30 September 2019/1 October 2019 Mr Mistry printed off the claimant's personal texts and showed them to Mr Nord's Personal Assistant, Amanda (Caucasian European), and left them on his desk.
e. On 11 June 2020, the respondent dismissed the claimant.

29. In each case of alleged direct discrimination, the claimant relies on a hypothetical comparator. The claimant also relies on the following actual comparators:

a. NS, FX Spot, Options and Precious Metals Middle Office Trade Support Manager was off for a total of 13 months due to mental health, he was allowed to return within a normal capacity and was not harassed by HR or the management team in any way and left daily at 5pm without any repercussions. (Caucasian European)
b. SB was off for many months in 2017 due to a health problem. He was allowed to return within a normal capacity and was not harassed by

the HR team or management team in any way when he had returned to work. (Caucasian European)

c. NK was also allowed time off for dependents / family issues / holidays without any issues. (Caucasian European)
d. AL was allowed time off for family issues without any issues. (Caucasian European)
e. 10 January 2019 racially abused by HR Manager Mr Le Prado after disciplinary meeting Mr Mistry directing the words "coloured" towards the claimant and the claimant's late father and no one else on the desk
f. AS only directed the words "Monkey Boy" towards the claimant and no one else on the desk . AS is of (Caucasian European)

Racial Harassment (section 26 Equality Act 2010)

30. Whether the respondent engaged in unwanted conduct related to the claimant's race that had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him taking into account the claimant's perception; the other circumstances of the case; and whether it was reasonable for the conduct to have that effect.

31. Did the matters listed immediately below occur and did each amount to unwanted conduct related to the claimant's race:

a. Mr Mistry on many occasions has directed the words "*coloured*" towards the claimant in conversation and spoke of the claimant's late father as being "*coloured*".
b. On or about the middle of 2017 the claimant found a notepad belonging to Hemel Mistry which purported to contain a list of 'cockney Racial words' written for the benefit of the claimant's colleague. The notepad contained the words "*wog, coon, banana boat, darky and monkey"*
c. On or about Early/Mid 2019 was called a "*monkey boy*" by Mr AS on the trading floor
d. On or about Early/Mid 2019 Mr Mistry was fully aware of these comments being directed at the claimant of which were totally ignored
e. Mr Le Prado and Mr Nord management team being made aware of Mr Mistry using racial words "*Coloured*" against the claimant and the use of Mr Mistry's racist wordings being noted on his notepad. No investigation was conducted.
f. On 10 January 2019 the claimant mentioned to Mr William "Bill" Kurz hearing manager, Mr Le Prado and Ms Barlow about race discrimination with regards to Mr Mistry and Mr AS and no investigation was conducted by either manager.
g. On or about 10 January 2020, as the claimant left a meeting with Mr Le Prado and Mr Kurz, Mr Le Prado mumbled: "*see you later black bastard*" at the claimant while they shook hands.

Unfair Dismissal (section 98 Employment Rights Act 1996)

32. Did the respondent dismiss the claimant for a reason related to his conduct and/or some other substantial reason, namely an irreparable breakdown in trust and confidence and therefore was the reason or principal reason for dismissal that of conduct, or some other substantial reason?

33. If so, whether in all the circumstances, the respondent acted reasonably in treating the claimant's conduct, or an irreparable breach of trust and confidence as a sufficient reason for dismissal.

34. If the dismissal was procedurally unfair, whether if a fair procedure had been followed, the claimant would have been dismissed in any event and if so when.

35. Whether the claimant contributed to his own dismissal by culpable blameworthy conduct.

The ACAS Code

36. Whether the claimant unreasonably failed to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures.

37. Whether the respondent unreasonably failed to follow the same ACAS Code of Practice.

Holiday pay

38. Is the clamant due to be paid any accrued but untaken annual leave on termination of employment? The holiday pay claim was withdrawn at the end of the claimant's cross-examination on day 5.

Breach of contract

39. Did the respondent, in breach of contract, fail to ensure payment of 70% of the claimant's monthly wage under the Zurich Permanent Health Insurance scheme for a period of 3 months in total and did they fail to pay him notice pay to which he was entitled?

Witnesses and documents

40. There was an electronic bundle of 1,473 pages.

41. The tribunal heard from the claimant.

42. For the respondent the tribunal heard from 5 witnesses: (i) Ms Gwenaël Rosec, Divisional HR Manager (ii) Mr William Le Prado, HR Business Partner (iii) Mr Mark Nord, now Chief Operating Officer (COO) of Global UK Markets and at the relevant times the manager of the claimant's line manager, Mr Mistry, (iv) Ms Isobel Barlow, HR Advisor and (v) Mr Donald McLean, Employee Relations Manager. Ms Rosec gave evidence from

France.

43. From the respondent we had a cast list, chronology and opening note.

44. We had written submissions from both parties to which they spoke. All submissions were fully considered together with any authorities referred to, whether or not expressly referred to below.

45. There was an allegation put forward by the claimant in his submissions that relevant documentary evidence had been excluded by the respondent; an allegation that was strongly denied by the respondent. There were many difficulties along the way with case preparation and defaults on the claimant's part which led to Judge Walker's preliminary hearing on 5 October 2021 and an Unless Order against the claimant.

46. Judge Walker told the claimant that it was open to him to submit his own bundle if he had documents which the respondent did not agree should go into the main bundle – Order paragraph (13). The claimant did not appear to have read this in the Order or taken it on board when it was said verbally by the Judge during that hearing. He made very serious and we find unwarranted allegations against the respondent's solicitors in this regard. We find that if he had more evidence that he wanted to rely on, he either knew or ought reasonably to have known, because he was told both verbally and in writing by Judge Walker, that he could submit it himself.

Findings of fact

47. The respondent is a corporate and investment bank. The claimant worked for the respondent on a contract basis for two periods prior to becoming an employee. This was from December 2010 to June 2013 and from September 2014 to March 2015. He became an employee of the respondent from 27 June 2016 as a Middle Office Analyst working in the Capital Markets Middle Office Credit Team.

48. The claimant became employed at the recommendation of his manager Mr Hemal Mistry, who put forward the claimant's name to his own manager Mr Mark Nord. Mr Nord was involved in interviewing the claimant and accepted Mr Mistry's recommendation, based on the claimant's prior experience of working as a contractor with them.

The December 2016 Christmas party

49. The claimant's case is that on about 11 December 2016 he attended the office Christmas party at a pub in Liverpool Street, in central London. He said he was standing making light conversation with two male colleagues when they were approached by a senior colleague, referred to as Ms L. Upon seeing Ms L approaching, the claimant says his male colleagues left.

50. The claimant's case is that Ms L initially made general conversation with

him and then asked him whether he had children and whether he was married. He replied that he had children but was not married. The claimant's case is that Ms L proceeded to touch his inner thighs whilst engaging in conversation and that he "*shuffled back just enough so she couldn't touch me"*. He said that she then said that she was staying at a hotel in London and that in France there was an old saying that whilst the husbands are indoors looking after the children, the wives could pretty much do what they wanted with other men. He alleged that she proceeded to touch him again on the side of his buttocks and firmly grabbed him and he made excuses to get another drink and went downstairs.

51. The claimant accepted in evidence that he did not tell anybody about this incident at the time, namely on the evening of the party. He did not know whether anyone else witnessed the incident. The claimant also accepted in evidence that from 11 December 2016 until the termination of his employment on 11 June 2020 there was no other point at which Ms L attempted to proposition or touch him inappropriately. He had no conversation of any kind with Ms L about his allegation. He did not contend that Ms L did anything to retaliate against him for rejecting her alleged advances.

Findings in relation to the time point

52. We find that the allegation of sexual harassment was an isolated incident. The claimant relied upon no other allegations of sexual harassment other than the alleged incident on 11 December 20`6.

53. The claimant gave no evidence as to the timing of the presentation of his claim despite saying in amendments he made to a draft List of Issues on 18 January 2021 that he wanted the "*Judge to hear about Sex Discrimination on full evidence which is connected to my victimisation/Discrimination".*

54. The claimant did not tell the tribunal that for example, his mental health prevented him from issuing his claim any earlier. We find that he was able to work during the majority of 2017 and much of 2019. He told the respondent that he was fit to work and he either declined or failed to attend OH appointments that they organised for him. We find that he was not prevented by ill health from issuing his claim within time.

55. We had no submission from the claimant as to why it would be just and equitable to extend time, other than he said that *"just because it was out of time, did not mean it did not happen".*

The protected acts

56. The claimant's protected acts for his victimisation claim rely on him informing members of the respondent about this incident in December 2016. There are four acts relied upon.

57. He says that (i) on or around 11 December 2016 he complained to his line manager Mr Mistry that Ms L had touched him inappropriately at the Christmas party and that this conduct was unwelcome. He also says that (ii) in early 2017 he informed HR manager Ms Rosec of the incident and that (iii) at a meeting on 27 February 2019 he asked HR Business Partner Mr Le Prado if HR had investigated the matter or spoken to Ms L about it. The claimant also says that (iv) during a meeting with Mr Nord on 30 September 2019 he "*raised his concerns about Ms L's conduct towards him*". He alleges that Mr Norwood then smirked at him and ignored his questions.

58. We have considered whether the claimant did the protected acts relied upon.

59. The first protected act was that on or around 11 December 2016 he complained about the incident to his line manager Mr Mistry. The claimant's case was that he complained to Mr Mistry the following day 12 December 2016. The claimant accepted that there was nothing in writing, no email or WhatsApp message.

60. The claimant and Mr Mistry were good friends both inside and outside work. Mr Mistry had helped the claimant secure his permanent appointment in June 2016. We saw several pages of WhatsApp messages between the claimant and Mr Mistry from November 2015 to October 2019. We say more about these messages below. The claimant accepted that these messages were often unprofessional. They contained offensive words and were often derogatory towards women. The claimant said he was not proud of these interactions and that it was "*banter*" in the banking world.

61. Also in relation to the WhatsApp messages, other than the recipient Mr Mistry, no-one at the respondent knew about these messages or had seen these messages until long after the termination of the claimant's employment. They were disclosed by the claimant within the tribunal process in about April 2021.

62. The claimant and Mr Mistry were originally good friends and they messaged each other on a personal as well as a work basis. We had over 16 pages of such messages and we find that Mr Mistry had blurred the lines between his managerial role and the personal friendship.

63. There was no message on 12 December 2016 complaining about the incident on 11 December 2016. The only message on 12 December 2016 was from the claimant saying that he had just arrived at a station (page 1221).

64. The claimant's evidence was that he reported the incident to Mr Mistry verbally in the office. The claimant gave some information as to this in his reply to the respondent's Request for Further Information (page 83). He says he told Mr Mistry that Ms L had touched him on his inner thigh and

propositioned him to the hotel she was staying in. He says that Mr Mistry replied "*good luck with that…".*

65. We saw a WhatsApp exchange on 31 May 2017 (page 1226) the claimant said "*[Ms L] as in the big f*****"* and Mr Mistry replied "*Yeh the one that touched you up".* We find that Mr Mistry already knew of the allegation and on a balance of probabilities we find that the claimant told Mr Mistry about it in or around December 2016.

66. We find that the claimant did the first protected act.

67. <u>The second protected act:</u> relied upon was that in early 2017 he informed Ms Gwenaël Rosec of the matter. Ms Rosec worked in London as an HR Business Partner from September 2016 until the end of 2017 when she returned to Paris. Ms Rosec denied that the claimant had reported to her and issue of sexual harassment in early 2017, or at all. Her evidence was that had this been reported to her she would have taken it very seriously and reported it to her line manager, the Head of HR. Ms Rosec's evidence was that the first time she became aware of this allegation was after claimant had brought this claim.

68. It was put to Ms Rosec that she was choosing not to remember because she was friends with Ms L and Ms L was more senior to her. Ms Rosec was firm in her evidence that she and Ms L were not friends and that she only had professional contact with her. Ms Rosec is now more senior than Ms L was in 2017. There was not a great deal of difference in their seniority.

69. The claimant put to Ms Rosec that the meeting took place in a meeting room on the trading floor. Ms Rosec said that she never held a meeting with any employee on the trading floor because it was not private enough. She said that she only held meetings with employees on the ground floor, which was not the trading floor. In his witness statement at paragraph 7 the claimant said Ms Rosec proceeded to write some notes down and after the meeting she said she would speak to Mr Mistry and Ms L about this. The claimant did not put to Ms Rosec in cross examination that she actually took notes in the meeting in which he says he complained about sexual harassment, yet much of his victimisation claim concerned the failure to provide him with meeting notes. He asked her whether it was standard practice to take notes and she denied that the meeting took place.

70. We saw in a WhatsApp message from the claimant to Mr Mistry (page 1226) on 31 May 2017 continuing the exchange we mentioned above, he said "*mate i mentioned that [Ms L] harassment to that hr woman few months ago nothing back yet".* He told Mr Mistry he did not want to see her, Ms L, in the office. A few months before 31 May 2017 puts it in early 2017 as he alleged.

71. We find that the claimant did a protected act in early 2017 to a female

member of HR. We found Ms Rosec's evidence compelling, particularly when she dealt with the claimant's question as to where the alleged meeting took place. We find that she did not hold such a meeting with the claimant. Nevertheless, we find that the claimant's message of 31 May 2017 to Mr Mistry was genuine and that he did report sexual harassment to a female member of HR in early 2017. We do not draw the automatic conclusion that a reference in the WhatsApp message to "*that hr woman",* was Ms Rosec and we find on her credible evidence that it was not Ms Rosec.

72. We find that the claimant did not tell Mr Mistry in May 2017 that he had told an "*HR woman*", when he had not. We find that due to the passage of time the claimant was mistaken as to the identity of the HR representative. We find that he did a protected act in early 2017 by reporting the matter to a female member of HR but that it was not Ms Rosec.

73. The third protected act was said to be at a meeting on 27 February 2019 when the claimant said he asked Mr Le Prado if HR had spoken to Ms L regarding the alleged sexual harassment.

74. The background is that on 26 February 2019 Mr Le Prado sent a letter to the claimant inviting him to a disciplinary hearing on 27 February 2019. This was to discuss his absences from work on four separate dates in February. In addition it was to discuss his failure to adhere to the respondent's policy that an employee should notify his or her manager in a timely manner of unexpected absence from work.

75. The Sick Leave and Pay policy was at page 1281. It said:

> *"In all cases of absence, employees must notify their line managers by telephone on the first morning of their absence, giving reasons for the absence (if the employees do not wish to reveal the exact nature of the illness they must indicate broadly the cause of absence) and its anticipated duration. If the employee's line manager is not available, they should speak to the next available manager or designated HR contact. It is not acceptable to leave a voice mail or text messages.*
>
> *Notification should be made as early as possible and in any event no later than 10am of the morning of the absence. Employees are responsible for keeping their line manager informed of their progress regularly and update them on the expected return date. Specific time frames are to be mutually agreed by line manager and employee,"*

76. The claimant was repeatedly reminded of the requirements of this policy.

77. When the claimant received the letter on 26 February 2019 he was not at all happy. He went straight to Mr Nord's office to complain. Mr Nord and Mr Mistry came to Mr Le Prado's office with the claimant as they wanted HR present to explain why he needed to follow the policy properly. The

claimant "*exploded*" in that meeting and began making multiple accusations against others. Mr Le Prado believed that in that meeting on 26 February 2019 the claimant may have said he had been sexually harassed by Ms L, although the claimant agrees that he gave no details of the allegation. We find on this evidence that the claimant made such a complaint on 26 February and the claimant did a protected act.

78. We find that this was the first time that Mr Le Prado knew about this allegation. Mr Le Prado's evidence was that in this meeting of 26 February the claimant made multiple allegations of bullying, harassment, discrimination and potentially sexual harassment. His evidence was that these allegations were vague and confused with no details. Mr Nord confirmed this in his oral evidence. Mr Le Prado felt that the claimant was being very defensive and that he was trying to deflect what was being said to him about his non-adherence to absence reporting policies. The claimant did not follow up on Mr Le Prado's request in that meeting to put his allegations in writing so that his complaints could be investigated.

79. A disciplinary hearing took place on 27 February 2019 with Mr Nord conducting the hearing and with Ms Barlow and Mr Le Prado from HR in attendance. The claimant was given a first written warning on 4 March 2019 (outcome letter page 762-763).

80. <u>The fourth protected act</u> relied upon was that during a meeting with Mr Nord on 30 September 2019 the claimant raised his concerns about Ms L's conduct. In his witness statement (paragraph 16) the claimant said "*I said to Mark Nord had HR spoken to [Ms L] and what was happening".* His witness statement did not give any more detail than this as to whether he made any reference to a sexual harassment allegation. In oral evidence he said that he "*could not remember word for word*" what was said. He said he "*would have*" asked what was happening about Ms L, but we find that his recollections of were hazy and he could not remember what he said.

81. In his witness statement at paragraph 54, Mr Nord said he did not specifically remember the claimant raising it at the meeting "*but it is possible that he did".*

82. We have made findings about this meeting below. It was a difficult and heated meeting from the claimant's point of view as he was angry at being invited to an informal meeting to discuss his attendance record and once again he made multiple unspecific allegations about other people. The claimant said he complained about sexual harassment in that meeting and the Mr Nord said it was possible that he did. This was enough for us to find that he did.

<u>The bad faith issue</u>

83. The respondent accepted that the claimant raised an allegation of sexual harassment in February 2019 and again on 10 January 2020. The

claimant did not rely on anything said on 10 January 2020 as a protected act. On both occasions where it is accepted that the claimant mentioned the allegation, the respondent says there was limited detail and they said it was not raised in good faith.

84. We have found above that the claimant made the allegations he relied upon save that the second protected act was made to a female member of HR but not Ms Rosec. We have gone on to consider whether the allegation of sexual harassment was false and made in bad faith.

85. Our finding and conclusion set out below is that the sexual harassment complaint was out of time, such that we had no jurisdiction to consider it and as such we have not made a finding of fact as to whether Ms L sexually harassed the claimant.

86. Our finding is that in relation to the third and fourth protected acts, the claimant was seeking to deflect the disciplinary issues against himself by making complaints about others, including Ms L. The primary question for us was whether the claimant acted honestly in making his allegation about Ms L. It is an allegation that the claimant made verbally on the occasions he relied upon. During his employment and despite numerous requests, he failed to put it in writing and give details so that it could be properly investigated. Nevertheless we found the claimant's references to this allegation to be firmly believed in his own mind, so we find that he did not act dishonestly when doing any of the protected acts he relied upon. As such we find that they were all protected acts.

87. We go on to make our findings as to whether any of the protected acts were causative of any proven detriments.

<u>The acts of victimisation relied upon</u>

88. The first act of victimisation relied upon by the claimant took place in January 2018, just over a year after the alleged incident and his first complaint about it to Mr Mistry.

89. <u>Allegation (i)</u> This was that in January 2018 Mr Mark Nord, Mr Mistry, and Mr Le Prado rated the claimant an "*underperformer*". The claimant was not aware of this prating until he was presented with an Investigation Report in October 2019. The claimant did not deal with this issue in his witness statement.

90. The January 2018 performance review was just over a year after the 2016 Christmas party and the first protected act.

91. Mr Mark Nord is currently the Chief Operating Officer of Global Markets UK at the respondent. In May 2017 he was Head of Capital Markets Middle Office in which the claimant worked and the manager of the claimant's line manager Mr Mistry.

92. Mr Nord, who was involved in recruiting the claimant in September 2016, did not consider him to be the most talented employee but said that in that role "*you did not need to be*". Mr Nord said that what was required was to be reliable and work well with other people which the claimant was able to do at the outset.

93. Appraisals at the respondent have a rating out of 5, with 5 being the top meaning that an employee is performing above expectation, 4 is exceeding expectation, 3 is meeting expectation, 2 is below expectation and 1 is not meeting expectations at all. The appraisal process is led by the direct line manager and then reviewed by more senior managers. Mr Nord reviewed the appraisal carried out by Mr Mistry in respect of the claimant.

94. The claimant's appraisal for the 2017 performance year was carried out in January 2018 - the document was at page 261. He rated "*below expectations*" (page 264). Mr Nord described an incident which was taken into consideration which involved a loss of £500,000 because the claimant had incorrectly processed some funding deals.

95. The claimant's case is that he was not made aware of his appraisal rating for 2017 until October 2019. It is the respondent standard practice for the employee to review and sign their completed appraisal form. The manager's comments were inputted on 12 January 2018 at 09:41 hours. At page 266 we saw the electronic stamp showing the claimant's approval on 17 January 2018 at 18:29 hours. He certified that he had read and understood the document, which included the rating "*below expectation*" and agreed in evidence that he had "*probably"* seen it. We find that he did and there was no failure to show him his appraisal for 2017 until October 2019. He saw it on 17 January 2018.

96. This allegation was withdrawn against Mr Le Prado because the claimant accepted that he did not join the respondent until April 2018.

97. We have considered whether Mr Nord and Mr Mistry rated the claimant, not as an "*underperformer"* but as "*below expectations*", because he had made a complaint of sexual harassment. On our finding, by the date of this appraisal in January 2018, the claimant had made an allegation of sexual harassment to Mr Mistry, but not to Mr Nord.

98. We find that the performance rating was related to the claimant's performance in 2017, which included the heavy loss of £500,000. The appraisal comments also included a criticism of the claimant (page 261) for viewing and discussing inappropriate WhatsApp content and images during working hours. We find that the performance rating was based on his performance and had nothing to do with the allegation made to Mr Mistry over a year earlier.

99. Allegation (ii) In April 2018 was put as Mr Le Prado calling the claimant's GP surgery where the claimant's sister worked and asked to speak to the

sister regarding the claimant's doctor's notes.

100. Mr Le Prado commenced employment with the respondent in April 2018 at which stage he had worked in HR for about 7 years. He is and was CIPD qualified. HR Advisor Ms Isobel Barlow reported to Mr Le Prado. She dealt with HR processes including the booking of OH appointments.

101. Just before Mr Le Prado joined, his role was filled by a temporary employee in HR, Ms Chandiramani. She told Mr Le Prado that she had received a screenshot of the claimant's medical certificate by email and she wanted to check its authenticity and she made a phone call to that effect. Mr Le Prado does not know exactly what she said during that call. Prior to the pandemic it was normal practice for employees to send in a hard copy of their doctor's note.

102. On 17 April 2018 the claimant complained by email that his GP surgery had been telephoned about the authenticity of his doctor's certificate. The reason for the confusion on the part of HR was that they had received a copy of a fit note for the claimant, from a person sharing the same last name as himself, whom we now know to be his sister and from a different GP surgery address. The claimant's GP surgery was in White City, London W12, the email which sent the GP note came from a different surgery in Fulham (page 271). We find it was legitimate for HR to make the enquiry.

103. We find that Mr Le Prado did not make the call to the GP surgery; the call was made by his predecessor Ms Chandiramani. During his cross-examination the claimant asked counsel for the respondent "*who made the call?"* yet he was prepared to make this allegation against Mr Le Prado when he did not know who made the call.

104. The claimant twice said in evidence it was not a disadvantage to him for this phone call to have been made. We find on the claimant's own evidence that it was not a detriment. This allegation fails on its facts.

105. Allegation (iii) On 20 April 2018 knowing that the claimant had become aware of Mr Le Prado's telephone call to the GP surgery, Mr Le Prado introduced himself to the claimant via email. The email was at page 322 and said:

> *"Pleased to meet you, I'm your new HRBP. I understand from your previous email that you have been surprised by the call we made. I wanted to let you know this is standard procedure for HR to contact the issuer of a document where the original has not been received. The HR teams did not want to contact you directly since you were signed off sick. I think it is relevant to highlight no confidential information was shared that the receptionist would not have already had access to.*
> *Looking forward to meeting you when you'll be back. In the meantime, let me know if you need any support.*
> *Kind regards"*

106. In his statement the claimant said he thought Mr Le Prado introducing himself this way was "*rather odd"* but we do not agree.

107. It is our finding above that Mr Le Prado did not make the call to the GP surgery, it was made by his colleauge. It was other members of the HR team who suggested that Mr Le Prado contact the claimant about the matter, and they suggested the wording he should use (pages 311-313). Mr Le Prado followed their direction. Furthermore we cannot see how receiving an email by way of introduction as a new member of the HR team amounts to a detriment.

108. The claimant initially agreed in evidence that this had nothing to do with his complaint about sexual harassment. When asked why it was included as an act of victimisation he said: "*I believe it is linked".* We accepted his first answer and find that it was not linked to any sexual harassment complaint he had made and it was not an act of victimisation.

109. This was a routine HR email and we also find that it was not a detriment to the claimant.

110. Allegation (iv) On 14 May 2018 Mr Le Prado emailed the claimant at 1:57pm despite being aware that the claimant's doctor's note was being sent in so there was no need for Mr Le Prado to email the claimant.

111. The claimant had a sick note which expired on 13 May 2018 (page 303). On the morning of 14 May, Mr Le Prado wanted to find out if the claimant was back at work. The claimant was not back at work so Mr Le Pardo sent an email at 13:57 saying: "*We were expecting you back today but have not heard from you. Hemal was unsuccessful trying to reach you by phone. Could you please provide me with some updates? In the meantime, let me know if you need any support and feel free to reach me directly."* (page 317).

112. Mr Le Prado denies sending the email in the knowledge that the claimant was sending in another doctor's note. His evidence was that he would not have sent the email had he known this. The claimant accepted that he had not informed HR of this, he alleged he had informed his manager Mr Mistry. We saw Mr Mistry's email of 14 May at 10:56 hours saying "*I've had no contact"* (page 325).

113. By 14:46 hours on 14 May 2018 Mr Mistry had received the doctor's note as he acknowledged this to the claimant in a WhatsApp message (page 1228). We find that when Mr Le Prado sent his email at 13:57 hours he did not know the doctor's note was on the way.

114. The claimant was asked about the link to Mr Le Prado's email to his complaint of sexual harassment. He said he "*felt it was abnormal and linked it to [his] complaint".* We did not consider this email "*abnormal*", it was a routine HR enquiry. We could see no link or connection with Mr Le

Prado's innocuous enquiry about the claimant's attendance at work and lack of notification and any alleged complaint of sexual harassment either 1 year or 1.5 years earlier and the claimant could not explain the link in any coherent manner. This allegation fails.

115. Allegation (v) This was withdrawn on the afternoon of day 3.

116. Allegation (vi) This was withdrawn on the afternoon of day 3.

117. Allegation (vii) On 11 September 2018 Mr Le Prado emailing the claimant to tell him not to attend work on 24 and 25 September but the respondent would pay him for those two days.

118. The email of 11 September 2018 said: "*Please find below the details of your occupational health appointment. As we want to ensure that you are fit to work and accommodate you accordingly where necessary, I require you not to attend work on Monday and Tuesday. As this is a request from your employer, you will receive normal pay for those two days*." (page 419).

119. In evidence the claimant accepted that this was not a detriment to him and he accepted in evidence that it was not an act of victimisation. This allegation fails on the claimant's own admission.

120. Allegation (viii) On 12 September 2018, the claimant sent emails to Mr Le Prado, Mr Mistry, and Ms Isobel Barlow regarding his 70% permanent health insurance but the claimant received no help from HR or management with regards to this issue leading to serious financial difficulties and severe depression.

121. Our findings on this allegation are dealt with together with Allegation (ix) below.

122. Allegation (ix) In October 2018 Mr Le Prado victimised the claimant with regards to payment of PHI with Zurich.

123. The respondent provides its employees with the benefit of a Permanent Health Insurance policy (PHI). The respondent's insurer is Zurich. If an employee satisfies the terms of the scheme and their claim is accepted, insurance will cover 70% of their income whilst they are incapacitated. On 22 May 2018 Mr Le Prado asked whether a claim had been made because the claimant had been absent for nearly 4 months. One of the respondent's Pension and Benefits Advisers set the process in motion on 25 May 2018. Mr Le Prado was one of the points of contact and over the next few days he emailed Zurich to give them information they needed. The decision as to whether to accept the claim and pay the benefits lay with the insurer and not the respondent.

124. Mr Le Prado was informed by Zurich that the claimant had not engaged with them and had not replied to their emails. In an email dated 8 August

2018, Mr Le Prado gave the claimant the relevant contact information at Zurich if he wished to pursue the PHI claim (page 393).

125. On 12 September 2018 the claimant emailed Mr Le Prado to ask what percentage of pay he could expect once this claim was successful. He chased this up with a further email on 13 September 2018 – page 415. The claimant complained that he received no support from HR or management in response to his email of 12 September 2018. Mr Le Prado emailed him on 13 September 2018 at 09:29 hours saying "*Our insurer Zurich cover 70% of your salary. I invite you to contact directly [name of contact at Zurich] to discuss the matter in further details* (page 418). The claimant's complaint as set out in his witness statement, was about the email of 12 September 2018, which he accepted was answered the following morning.

126. On 9 January 2019 Mr Le Prado informed the claimant that Zurich had declined his claim. They said he did not meet their definition of disability. It was a matter for the insurers and not the respondent as to whether the claim was accepted.

127. The claimant was told about an appeals process to Zurich. The claimant asked Mr Le Prado in an email of 9 January 2019 to "*kick off"* the appeals process for him (page 583) which he did. The claimant did not suggest in his email of 9 January 2019 that it was Mr Le Prado or the respondent's fault that the claim had been declined.

128. The claimant said in oral evidence that he believed Mr Le Prado "*jeopardised*" his insurance claim by sending emails to Zurich behind his back from May 2018, not disclosing them, and saying that he should not be paid. None of these serious allegations were set out in the claimant's witness statement. It was put to the claimant that this allegation was an "*invention*".

129. The Zurich appeal decision dated 24 May 2019 was at page 839. It was a clear and detailed letter setting out the reasons for declining the claim. The claimant did not satisfy the scheme's conditions for payment. The claimant said he had made a complaint to the Financial Services Ombudsman about this matter but he had disclosed no paperwork related to this. He told the tribunal that this complaint was unsuccessful.

130. The claimant's assertion in oral evidence was that Mr Le Prado contacted Zurich to influence the outcome of his insurance claim as an act of victimisation for the Ms L complaint and an act of fraud on the part of the insurance company. By necessary implication, on his case the insurance company agreed to go along with this fraudulent practice. The claimant could give no credible explanation as to why Mr Le Prado as an HR professional and an insurance company responsible for the decision would choose to act in this way. The allegation had never been made before, it was unsubstantiated, unsupported by evidence and we find it had no foundation whatsoever. We find that Mr Le Prado did not victimise

the claimant with regard to payment of PHI with Zurich.

131. We make further findings below in relation to the PHI claim under the heading of the claimant's breach of contract claim.

132. Allegation (x) On 2 October 2018, the claimant was unfairly given an informal warning by Mr Le Prado.

133. The claimant could not remember if he had been given a warning on 2 October 2018. His only basis for this was a list of warnings in an Investigation Summary from Mr Lance Carley, Head of IT Production Services, produced on 16 October 2019 (at page 1010, history of warnings at page 1012). The claimant did not know whether he was actually given a warning on 2 October 2018. We saw no documentary record of such a warning and the claimant could not tell us anything about the warning or what it was for.

134. We find that there was no warning of that date and this allegation fails on its facts. We find that the list on page 1012 was incorrect in that there was no informal warning on that date.

135. Allegation (xi) On 2 October 2018 the respondent failed to show the claimant the meeting minutes regarding the informal warning issued on 2 October 2018 and what was discussed between Mr Le Prado and Mr Mistry.

136. The claimant's case was that if he was given a warning on 2 October 2018, there should have been a meeting and there should have been minutes. We find that there was no warning, there was no meeting and there were no minutes. This allegation fails on its facts.

137. Allegation (xii) On 9 October 2018, Mr Le Prado emailed the claimant about a disciplinary meeting telling the claimant he would be booking a room within the respondent's offices and for the claimant to attend to explain his absence from work. It was a long email at page 438. It explained that following the claimant's last OH appointment on 18 September 2018 the doctor had recommended a phased return to work with supervision, which they had implemented. It said that the claimant had failed to attend work on 1, 2, 8 and 9 October 2018 because he said he could not afford to travel to work. The claimant said this was because his PHI claim had been declined. Mr Le Prado reminded the claimant of the reporting obligations when not attending work. The claimant had not adhered to this. The reason for the disciplinary was about the claimant's non-attendance at work and this was made clear in the email. The claimant was given the option to have the disciplinary hearing by telephone.

138. The claimant had failed to attend work. The claimant said he had told Mr Mistry that he could not come to work because he had no funds to travel because the PHI policy had not paid out. Mr Mistry told the claimant by

email that if he wanted to get paid, he needed to attend work. Mr Mistry told the claimant in a WhatsApp message of 7 October 2018 at 15:43 (page 1230) "*we expect to see you in work as expected. I don't think it'll be accepted that you can't afford to get in to be honest*" and on 10 October "*If you're not sick then the bank will not accept financial issues as a reason for not attending work"* (page 1231).

139. The claimant was also pointed to the option of obtaining a season ticket loan, which the respondent offered, but in evidence he said he *"hit a problem*" when applying for this on-line. He did not tell the respondent about this difficulty. We saw no evidence of any attempt by the claimant to obtain the funds to travel to work, whether by seeking a short temporary loan from his bank or from someone close to him. The travel cost would have been small for those 4 days and once he had attended work he would have been paid in the next pay run. The claimant was absent without authority. There was no obligation on the respondent to fund the cost of his travel to work. This was his responsibility. He appeared to accept this on page 5 of his written submissions when he said: "*Albeit Credit Agricole isn't responsible for funding me getting to work…".*

140. The claimant had been absent from work without authority; that is the reason Mr Le Prado emailed him about it and wanted to set up a meeting to discuss his absence from work. It had nothing to do with any protected act done by the claimant.

141. Allegation (xiii) On 15 October 2018 Mr Le Prado again emailed the claimant about a disciplinary meeting again asking him for an explanation as to why he was off work, despite knowing the reasons for his absence from work.

142. The claimant did not reply to Mr Le Prado's email of 9 October 2018 referred to above (under allegation xii), so Mr Le Prado chased this up on 15 October 2018 (page 452). The email of 15 October said "*Please remember to let us know by the end of the Morning if you are unable to commute to work to attend the Meeting tomorrow. We can organise it by phone. One of the purposes of the Meeting is to understand the reasons of your absence. If you have any questions please let me know*." At 12:46pm on 15 October 2018 the claimant said: "*Please organise via phone!".*

143. We cannot see that this email to the claimant was to his disadvantage. The claimant was offered a meeting by phone and he agreed to it, although he subsequently failed to pick up the phone on the day of the meeting. As we have found above, the reason for the disciplinary meeting had nothing to do with any protected act and the email on 15 October 2018 was about arrangements for that hearing, offering the claimant an option that he wanted. This was not a detriment and it was not because of any protected act.

144. Allegation (xiv) On 16 October 2018 Mr Le Prado unreasonably emailed

the claimant about a disciplinary meeting.

145. The email was at page 457. It said: "*Though we tried 3 times, we did not manage to reach you at your personal mobile phone [number given] for the Disciplinary Meeting organised today at 10am. Please come back to me asap*."

146. The claimant accepts that he did not pick up the phone on 16 October 2018 for the disciplinary hearing and he said it was because he was stressed and he was "*not in the mood"* (his message to Mr Mistry at page 1231). A number of attempts were made to reach him by phone but were unsuccessful so the hearing took place in his absence. We can see nothing unreasonable in Mr Le Prado's email of 16 October set out above. There was a disciplinary hearing scheduled by phone, which the claimant wanted and he had not picked up the phone. We find it was reasonable for Mr Le Prado to email him to find out where he was. This had nothing to do with any complaint he had made about sexual harassment.

147. Allegation (xv) On 17 October 2018 the respondent failed to show the claimant the meeting minutes from the first written warning issued on 17 October 2018 and what was discussed between Mr Le Prado and Mr Mistry.

148. The claimant complains that he was not shown the notes of this meeting which he admits he did not attend. He was given the reasons for the warning he was given in an outcome letter referred to under Allegation (xvi) below. The claimant admitted that he did not make any request for any notes.

149. We find that there was no meeting and there were no meeting notes. A decision was made on the papers. This allegation fails on its facts.

150. Allegation (xvi) On 17 October 2018 Mr Le Prado unfairly gave the claimant a written warning.

151. The first written warning was jointly signed by Mr Mistry and Mr Le Prado (page 470). The reason for the warning was the claimant's non-attendance at work, he had not followed the notification requirements in the policy and had not given an explanation. We find on Mr Le Prado's evidence and in our experience it is common HR practice across many industries, that the decision maker on the disciplinary was Mr Mistry, with Mr Le Prado giving HR advice. Mr Le Prado was not the decision maker.

152. The claimant was given a right of appeal and he agreed that he did not exercise that right.

153. The claimant's case was that if he had not made a complaint of sexual harassment, he believed there would have been a different outcome, but he did not say what he thought that would have been.

154. We find that the warning was because of the claimant's unauthorised absences and failure to comply with policy. Even though Mr Mistry was aware of the claimant's allegation of sexual harassment, we find that the legitimate issue of concern for him as a manager and for the respondent was the unauthorised absence. On our finding Mr Le Prado was not aware of the sexual harassment allegation when he gave HR advice to Mr Mistry. The warning was not because of any protected act done by the claimant.

155. Allegation (xvii) On 29 January 2019, the claimant was unfairly given an informal warning by Mr Le Prado.

156. The only document that was in the bundle from Mr Le Prado dated 29 January 2019 was an email at 09:14 hours (page 670) in response to the claimant saying he would be in the next day, having previously said he would not be at work. The email said:

> *"I confirm that in the absence of your manager, you should either inform his deputy or your N+2. It is always appreciable that you inform me as well but I insist your manager (or his representative) is the one you should inform in priority."*

157. The claimant did not contend that this email was a written warning. The claimant's only basis for saying that he had a warning on that date, was because of the summary in Mr Carley's investigation report. Other than that list in the investigation report, the claimant had no recollection or knowledge of any warning on that date. We find that there was no such warning and this allegation fails on its facts. We repeat our finding at allegation (x) that the list was not correct.

158. Allegation (xviii) On 29 January 2019, the respondent failed to show the claimant the meeting minutes for the second informal warning issued on 29 January 2019 and what was discussed between Mr Le Prado and Mr Mistry/Mr Nord.

159. As we find that there was no hearing and no warning, there were no meeting notes or minutes to be given to the claimant. This allegation fails on its facts.

160. Allegation (xix) On 21 February 2019, the claimant was again unfairly given an informal warning by Mr Le Prado.

161. Along with many of the other allegations, there was no reference to this in the claimant's witness statement. The only document of 21 February 2019 was at page 715. This was an email from Mr Mistry and not from Mr Le Prado. It said:

> *"I understand from your emails that you are currently away as you need to acquire copies of documentation about your period away from work last year owing to illness.*

As you can imagine we are very busy, particularly at the moment as Anita has been signed off work ill and Simon is about to take some leave as well. The problem, as discussed before, is that I need to hear from you by phone before 10AM on any day where I don't already know you won't be in, and I haven't. I also need to know how long for, and I don't. All this needs to be agreed upfront whether holiday or unpaid leave, and it wasn't. This makes it very difficult for me to manage the workload of the team, and puts a strain on your fellow team members.

In short, we need you on the desk, and I would really like to know what is left for you to sort out and when you will be back."

162. This was not a warning and the claimant said he had no problem with this email. The claimant could not remember any warning having been given to him on 21 February 2019. We find he was not given a warning of 21 February 2019 by Mr Le Prado or anyone else. This allegation fails on its facts.

163. Allegation (xx) On 21 February 2019, the respondent failed to show the claimant the meeting minutes for the 3rd informal warning issued on 21 February 2019 and what was discussed between Mr Le Prado and Mr Mistry/Mr Nord.

164. As we find that there was no warning, there was no hearing and there were no meeting notes or minutes to be given to the claimant. This allegation fails on its facts.

165. Allegation (xxi) On 4 March 2019 the claimant was unfairly given another first written warning by Mr Le Prado.

166. There was a disciplinary hearing on 27 February 2019. At that hearing Mr Nord acknowledged that the claimant was clearly going through tough times, but there were simple rules on absence reporting that needed to be followed (meeting notes page 743). The claimant said he had taken time off to deal with the papers for his appeal on the Zurich PHI matter.

167. The claimant was sent an outcome on 4 March 2019 (page 762) which explained the reason for the first written warning. Mr Nord explained in the outcome letter the effect that the claimant's absences had on the colleagues in his team and that managers needed advance notice so that they could plan the workload for the rest of the team. The claimant was already subject to the warning of 17 October 2018 and this warning was on file for 12 months. As the claimant already had a live first written warning on file, it was open to Mr Nord to give him a final written warning. Mr Nord chose to impose a lesser sanction, taking account of the difficulties the claimant had encountered.

168. The respondent accepted (submissions paragraph 105) that at the time Mr Nord decided to issue the claimant with this warning, he was aware that the claimant had made an allegation of sexual harassment. This was

in the impromptu meeting on 26 February 2019 when the claimant had arrived in his office seeking an explanation of the invitation to a disciplinary hearing.

169. The reason for the warning was because he had 10 unauthorised days of absence and he had not complied with the leave policy despite being reminded repeatedly of the requirements. These were justifiable reasons for this warning and if, as the claimant suggested, the respondent was aiming to dismiss him, we find that they would have moved to a final written warning, which they did not.

170. The warning was not because of any protected act.

171. Allegation (xxii) On 4 March 2019, the respondent failed to show the claimant the meeting minutes for the 2nd first written warning issued on 4 March 2019 and what was discussed between Mr Le Prado and Mr Mistry and Mr Nord.

172. The claimant was sent the notes by Ms Barlow on 1 March 2019 (page 740). Having been taken to this, the claimant withdrew allegation (xxii).

173. Allegation (xxiii) On 12 March 2019 the claimant was unfairly issued with a further informal warning based on the Investigation Summary of 16 October 2019.

174. It was unclear to us how a warning of 12 March 2019 could be based on an Investigation Summary produced 7 months later on 16 October 2019. The claimant said that the allegation should only have read: "*On 12 March 2019 the claimant was unfairly issued with a further informal warning*".

175. There was an email from Mr Nord of 12 March 2019 at page 1004. The claimant was asked if he regarded this as an informal warning. The claimant could not point us to an informal warning of 12 March 2019. The claimant said he had no problem with the email at page 1004. We find there was no warning.

176. The email was about unexpected absences the previous week and Mr Nord reminded the claimant of their discussions about the reporting procedure for absences. The claimant had been reminded about this many times. This allegation fails on its facts.

177. Allegation (xxiv) On 12 March 2019, the respondent failed to show the claimant the meeting minutes for the 4th informal warning issued on 12 March 2019 and what was discussed between Mr Le Prado and Mr Mistry and Mr Nord.

178. As we find that there was no warning, we find there was no hearing, no meeting notes or minutes to be given to the claimant. This allegation fails on its facts.

179. Allegation (xxv) On 30 September 2019 the claimant was summoned to an unscheduled meeting held with Mr Nord and Mr Mistry, whose alleged misconduct was totally fabricated by Mr Mistry and Mr Nord. The claimant referred to his concerns about Ms L in this meeting. Mr Nord smirked at the claimant and ignored his questions.

180. On 30 September 2019 the claimant's managers Mr Nord and Mr Mistry had noticed that he was having some serious issues with non-attendance at work. By September 2019 the claimant had taken 26 days off, of which 18 were for self-certified sickness and 8 were unauthorised Mr Nord invited the claimant to an informal meeting with himself and Mr Mistry to discuss this and to remind him of the warnings he had been given on 17 October 2018 and 4 March 2019. The purpose of the meeting was to remind the claimant of the procedure for booking leave in advance and the need to communicate with his manager in accordance with the policy if he was going to be absent.

181. The claimant did not react at all well to being invited to this meeting. It was intended as a short meeting but lasted about 2 hours. In his witness statement (paragraph 16) the claimant said he was "*frustrated"* at being taken into the office and "*spoken to like that by management".* He alleges that Mr Nord was "*pointing a pen in his face".* Mr Nord's evidence was that they were in his office seated at a round table with a circumference of 1.5 metres. Mr Nord accepts he was holding a pen and may have been playing with it but he denied waving it in the claimant's face. We find that where there was a table between them of around 1.5 metres, Mr Nord was not pointing a pen in the claimant's face.

182. There is a dispute as to whether the claimant threatened Mr Nord. Mr Nord said the claimant made comments along the lines that if he saw Mr Nord on the streets "*he would know what to do"* and Mr Nord perceived this as a threat and felt concerned for his physical safety. He interpreted it as the claimant threatening that if he saw him in the street he would use physical violence towards him. The claimant's account in his witness statement was that he said "*you wouldn't do that to someone in the street, have some respect".* They agree that there was reference by the claimant to being out in the street.

183. The claimant was very angry that Mr Mistry had prepared a spreadsheet recording his absences, the reasons for those absences and details of the messages sent by the claimant to Mr Mistry about those absences. We deal with this in more detail below as it is an allegation of direct race discrimination.

184. The claimant's case is that the act of victimisation was calling him to this meeting and "*fabricating"* alleged misconduct about him. In addition he says that Mr Nord "*smirked"* and ignored his questions.

185. At 6pm on 30 September 2019, following the meeting the claimant sent a WhatsApp message to Mr Mistry, saying "*Not Happy wid whaat went.*

*Down this morning!! ……all f***ing bullshit!"* and "*let anyone on da desk no if they've Got Ann issue widd me. And I'll pull em aside or we just. Have a massive meeting and. Haaveee it Out then! ! ! My time off is no onees f******ng business!"*

186. Due to his concerns about the meeting, Mr Nord sent an email to Mr Le Prado the following morning at 08:52 (page 915). Mr Nord said that the claimant accused Mr Nord of bullying him, alleged that he was not being respected, that he was not being treated fairly and was furious that there was a spreadsheet logging his absences. We saw from this spreadsheet (page 917) that he had 15 days absences between July and the end of September 2019 which were not pre-arranged, including 9 days in September itself. Mr Nord said he felt that the claimant was being as aggressive as he could be without threatening anything specific and "*implications about what happened to people in the street if they behaved like I did in the office."*

187. Two weeks later on 15 October 2019, in an investigatory meeting with Mr Carley, Mr Nord said (meeting notes page 989):

> *MN - I found it a very challenging meeting because he was very difficult to talk to. He wasn't listening to me. He wasn't making sense of what I was saying. He was accusing me of looking at him funny and bullying him, which wasn't linking with what I was saying which was confusing. When he said "if this was the street I would know how to act and you wouldn't dare do this to me", I asked him what he was warning me of. He said "I'm not stupid enough to give you an answer to that". I started thinking I need to be careful on my way home from work in case there was an angry employee behind me.*

188. In Mr Mistry's investigatory meeting (page 983) he told Mr Carley that he found the meeting "*uncomfortable"* and *"frightening*".

189. There was common ground between the parties that there was reference to behaviour out in the street. Mr Nord's account was repeated in his contemporaneous email of 1 October 2019, quoted above. We find that the claimant behaved aggressively in that meeting. Mr Nord gave another consistent account at the investigatory meeting on 15 October 2019 and Mr Mistry's account was that the meeting was "*frightening*". The WhatsApp message to Mr Mistry again indicated that the claimant wanted to "*pull them aside and have it out with them*". Based on all of this we find the claimant was angry and threatening during that meeting on 30 September.

190. We find that the claimant was called to an unscheduled meeting to discuss his absences. We find that the claimant's misconduct was not "*totally fabricated*", he had taken time off work and had not followed proper procedures for seeking leave. The conduct matter raised with the claimant at that meeting was about his unauthorised absences from work

191. We have found above that at that meeting on 30 September the claimant did mention his allegation of sexual harassment by Ms L. We find that Mr Nord did not ignore the claimant's questions, he gave him two hours of his time, in a meeting that was only intended to be short. We find that the claimant was combative and aggressive in that meeting and on a balance of probabilities we find Mr Nord did not smirk at him. He was trying his best to manage a meeting that became increasingly difficult.

192. We find that the reason the claimant was called to the meeting was to discuss the high level of his unplanned absences from work and had nothing to do with any protected act. The allegations of misconduct were not fabricated and we find against the claimant on his allegations as to Mr Nord's conduct.

193. Allegation (xxvi) On 30 September 2019, the respondent failed to show the claimant the meeting minutes for the fifth informal warning issued on 30 September 2019 and what was discussed between the claimant and Mr Mistry and Mr Nord.

194. The claimant agreed that nobody took any notes at this meeting on 30 September 2019. We find that this is the reason he was not sent any notes. This allegation fails on its facts as there were no notes to be sent to him.

195. Allegation (xxvii) On 15 October 2019 an investigation meeting was organised between Mr Le Prado, Mr Nord and Mr Mistry which was victimisation based on context described against the claimant.

196. The claimant was asked to explain this allegation which he found difficult to do. As we have found above, on 15 October 2019 Mr Nord and Mr Mistry attended investigatory meetings in connection with the allegations concerning the claimant's conduct on 30 September 2019 that he had been aggressive and threatening and his absences in 2019. We find that the respondent needed to speak to his managers about it. The claimant said the investigation went "*way beyond what it should have been".*

197. We saw the notes of the investigatory meetings which we find were standard investigations into the allegations in issue. There was nothing in them that went beyond the allegations they were investigating and we find that the investigations had nothing to do with any protected act done by the claimant. It was an investigation into allegations of misconduct based on his alleged aggressive behaviour at the meeting on 30 September 2019, alleged in subordination and alleged poor attendance at work.

198. Allegation (xxviii) On the 15 October 2019 the respondent failed to show claimant the note takers minutes by HR Advisor Cari Risk.

199. The claimant accepted that he received the interview notes and this allegation was withdrawn at the start of day 5.

200. Allegation (xxix) On the 15 October 2019 the respondent failed to show the claimant the interview minutes with AL and VP and what was discussed between Mr Le Prado, Mr Nord and Mr Mistry regarding the investigation of the claimant.

201. We accepted the respondent's evidence that Ms AL (not to be confused with "Ms L") and Mr P were not interviewed as part of this investigation. The claimant had no knowledge of whether they were interviewed or not. As we find they were not interviewed, there were no notes to show him. This allegation fails on its facts.

202. Allegation (xxx) On 16 October 2019 the claimant was unfairly suspended by Mr Le Prado for 8.5 months.

203. The claimant did not deal with this allegation in his witness statement. The reason he was suspended for as long as 8.5 months was his failure to engage in the disciplinary process and the attempts to refer him to OH during this time. The respondent made multiple attempts to have the claimant attend OH and he did not engage with the process. In the dismissal letter at page 1170 there was a heading "*Disciplinary Process*" setting out what we find, on the evidence we were shown, was an accurate account of the efforts made by the respondent to secure the claimant's engagement in the process. The claimant's evidence was that he did not know the process, he did not know what HR could have done but he thought they should have been "*more sympathetic*".

204. The claimant was suspended on 16 October 2019 in relation to three disciplinary charges, being his aggressive behaviour on 30 September 2019, his failure to comply with absence procedures and the failure to follow reasonable management instructions. It was the aggressive behaviour that led to the decision to suspend.

205. The disciplinary hearing was originally due to take place on 21 October 2019 and had it taken place then, the suspension would have been for 3 working days. It was rescheduled to 28 October 2019. The claimant then informed Mr Le Prado that he was unwell. It was rearranged for 10 January 2020. The claimant attended but Mr Le Prado had concerns for the claimant's welfare and wished to refer him to OH to make sure that he was fit to participate in a disciplinary hearing. It was rescheduled for 24 February 2020 and then to 3 March 2020. The claimant did not make contact with regard to his OH appointment.

206. Given the claimant's lack of engagement he was given an opportunity to send written representations for his disciplinary hearing, to be submitted by 10 April 2020. No written representations were received so the deadline was extended to 21 April. At no point did the claimant send in any written representations or submissions that he wished to be considered at the disciplinary hearing.

207. The hearing took place on 24 April 2020 in the claimant's absence and the

decision to dismiss is dealt with below.

208. The length of the suspension was because of the claimant's lack of engagement with the process and not because of any protected act. We find that the suspension itself was not unfair, it was justified because of the claimant's aggressive and threatening behaviour on 30 September 2019.

209. Allegation (xxxi) On 16 March 2020 Mr Le Prado emailed the claimant asking him to attend OH on 18 March 2020 during the Covid crisis. The claimant explained via telephone that this would further heighten his anxiety/mental health and that this would not be appropriate given the Government's lockdown rules.

210. On 26 February 2020 (page 1105) Mr Le Prado asked the claimant to confirm his attendance at a disciplinary hearing and asked him if he wanted it by telephone. The date of the disciplinary hearing was 3 March 2020. The claimant did not reply until the date of the hearing to say he would not attend. Mr Le Prado suggested an OH appointment to see what adjustments might need to be made. Mr Le Prado had been trying to call the claimant with no success. He wondered whether the claimant had changed his telephone number.

211. A telephone OH appointment was set up for the claimant. On 16 March 2020 at 3:07pm Mr Le Prado informed the claimant about the OH appointment for 17 March (page 1112). The claimant's issue was that the OH appointment had been made in person during the pandemic. The email made clear that the OH team, from an external provider, had requested that it be in person, not the respondent. This was just before the first national lockdown on 23 March 2020.

212. The claimant's response was to say he could not attend due to childcare reasons, not because of the pandemic (page 1122). By 17 March (page 1121) Mr Le Prado converted it to a telephone appointment for reasons of the claimant's safety, as the circumstances of the pandemic were becoming more serious. The first national lockdown happened about a week later.

213. We find that all the respondent's actions were fair and reasonable. This was not a detriment to the claimant. This allegation fails on its facts.

214. Allegation (xxxii) On 16 March 2020 the respondent/Ms Barlow failed to send the doctor's confirmation over to the claimant to confirm the OH appointment for 18 March 2020 and the claimant received no contact from the HR Advisor.

215. This allegation was withdrawn during cross examination on the morning of day 5.

216. Allegation (xxxiii) On the 26 March 2020 the respondent emailed the

claimant and accused him of not picking up his phone regarding a OH call from the 18 March 2020. The claimant had not received a call during 18 March 2020.

217. This is dealt with below together with allegation xxxiv.

218. Allegation (xxxiv) On the 26 March 2020 the respondent/Mr Le Prado emailed the claimant out of office hours at 7:23pm and stating that he hoped the claimant's loved ones were safe and well at home. The claimant said he took this as a direct threat to his family as the respondent has never entered an email conversation with this nature outside of office hours before, thus making the claimant's anxiety and condition worsen.

219. The email of 26 March 2020 (page 1120) said as follows: *We hope you and your loved ones are safe at home. With regard to the last [OH] appointment organised on the 18th March, could you please let us know if there is any reason why you did not pick up the doctor's phone call?".*

220. The date of 26 March 2020 was within three days of the first national lockdown at the very start of an unprecedented pandemic. It was a very worrying time for most people in the UK. We find that Mr Le Prado's expression of good wishes for the claimant and his family and their health and safety was a kind gesture in those very concerning circumstances. Mr Le Prado and Ms Barlow had said similar things to one another in emails on 20 March 2020 (page 1119). It had nothing to do with the fact that the claimant had made a complaint in the past about sexual harassment. The claimant's interpretation of this comment as a "*threat*" was disproportionate. It was not a threat.

221. In relation to the OH appointment, Mr Le Prado and Ms Barlow had been told by the OH provider that the claimant had not answered the call so that the appointment could be carried out. It was perfectly legitimate for Mr Le Prado to enquire as to why that might be. It had nothing to do with the claimant's past complaint of sexual harassment. It was for the purpose of ensuring that an OH assessment could take place.

222. Allegation (xxxv) On 13 March 2020, Mr Le Prado contacted the claimant's ex-partner CR, who was not listed as one of the claimant's emergency contacts, via phone call and email, without any justifiable reason.

223. The respondent had been unable to contact the claimant for two weeks and they did not know the reason. Mr Le Prado had looked at the self-service HR details called iTrent. The details he found for the emergency contact for the claimant were for Ms CR. The claimant said his emergency contacts were his sister and his current partner. The claimant was asked how else Mr Le Prado would have known CR's contact information. The claimant, who had not dealt with this in his witness statement, said that the information was in a Word document in his PC. Mr Le Prado did not know that CR was the claimant's ex-partner.

224. The claimant said he and Ms CR broke up in 2010 but she was his partner when he very first joined the respondent on a contract basis. The claimant did not appear to know that it was his responsibility to change the emergency contract information on iTrent.

225. There was a note purportedly from Ms CR at page 1311 of the bundle dated 7 May 2021. All she said as to the content of the phone call was "*On 13th March 2020 I received a call from William Le Prado [job title] asking me if I had been in contact with [MJS] as he was unable to reach him".* She then went on to say she was shocked to receive the call. We find from her account and on Mr Le Prado's evidence that no personal or confidential information was divulged during that call.

226. The claimant's evidence was that Mr Le Prado contacted CR to "*wind him up*". We find that whatever happened with the contact information, Mr Le Prado was doing nothing more than looking at the information in front of him and the call to Ms CR was out of concern for the claimant and to find out his whereabouts and had nothing to do with any protected act. We also find that the phone call was not a detriment to the claimant, no personal information was divulged.

227. Allegation (xxxvi) On 24 April 2020 the respondent failed to send the claimant the minute meetings conducted on the 24 April 2020 with regards to his dismissal.

228. This was the date of the final disciplinary hearing which the claimant declined to attend. The claimant had been given a number of opportunities to submit written representations which he also declined to do.

229. The outcome letter of 11 June 2020 sets out in detail the reasons for the termination of the claimant's employment. There was no meeting on 24 April 2020 because the claimant failed to attend, so there were no meeting minutes to send him. This allegation fails on its facts.

230. Allegation (xxxvii) This was withdrawn on the afternoon of day 3.

231. Allegation (xxxviii) Before 2018 Mr Mistry would allow the claimant to be paid for looking after his dependants. However from October 2018 until the claimant's suspension, any leave to look after his dependants was unpaid then suddenly blocked.

232. This allegation was not dealt with in the claimant's witness statement. He agreed that at no time were his requests for such leave refused. The policy was only to pay parental leave if the children were under 5 (Mr Nord's email page 254). He accepted that both his children were over the age of 5. The claimant did not contend that any policy said that he should be paid for time off to care for children over 5. His case was that he had been allowed paid time off until he returned to work in October 2018.

233. We find that whatever Mr Mistry had been doing in arrangements with the claimant prior to October 2018, we find that the claimant had no entitlement to paid time off to look after his dependents and when he returned to work in October 2018, the position reverted to the policy. The has nothing to do with any allegation made by the claimant of sexual harassment.

234. Allegation (xxxix) Mr Mistry denied the claimant a slot to a mental health seminar without any justifiable reason.

235. This was not dealt with in the claimant's witness statement. He said in oral evidence that it happened in 2017 but he could be no more specific as to when this happened. It concerned a mental health seminar. We were told that a group email was sent out saying there were a limited amount of slots. We were not taken to this email. The claimant wanted a particular slot but Mr Mistry said he wanted the claimant to stay on the desk. The claimant said it was quiet so he could not understand why he could not have the slot he wanted. The claimant asked whether this was connected with a complaint about sexual harassment in December 2016. He said "*it could well be".*

236. We were not taken to any evidence to support this allegation which the claimant had not dealt with in his witness statement. The claimant did not show us that there were facts from which we could conclude, in the absence of any other explanation, that he had been victimised in this respect.

237. Allegation (xl) On 11 June 2020, the respondent dismissed the claimant. It is admitted that the respondent dismissed the claimant.

238. We have made our findings below in relation to the unfair dismissal claim. For the reasons we set out, we find that the claimant was fairly dismissed for gross misconduct and not because he did a protected act in complaining about the conduct of Ms L.

239. For the reasons given, the claim for victimisation fails and is dismissed.

Direct race discrimination

240. Allegation 1: was that the failure to pay the claimant a bonus in March 2018, March 2019 and March 2020 was on each occasion less favourable treatment because of his race and relying upon a hypothetical comparator .

241. We find as follows: For his performance in 2017 he was rated *"below expectation"* and that is the reason he was not paid a bonus. We find that the reason was his performance and not his race and that any other employee of any racial group who rated "*below expectation"* would not have received a bonus. The claimant signed off the appraisal showing his approval on 17 January 2018 at 18:29 hours (page 266). He did not challenge his rating.

242. The claimant was absent from work in 2018 from January to 24 September, the bulk of the year and on his return there were further attendance problems such as in early October 2018. We find that this is the reason he did not receive a bonus, it was not because of his race. We find that any other employee of any racial group who had not worked for the bulk of the year would not have received a bonus.

243. In the performance year 2019 the claimant had a phased return to work and considerable attendance problems, including being given a written warning on 4 March 2019. By 16 October 2019 he had been suspended on serious disciplinary charges. We find that this is the reason he did not receive a bonus, it was not because of his race. We find that any other employee of any racial group who had considerable attendance problems and a warning for this during the year and a suspension on serious disciplinary charges would not have received a bonus.

244. The claimant was not denied a bonus because of his race. The reasons he was not paid bonus are as set out above.

245. Allegation 2: was that on his return to work in October 2018 he was left alone on the desk more than any of his colleagues leading up to his suspension in 2019. He says this had never happened previously before taking time off. This was his lengthy period of sick leave from January to late September 2018.

246. In his ET1 box 15 (page 42) the claimant said: "*Hemel being incompetent by booking two people off at the same time thus leaving more pressure on me on the desk"*. This was a reference to Mr Mistry. The claimant case in his ET1 was that Mr Mistry had booked two people off at once, leaving more pressure on himself and this was due to incompetence. The claimant agreed that incompetence was unrelated to race. Mr Nord said it was not unusual for someone to be alone on the desk if there were staff absences.

247. We find that even if the claimant was sometimes on the desk on his own this was not because he was black, mixed race or of African heritage. We find it was because of staff shortages. The claimant did not show facts from which we could conclude, in the absence of any other explanation, that he was left on the desk alone at any point because of his race.

248. Allegation 3: was that he was excluded from all team meetings towards the later stages of 2019. There was no reference to this in his claim form or in the additional details of his claim which he submitted on 9 December 2020 (page 80). This allegation was not mentioned in his replies to the respondent's Request for Further Information (starting at page 83). We had no details as to who was said to have excluded the claimant from team meetings or the circumstances in which this happened.

249. The claimant's evidence was that there were about 6-7 members of the

team and that they sat at a bank of desks on the open plan trading floor. When Mr Mistry held a team meeting they were held at the bank of desks in this open plan setting. Mr Nord said it would be difficult to exclude the claimant from a meeting in those circumstances.

250. This was a vague, unparticularised allegation and the claimant did not show facts from which we could conclude, in the absence of any other explanation, that he had been discriminated against because of his race by any exclusion from team meetings. He did not satisfy us that he was excluded from team meetings. We accepted Mr Nord's evidence that because of the layout, it would be very difficult to exclude the claimant from any such meetings. We find that the claimant was not excluded from team meetings.

251. Allegation 4: was that on 30 September 2019 / 1 October 2019 Mr Mistry printed off the claimant's personal texts and showed them to Mr Nord's Personal Assistant, Amanda (Caucasian European), and left them on his desk.

252. This was not referred to in the claimant's witness statement. Mr Nord's evidence was that by mid-September 2019 Mr Mistry told him that the claimant had started to take a lot of absences. Mr Mistry had kept a record at Mr Nord's request. The claimant was angry that Mr Nord had a spreadsheet in which Mr Mistry had compiled the absence information. Mr Nord was not aware that the information had ever been shown to his PA.

253. The information was not collated because of the claimant's race but because they needed to understand the absence situation. The spreadsheet information was at 900-901. The spreadsheet detailed the absences and how they had been reported to Mr Mistry. It included the claimant's messages as to the reason for his absence. These included: "*Hemz I'm still in Birmingham alarm didn't go off. Wtf"; "couldn't get through to your mobs. I left a message anyway? I'll be. Off today! Feel slightly better. Cheers"; "I'll be off the rest of the week mate. Much appreciated"; "Got some major stuff going on! Won't be in unfortunately!"; "I've been moving my belongings to my new place…."; "Will not be in due to some personal things going on"; "I'll be off. Has William left?".* The tribunal asked him if page 900 was the list to which he was referring and he said yes.

254. We find on a balance of probabilities, based on Mr Nord's evidence, that that no text messages were printed off and left on his PA's desk. There was a spreadsheet prepared by Mr Mistry at Mr Nord's request to deal with an escalating unauthorised absence situation and this included the reasons the claimant had given for being absent. Mr Nord said that they needed the details in case the claimant asked for examples, so that they could be specific. We find that this was an appropriate method of absences management, noting the absences and reasons given. Mr Nord had no knowledge of the spreadsheet being shown to his PA.

255. The claimant said that no-one else on the desk had been treated like this and he said no-one else was of Black African heritage. It was put to him that no-one else behaved in the same way. In terms of the composition of his team of about 6 or 7 people, Mr Nord's evidence was that it was a racially mixed team, more so than any of the other teams. We were told that Mr Mistry and Mr VP are British and both of Indian origin. Two were East Europeans, and Mr AS is French and of Spanish origin. Whilst the claimant was the only member of his team who described themselves as black, mixed race of African heritage, Mr Nord said that there were employees of this racial group in other teams. We had no evidence of anyone else having the same absence issues as the claimant.

256. We find that the spreadsheet was an appropriate method of absence management and it was not less favourable treatment because of the claimant's race. We find that any other employee with a similar poor absence record would have had the examples recorded in the same way together with the reasons given. This was not less favourable treatment because of the claimant's race.

257. Allegation 5: was that the claimant was racially abused by Mr Le Prado on 10 January 2020 after a disciplinary meeting. This was also relied upon as racial harassment and we have made our detailed findings under that heading. The allegation fails on its facts. Our finding is that Mr Le Prado did not make the comment relied upon.

258. Allegation 6: was that on a number of occasions Mr Mistry directed the word "*coloured*" towards the claimant and his late father and no-one else on the desk. Other than saying in his witness statement (paragraph 8) that it happened in 2017, the claimant gave no particulars as to the circumstances in which Mr Mistry is alleged to have said this. This allegation was not referred to in his Particulars of Claim attached to his ET1.

259. In its Amended Grounds of Resistance at pages 135 and 137, the respondent admitted that until a few years ago, Mr Mistry used the term "*coloured"* in relation to himself and others. We were told that Mr Mistry is British of Indian origin. It was not admitted that Mr Mistry used the term specifically in relation to the claimant or his father.

260. In the complete absences of any particulars from the claimant we are unable to make a finding that Mr Mistry called him or his father "*coloured"* in unspecified circumstances or on unspecified occasions in 2017. The claimant has not shown facts, from which we could conclude, the absence of any other explanation, that Mr Mistry used this term towards him or his father.

261. Allegation 7: was that Mr AS a white European directed the words "*monkey boy"* towards the claimant and to no-one else on the desk. This was also relied upon as racial harassment and we have made detailed findings of fact under that heading. No date was placed on this allegation

of direct race discrimination.

262. The claimant said in paragraph 8 of his witness statement that AS used the term towards him at a summer party. Paragraph 8 dealt with events in 2017. Allegation (c) under racial harassment below was that AS used the term on the trading floor in early to mid-2019. The claimant did not raise any complaint about this until he attended a disciplinary hearing on 10 January 2020, at least six months later and 3 years after he said the term had been used in 2017.

263. As we find below in relation to racial harassment, "*monkey boy"* was a term that the claimant used freely of himself and others and he defended the use of the term when questioned about it by a colleague, saying monkeys were "*nice*". The claimant used this term towards a number of colleagues of different racial groups and considered this acceptable.

264. Nevertheless we find that workplace colleagues take a risk if they use a term such as this, which could be taken pejoratively about a colleague who is black, mixed race or of African heritage. We find Mr AS did use the term, as did the claimant. We find that because of its offensive connotations, it amounted to less favourable treatment because of race to use this term towards the claimant who describes himself as black, mixed race and of African heritage.

265. We deal with the time point in relation to this claim under the heading Conclusions below.

266. Allegation 8: The claimant relied on his dismissal as an act of direct race discrimination. We deal with this under our findings on unfair dismissal and the reasons are set out below. We find that the claimant was dismissed for gross misconduct. He was not dismissed because of his race.

The claimant's named comparators

267. In addition to relying on a hypothetical comparator, the claimant relied upon four named comparators, all said to be white European. They are (i) Mr NS whom the claimant said was off sick for a total of 13 months but was "*allowed to return in a normal capacity and was not harassed by HR or management*"; (ii) Mr SB who was off for many months in 2017 due to a health problem and was "*allowed to return in a normal capacity and was not harassed by HR or management*"; (iii) Mr NK who was allowed time off to care for dependents, family issues or holidays without any issues and (iv) Ms AL who was allowed time off for family issues without any issues.

Comparator NS

268. The claimant said NS, FX Spot, Options and Precious Metals Middle Office Trade Support Manager, was off for a total of 13 months due to

mental health, he was allowed to return within a normal capacity and was not harassed by HR or the management team in any way and left daily at 5pm without any repercussions.

269. The claimant did not refer to any of his comparators in his witness statement. The claimant said in oral evidence that it was only NS who had a lengthy period of time off work. The claimant was asked whether any of his comparators, on their return to work, had unauthorised absences and failed to follow absence reporting procedures. In relation to Mr NS the claimant said he was on the FX desk so he was "*not actually sure what was going on*".

270. Given that the claimant did not put himself "*in the same category*" as NS, we find that there were material differences in the circumstances of the claimant and NS for the purposes of any comparison. The claimant said in oral evidence "*NS worked on the FX desk so I am not actually sure what was going on, we are two different people on different desks and different mental health issues so I am not going to put myself in the same category as NS".*

271. We find that the claimant did not present facts from which we could conclude, in the absence of any other explanation, that he was treated less favourably than NS in circumstances that were not materially different.

Comparator SB

272. The claimant's case in the List of Issues was that SB was off for many months in 2017 due to a health problem. He was allowed to return within a normal capacity and was not harassed by the HR team or management team in any way when he had returned to work.

273. The claimant was absent from January 2018 to 24 September 2018, a period of 8.5 months. He had unauthorised time off in October 2018 and his work pattern was intermittent in January and February 2019.

274. The claimant's oral evidence was that SB was "*off for about a month*", so we find that he was not off for "*many months"* and that it was only NS who had a lengthy period of time off work.

275. We had no evidence to suggest that when SB returned to work after a comparatively short absence, he then had unauthorised absences or failed to follow absence reporting procedures. SB's absence was far shorter than the claimant's period of absence.

276. We find that the claimant did not present facts from which we could conclude, in the absence of any other explanation, that he was treated less favourably than SB in circumstances that were not materially different.

Comparator NK

277. The claimant complained that Mr NK was given time off to go abroad. He said NK had a son and the claimant has 2 sons. The claimant said that when he wanted time off to look after his sons, once he returned from his long period of sick leave in September 2018 "*things changed*". The claimant agreed that there was no occasion on which he asked for time off to look after his sons, when it was refused. He agreed that there was no issue with him taking time off for his dependants so in this respect we find that there was no less favourable treatment. The claimant said that the difference was that after his return from sick leave, the time off was unpaid.

278. It was put to the claimant that time off for dependants was unpaid unless it was for parental leave and the children were under 5 years. The claimant's children were over the age of 5. The claimant knew that if he wanted to be paid, he could book annual leave. The claimant simply did not know the circumstances with NK. He said in evidence *"he might have had holiday, I can't answer that".*

279. The respondent's Special Leave Policy was at page 1275 and included time off for dependants (clause 4.10 at page 1279). This was a right to a reasonable amount of unpaid time off to care for a dependant in circumstances mirroring the statutory right.

280. The claimant was asked why he said this allegation was because of his race. He said that NK is a white European and so was NS.

281. We find that the claimant did not present facts from which we could conclude, in the absence of any other explanation, that he was treated less favourably than NK in circumstances that were not materially different. He simply did not know the circumstances relating to NK.

Comparator AL

282. The allegation was that AL was allowed time off for family issues without any issues. As set out above, the claimant agreed that there were no issues with him taking time off for his dependants. We find that at no time did he make a request for time off to look after his sons and was refused. The claimant did not show that he was less favourably treated than Ms AL, let alone because of his race.

283. We find that the claimant did not present facts from which we could conclude, in the absence of any other explanation, that he was treated less favourably than AL in circumstances that were not materially different. He had no evidence to offer on this issue.

284. For the reasons set out above and in consideration of the time point on allegation 7, the claim for direct race discrimination fails.

Harassment related to race

285. The claimant relies on seven acts of racial harassment as follows:

286. Allegation a: That Mr Mistry on many occasions has directed the words "*coloured*" towards the claimant in conversation and spoke of the claimant's late father as being "*coloured*".

287. This was not dealt with in the claimant's witness statement. We have made findings above in relation to this allegation relied upon as direct race discrimination. In the absence of any particulars we are unable to make a finding that Mr Mistry called the claimant or his father "*coloured"* in unspecified circumstances or on unspecified occasions in 2017. The claimant did not show facts, from which we could conclude, the absence of any other explanation, that Mr Mistry used this term towards him or his father. This allegation is unproven.

288. Allegation b: That in or about the middle of 2017 the claimant found a notepad belonging to Hemel Mistry which purported to contain a list of '*cockney Racial words'* written for the benefit of the claimant's colleague. The notepad contained the words "*wog, coon, banana boat, darky and monkey".*

289. Mr Nord's evidence at paragraph 38 of his witness statement was that following the claimant's complaint about this matter at a meeting on 26 February 2019, he spoke to Mr Mistry about it. Mr Mistry told him that AS had heard a word and did not know what it meant, so Mr Mistry gave him a list of words not to use. We were told that AS is French and had "*struggled*" with English. Mr Nord told Mr Mistry that writing the list was inappropriate and asked if he understood this. He replied that he was only trying to be helpful.

290. We find that the list of offensive racial words was made, because Mr Mistry admitted it to Mr Nord. The claimant saw it and was offended by it. We find that seeing a list of racially offensive words on his manager's desk did have the effect of creating an offensive environment for him and it was reasonable for it to have that effect.

291. The claimant has not explained why, if he regarded this as an act of racial harassment in the middle of 2017, he waited until 15 September 2020 to bring a claim in relation to it. It is 3 years out of time. We set out under the heading Conclusions below, our reasons as to why we say this claim is out of time and we have no jurisdiction to consider it.

292. Allegation c: The claimant complains that in or about early to mid-2019 he was called a "*monkey boy*" by AS on the trading floor.

293. The term "*monkey"* was one which the claimant was accustomed to using about himself and towards others. We saw in emails between himself and his girlfriend, using his work email during working hours on 9 July 2019,

where he refers to them both as "*monkey"* (page 846). The claimant said this was a term of endearment.

294. On 16 January 2017 in WhatsApp messages with Mr Mistry (page 1222) the claimant referred to Mr Mistry as a "*nutter"* and used three monkey emoji's. He used that emoji with Mr Mistry again on 9 May 2017.

295. In his ET1 and Particulars of Claim, in the clarification of his claim at page 80 and in his responses to the respondent's Request for Further Information the claimant made no mention of the words "*monkey"* or *"coloured*" being used.

296. At page 203 we saw an email from the claimant to Mr AS dated 11 January 2017 saying: "*Can u check if on failed trades monkey boy".* This was the claimant showing that he was comfortable using this term towards a colleague. We were not shown any document in which it was used in writing towards him. In an email with a colleague TT on 28 June 2017 (page 219) the claimant said that the colleague was "*gona be jumping around the place like a monkey soon".* In that same email chain the claimant referred to himself as a chimp saying: "*And im the chimp….Chimpy [MJS]"* (page 214).

297. On 22 September 2017 (page 229) in an email to another colleague, he referred to her in French as "*mon petit singe [monkey]",* she asked if she looked like a monkey and the claimant replied that monkeys were "*nice*". To that same colleague on 23 November 2017 he said (page 243) "*how r u my little monkey…?".*

298. On 15 December 2017 to colleague Ms DVT the claimant titled the subject of the email as "*oi little monkey".* On 12 December 2018 to colleague JR the claimant referred to himself, saying "*Im brown monkey though….hahahaha"* (page 555). We find that it was terminology the claimant was comfortable with, both in terms of using it about himself and towards others.

299. It was acceptable in the claimant's mind for him to call Mr AS "*monkey boy*" in the email of 11 January 2017. The claimant said it was endearment when he used it, but it was offensive when it was used towards him.

300. When a colleague reacted to the claimant using the term towards her, saying "*do I look like a monkey*" he defended the use of the term by saying that monkeys were "*nice".* We find that the claimant used this term freely towards others and defended the use of the term.

301. As we have found above, workplace colleagues take a risk if they use a term such as this, which could be taken pejoratively about a colleague who is black, mixed race or of African heritage. We find Mr AS did use the term, as did the claimant. In the circumstances and context where the claimant used this term freely, this was a difficult decision for us. We took

the view that when used towards the claimant, who describes himself as black, mixed race and of African heritage, the term did have the effect of creating an offensive environment for him and it was reasonable for it to have that effect.

302. We deal with the time point on this allegation below under the heading Conclusions below.

303. Allegation d: That in or about early to mid-2019 Mr Mistry was fully aware of these comments being directed at the claimant of which were totally ignored.

304. This was not dealt with in the claimant's witness statement so he led no evidence on the point.

305. We saw no record of the claimant making any complaint to Mr Mistry about the use of this terminology and we find that he did not. This allegation fails on its facts. Without evidence that the claimant complained about it, we are unable to find that Mr Mistry ignored the matter.

306. Allegation e: That Mr Le Prado and Mr Nord being made aware of Mr Mistry using racial words "*coloured*" against the claimant and the use of Mr Mistry's racist wordings being noted on his notepad, no investigation was conducted.

307. Our finding of fact under the allegation put as direct race discrimination was that we were unable to make a finding that Mr Mistry called the claimant or his father "*coloured"* in unspecified circumstances or on unspecified occasions in 2017. The claimant has not shown facts, from which we could conclude, the absence of any other explanation, that Mr Mistry used this term towards him or his father.

308. Mr Nord's evidence (statement paragraph 79) was that he did not remember the claimant ever complaining about this to him. In his experience he did not hear Mr Mistry using the word "*coloured*" about anyone. Mr Le Prado similarly did not remember the claimant ever complaining about this to him (statement paragraph 112).

309. We find that the claimant did not complain about the alleged use of the word "*coloured*" by Mr Mistry and the lack of any investigation was not related to his race and it was not with the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. If it had that effect, it was not reasonable, in the absence of a complaint, for it to have had that effect.

310. We find that the lack of an investigation into the use of the term coloured did not amount to harassment related to race.

311. In relation to the list of words "*not to use*" our finding under allegation (b) above, is that Mr Nord did conduct an investigation by speaking to Mr

Mistry shortly after the meeting on 26 February 2019. This allegation fails on its facts because we find that an investigation was conducted with Mr Mistry.

312. Allegation f: That on 10 January 2020 the claimant mentioned to Mr Kurz, the hearing manager, Mr Le Prado and Ms Barlow about race discrimination with regards to Mr Mistry and AS and no investigation was conducted by either manager.

313. The claimant was continually asked to provide details of his complaints with particulars so that they could be investigated and he failed to do this. The lack of any investigation into those allegations was due the failure by the claimant to give details, particulars and any evidence about his complaints. Even after the termination of his employment he was asked by the Head of HR Ms David, in a letter dated 18 June 2020 (page 1189) to provide the information and evidence that he would like them to consider including the specific details of the allegations, when it happened and whether anyone witnessed it. The claimant did not do so.

314. The lack of any investigation was not related to his race and it was not with the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. If it had that effect, it was not reasonable, in the absence of the details of the allegations, for it to have had that effect. It was not harassment related to his race.

315. Allegation g: That on or about 10 January 2020, as the claimant left a meeting with Mr Le Prado and Mr Kurz, Mr Le Prado mumbled "*see you later black bastard*" at the claimant while they shook hands outside the lifts.

316. This was the first day of the disciplinary hearing initiated in October 2019 and conducted by Mr Kurz with Ms Barlow and Mr Le Prado in attendance. Mr Le Prado described the claimant's behaviour at that hearing as uncooperative. The disciplinary hearing concluded on 24 April 2020.

317. Mr Le Prado denied that he made any comment whatsoever concerning the claimant's race. He was adamant that he "*never used such words".*

318. The claimant was agitated at the end of the meeting on 10 January 2020. He wanted to go to the trading room to collect personal belongings and was not allowed access. Despite Mr Le Prado telling the claimant he could not access the trading room, the claimant began to climb the stairs to go there. Security was called. The claimant's belongings were brought to him so he could take them.

319. We find that if Mr Le Prado had made such a racially offensive comment, the claimant would have reacted strongly to this at the time. We had no evidence that he did so and we find that he did not. We found Mr Le Prado to be a credible witness when this allegation was put to him by the claimant

a number of times. He was clear and firm in his denial and we find that Mr Le Prado did not use these words towards the claimant. This allegation fails on its facts.

Unfair dismissal

The investigation

320. The claimant faced three disciplinary charges. These were in relation to his aggressive conduct on 30 September 2019, his unauthorised absences and insubordination for failure to carry out reasonable management instructions. This was the failure to report his unexpected absences in accordance with policy and his decision not to carry out some tasks within his job that he was expected to carry out along with other members of the team.

321. There was a disciplinary investigation carried out by Mr Carley. He interviewed the claimant's manager Mr Mistry and Mr Mistry's manager Mr Nord. He also collected relevant paperwork including a list of tasks performed by the team with a highlight on those the claimant refused to do, Mr Nord's email of 1 October 2019 describing the aggressive behaviour on 30 September and the claimant's absence record. There was no investigatory interview with the claimant because of his lack of engagement with the process.

322. The claimant said that his colleagues AL and VP should have been interviewed. Mr Le Prado said it was a matter for the investigatory officer to decide whether they were relevant. We saw that in his own investigatory meeting on 15 October 2019 (notes page 985) that Mr Mistry said to the investigating officer that he thought AL and VP should be interviewed. Mr Le Prado said that AL was part of the management team so may be a good person to speak to, but he could not see the reason to interview VP.

323. The investigation was into the three disciplinary charges of aggressive conduct on 30 September 2019, his unauthorised absences and insubordination for failure to carry out reasonable management instructions. VP and AL were not present at the meeting on 30 September 2019 so we find that there was nothing that they could add to this. Neither of them were the claimant's managers so we find they had nothing to contribute in relation to the claimant's absence management. The same applied to the allegation that the claimant had failed to comply with absence reporting procedures. They were not his managers. We were not told what input Ms AL could have into the allegation that the clamant had failed to perform tasks he should have carried out. We find there was a reasonable investigation and there was no unreasonableness in not conducting investigatory meetings with AL or VP. We find that they could not add anything of substance to the fact finding investigation.

324. We find that Mr Carley conducted a reasonable investigation by

interviewing the claimant's manager Mr Mistry and the manager above, Mr Nord. There was no investigatory meeting with the claimant as he failed to engage with the process. Mr Carley also collected relevant documents including the two formal warnings given to the claimant on 17 October 2018 and 4 March 2019, Mr Nord's email of 1 October 2019 with his account of the meeting on 30 September 2019, an absence report record, documents related to the claimant's phased return to work at the end of 2018 and a list of tasks, showing those the claimant refused to do.

The disciplinary hearing

325. The disciplinary hearing was conducted by Mr Bill Kurz, the Global Head of Run Capital Markets IT. The hearing initially commenced on 10 January 2020 and was adjourned due to concerns held by Mr Kurz and Mr Le Prado as to the claimant's wellbeing and fitness to attend a disciplinary. They wished to refer him to OH. They tried a number of times to reschedule the hearing. The claimant refused to engage with OH.

326. We did not hear from Mr Kurz. We were told that he was in Hong Kong and that it was difficult to obtain consent from the People's Republic of China for him to give evidence from that jurisdiction. We had Mr Kurz's outcome letter and the documents he considered. We also had evidence from Mr Le Prado and Ms Barlow of HR who advised Mr Kurz in connection with the disciplinary process.

327. We have considered whether the claimant was given an opportunity to state his case to the disciplinary hearing. He attended on 10 January 2020. That meeting lasted 1.5 hours. He was given a number of opportunities to send written representations and any mitigation evidence to the reconvened hearing on 24 April 2020. He did not do so and he declined to attend the hearing. We find that the claimant was given every opportunity to state his case to the disciplinary hearing.

The decision to dismiss

328. The reasons for dismissal were set out in Mr Kurz's outcome letter of 11 June 2020 at pages 1170-1175. Mr Kurz found all of the disciplinary allegations proven. He said: "*I have concluded that your behaviour in relation to allegation one [the aggressive behaviour on 30 September 2019] was sufficiently serious to constitute gross misconduct in accordance with the Bank's Disciplinary Policy and warrants the immediate termination of your employment with the Bank under clause 15 of your Employment Contract."*

329. Mr Kurz said that in the alternative, the claimant's pattern of misconduct was sufficient to undermine the relationship of trust and confidence.

330. We find that Mr Kurz had a reasonable belief in the claimant's gross misconduct of threatening behaviour on 30 September 2019, based on the evidence before him from Mr Nord and Mr Mistry, Mr Nord's

contemporaneous email of 1 October 2019 and in the absence of any representations from the claimant, having been given every opportunity to provide them.

331. We find that the principal reason for dismissal was gross misconduct on 30 September 2019. The other allegations were also upheld but the principal reason for dismissal was gross misconduct in terms of the threatening behaviour on 30 September 2019.

332. The reason for dismissal was not because of any protected act done by the claimant and it was not because of his race.

333. We have considered whether dismissal fell within the band of reasonable responses open to the respondent and we find that it did. The proven disciplinary charge of threatening a manager was sufficient to warrant dismissal. The claimant failed to provide any written representations or provide any mitigation. He had told Mr Le Prado he was fit to attend a disciplinary hearing and he had declined to undergo an OH assessment.

334. We find that the dismissal of the claimant was fair.

The right of appeal

335. The claimant did not appeal against his dismissal. He said that this was because he was asked to send his appeal to Mr Le Prado. It was put to him that this did not mean that Mr Le Prado was going to be the appeal officer and that the claimant had been sent a copy of the disciplinary procedure. He agreed that he was sent a copy of the procedure.

336. The dismissal letter did not say that Mr Le Prado was to be the appeal officer. Even if the claimant thought that was the case, he did not email to say that he would like to appeal but did not want Mr Le Prado to be the appeal officer. He simply did not submit an appeal.

337. The claimant was given a number of extensions of time for an appeal to be submitted but he did not exercise this right.

338. Numerous requests were made for the claimant to provide the detail of his complaints and the evidence which he said he had, for example from his phone. At no time did he provide this.

ACAS Code

339. We find that the respondent complied with the ACAS Code on Disciplinary and Grievance Procedures in its conduct of the disciplinary process. We find that the claimant unreasonably failed to comply with the Code by failing to engage in the disciplinary process when he said he was fit enough to participate and he refused an OH assessment. The ACAS Code at paragraph 12 says that employers and employees should make every effort to attend the disciplinary meeting and the claimant did not do

this.

Post dismissal

340. The claimant reacted very badly to his dismissal. Instead of submitting in an appeal he telephoned Mr Le Prado in a manner which we find was aggressive, unpleasant and threatening. Mr Le Prado sent an email to the Head of HR Ms Anita David shortly after the call, setting out the ways in which he felt the claimant had threatened him (page 1166). This included the claimant saying he knew where Mr Le Prado worked and where he lived and that he was "*coming for him*", that he would "*get him sacked*" and would "*f****** destroy him*" and he would post things online. The claimant followed up on his threat to post things online by posting on an alumni network of which Mr Le Prado was the President saying: "*William Le Prado works for a racist company called credit agricole … he is incompetent at his current role…. more to follow!!".* We saw a copy of this post at page 1176.

341. Mr Le Prado was sufficiently intimidated and concerned that he reported the matter to the police (Crime Report page 1180). The claimant did not accept that he was aggressive but did admit in evidence to being *"a bit aggravated".* We find that his behaviour was aggressive, intimidating, threatening and completely unacceptable including attempting to damage Mr Le Prado's reputation. Mr Le Prado was doing no more than carrying out his role properly as an HR professional. In any event Mr Le Prado was not the decision-maker on the decision to dismiss, but even if he was, it does not in any way justify the claimant's intimidatory actions.

342. The claimant also telephoned a number of other people. On 16 June 2020 he called Mr Nord saying he would take them all to court, that he had Mr Nord's phone number, that Mr Nord was "*racist" a "bad manager",* that he was "*going to get [him] for racism"* and that he was *"coming for [them]."* We find this was a threatening phone call.

343. The claimant also tried to contact Mr Kurz, Mr Mistry, Mr Yusuf from security and Ms L.

344. We saw a text message at page 1179 from the claimant to Mr Nord which said:

> *"Absolute disgrace mark nord?? I'm going on to the media and Im going to the papers to ex-pose yourself, Hemal, William, Izzy and [Ms L]!! Racism , bullying , harassment, !! Mental health is very big at the moment and u have made this situation unbearable !!"*

345. The matter was escalated to the Head of HR, Ms David, who wrote to the claimant on 18 June 2020 (page 1189). She asked him to stop his threatening behaviour. She extended his time for the presentation of an appeal, this time to send it to herself and not Mr Le Prado and she asked him, as she did on subsequent occasions, for details of his allegations of

harassment and racism.

346. We do not record each and every occasion but we find that the claimant was asked over and over again to provide the details of his allegations of harassment and racism so that these matters could be properly investigated and he failed to provide the information and evidence he claimed he had.

347. The claimant was given a further extension of time to 25 June 2020 to present his appeal. He said that by this time he was already speaking to ACAS and putting this claim into place. On 10 July 2020 he emailed Ms David, using "*shouty*" capital letters and exclamation marks saying he had suffered racism and had been sexually harassed. He said he would have a reporter call Ms David and continued to claim he had evidence on his mobile phone. He said he would name and shame his managers whom he said had "*lied*" (page 1196). The claimant was given a further opportunity to provide his evidence to allow the respondent to investigate his complaints but he did not do so.

348. On 20 July 2020 the claimant sent yet another aggressive email to Ms David. The claimant had been offered a virtual meeting with Ms David and Mr Walker, the Head of Fraud Prevention, to discuss the allegations he had raised. The claimant refused this meeting.

<u>The claim for holiday pay</u>

349. In his comments on a draft list of issues dated 18 January 2021, in relation to his holiday pay claim the claimant said "*No Holidays taken in 2020, I do not have an accurate schedule of holidays for October 2019 So Respondents will have to confirm on my behalf on what was owed for 2019".*

350. In his replies to the respondent's Request for Further Information the claimant said of his holiday pay claim (page 90) "*please have your client investigate on my behalf*". He did not deal with holiday pay claim in his witness statement and had not set it out anywhere.

351. Ms Barlow's evidence was that between January and June 2020 the claimant accrued 11 days of holiday. She agreed that he did not take any holiday in this period and says that he was paid in lieu of this holiday entitlement in his final pay. Ms Barlow also said that in addition to holiday accrued for 2020, he had accrued 5.5 days of holiday from 2019 (page 1210. The respondent has a policy that allows the carryover of up to 5 days with any additional carryover requiring approval on an exceptional basis. Under their policy any holiday carried over from 2019 had to be used by the end of May 2020 or would be forfeited. The respondent did not forfeit any of the carryover. Ms Barlow's evidence was that the claimant was entitled to 11.5 days and was paid for it. We saw the claimant's June 2020 payslip at page 1191 which included a payment of 11.5 holiday days in the sum of £2,211.57.

352. When Ms Barlow's explanation was put to the claimant in cross-examination he withdrew the holiday pay claim.

Breach of contract: failure to pay Permanent Health Insurance

353. The claimant says that the respondent failed to ensure that he was paid 70% of his PHI pay. In his witness statement the claimant said that the respondent had "*decided to withhold payment to [him] on [his] Zurich permanent health insurance which equates to £8,748*".

354. In clause 14 of his contract of employment (page 1243) it stated that he was eligible to participate in the Permanent Health Insurance scheme offered by the company. It stated that it was subject to the terms and conditions of the scheme. It said that if a scheme provider refused for any reason to provide benefits to the employee, the company would not be liable to provide or compensate the employee for loss of any benefits. Zurich was the insurer and the scheme provider.

355. The claimant could not point to any contractual basis upon which the respondent was liable to pay him the insurance benefits and we find that there was no contractual obligation upon them to do so. It was specifically dealt with in clause 14 of his contract. It was also not for the respondent to "secure" the payment of PHI. This was a matter for the insurance company under the terms of the policy.

356. The claim for breach of contract fails and is dismissed.

The relevant law

Unfair dismissal

357. The categories of potentially fair reason for dismissal are set out in section 98 of the Employment Rights Act 1996. Misconduct is a potentially fair reason under section 98(2)(b). Some other substantial reason is a potentially fair reason under section 98(1)(b).

358. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

359. As is well known, the leading case of ***British Home Stores Ltd v Burchell 1978 IRLR 379*** sets out three elements for a fair conduct dismissal. First, there must be established by the employer the fact of the belief by the employer in the guilt of the employee in relation to that misconduct.

Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

360. A dismissal is fair if it falls within the band of reasonable responses - see ***Iceland Frozen Foods v Jones 1983 ICR 17***. The Tribunal is not entitled to substitute its view for the view of the employer, either in relation to the fairness of the sanction or the reasonableness of the investigation; the band of reasonable responses test applies equally to both – see ***Sainsbury's Supermarkets Ltd v Hitt 2003 ICR 111***.

361. In relation to a disciplinary investigation, the Court of Appeal in ***Shrestha v Genesis Housing Association Ltd 2015 IRLR 399*** said: "*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness*." (Judgment paragraph 23).

Direct race discrimination

362. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

363. Section 23 of the 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.

364. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

Harassment

365. Section 26 of the Equality Act 2010 defines harassment under the Act 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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b)

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

366. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

367. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important

control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (para 47)

and

I do not think that a tribunal is entitled to equate an uncomfortable reaction to humiliation. (para 51).

Victimisation

368. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

369. Each of the following is a protected act:

> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

370. Section 27(3) says: "*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."*

371. It is for the claimant to prove that he did the protected acts relied upon before the burden can pass to the respondent - see ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)***: "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.*"

372. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005***, the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator is a precondition to liability. The burden of proving knowledge lies on the claimant.

373. In relation to what is a detriment, this is not defined in the Equality Act. In the ***Shamoon*** case (referenced below) the House of Lords said that an unjustified sense of grievance cannot amount to a detriment, but that it is not necessary to demonstrate some physical or economic consequence.

374. For section 27(3) to apply the tribunal has to consider whether the evidence, information or allegation is false and if it is false, whether it was given or made in bad faith.

375. The EAT considered the question of bad faith in ***Saad v Southampton University Hospitals NHS Trust 2019 ICR 311***. Eady J said:

"The tribunal is simply required to find whether that evidence, information or allegation is true or false; if false, it must then determine whether it was given or made by the employee in bad faith. And that must mean that it has to determine whether the employee has given the evidence or information or made the allegation honestly" (judgment paragraph 47). Eady J also said (judgment paragraph 48): *"In raising an allegation of discrimination in response to the complaint, the employee might well be seeking to deflect the criticism they face but that does not mean they are acting in bad faith"* (paragraph 49). The existence of an ulterior motive may be relevant but it is not determinative.

The burden of proof

376. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if the respondent can show that it did not contravene that provision.

377. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

378. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

379. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

380. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

381. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

382. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

Time limits

383. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..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.*

384. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant - ***Bexley Community Centre (t/a Leisure Link) v Robertson 2003 IRLR 434***.

385. When exercising discretion under section 123(1)(b) EqA 2010, Tribunals should assess all relevant factors in a case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and reasons for, the delay – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*** (judgment paragraph 37).

386. The leading case on whether an act of discrimination it to be treated as

extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

387. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

388. The tribunal can find that some acts should be grouped into a continuing act, while others remain unconnected: ***Lyfar v Brighton and Sussex University Hospitals NHS Trust 2006 EWCA Civ 1548***.

389. In ***Aziz v FDA 2010 EWCA Civ 304*** the Court of Appeal said that one relevant but not conclusive factor was whether the same or different individuals were involved in the incidents. The CA said that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs (paragraph 36 of the judgment).

390. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

Conclusions

<u>Time point sexual harassment allegation</u>

391. The claimant's case is that he was sexually harassed on or about 11 December 2016. It is the only act of sexual harassment relied upon. His claim was presented on 15 September 2020. The primary time limit expired on or about 10 March 2017. The claim is 3.5 years out of time. We have found above that it was an isolated incident and therefore there are no other allegations of sexual harassment with which to link it for the purposes of any continuing act. There was no continuing act.

392. In amendments made to a draft List of Issues on 18 January 2021 the claimant accepted that this allegation was out of time. He said "*Judge to hear about Sex Discrimination on full evidence which is connected to my victimisation/Discrimination".*

393. The claimant gave no evidence as to the timing of the presentation of his

claim. In submissions, when asked about the time point, he said that "*just because it was out of time did not mean that it did not happen*". He also said he had a lot going on in his personal life. Other than this he gave no explanation for the delay.

394. We have found above that he was able to work during the majority of 2017 and much of 2019 and that he was not prevented by ill health from presenting his claim in time.

395. We find that the claim for sexual harassment is substantially out of time, there was no continuing act of sexual harassment. We find that the claimant has given no evidence to us as to why it would be just and equitable to extend time. The burden is on him to establish this and we find that it is not just and equitable to extend time.

396. Because this claim is out of time, the tribunal has no jurisdiction to hear it and we decline to make any finding of fact as to whether the claimant was or was not sexually harassed by Ms L as the issue is outside our jurisdiction. This finding on the time point had no impact on the victimisation claim which is a separate cause of action.

Time point – allegations (b) and (c) racial harassment

397. Allegation (b) under racial harassment related to the list written by Mr Mistry containing racist words, that the claimant saw in the middle of 2017. We found that Mr Mistry did create the list and that it was racially offensive to the claimant. This claim is 3 years out of time. We find that it is not a continuing act with allegation (c) below which took place two years later. We find this because of the passage of time and the fact that the alleged perpetrators were different people. We find that it is not just and equitable to extend time for the same reasons as given above in relation to the sexual harassment claim. This claim is out of time and we have no jurisdiction to deal with it.

398. Allegation (c) under racial harassment was Mr AS calling the claimant a "*monkey boy"* in early/mid 2019. This claim is a year out of time. There is no other successful allegation of racial harassment with which to link it for the purposes of a continuing act. We find that it is not just and equitable to extend time for the same reasons as given above. This claim is out of time and we have no jurisdiction to deal with it.

399. All other claims of harassment related to race fail for the reasons given above.

Victimisation

400. We have found above that the claimant did the protected acts relied upon and they were not done in bad faith.

401. The victimisation claim failed on the following basis:

402. Allegations (v) (vi) (xxii) (xxviii) (xxxii) (xxxvii) were withdrawn.

403. Allegations (x) (xi) (xv) (xvii) (xviii) (xix) (xx) (xxiii) (xxiv) (xxvi) (xxix) (xxxi) (xxxvi) (xxxix) and (xl) failed on their facts. We found that allegations (ii) and (iii) did not amount to a detriment.

404. On Allegations (i) (iv) (vii) (viii) (xi) (xii) (xiii) (xiv) (xvi) (xxi) (xxv) (xxvii) (xxx) (xxxiii) (xxxiv) (xxxv) (xxxviii) the claimant did not show causation between the protected act and the detriment relied upon. Causation was not proven on Allegations (iii) (xiii) (xxxi) (xxxiv) and in addition we found they did not amount to a detriment.

Direct race discrimination

405. For the reasons set out above, the claims for direct race discrimination fail save for Allegation 7 (the use of the term "*monkey boy"*) which is out of time. We found that the claimant was not treated less favourably because of his race on any of the allegations relied upon, save for allegation 7 which is out of time.

406. Time point on Allegation 7: This took place, on the claimant's case, in early to mid-2019. It is at least a year out of time. There is no other successful claim of direct race discrimination to which it could be linked for the purposes of a continuing act. We find that it is not just and equitable to extend time for the same reasons as given above in relation to the sexual harassment claim. This claim is out of time and we have no jurisdiction to deal with it.

Unfair dismissal

407. We found for the reasons set out above that the claimant was fairly dismissed for gross misconduct.

Holiday pay

408. The claim for holiday pay was withdrawn.

Breach of contract

409. The breach of contract claim failed because the respondent had no contractual obligation to secure the payment of Permanent Health Insurance to the claimant.

Employment Judge Elliott
Date: 24 January 2022

Judgment sent to the parties and entered in the Register on: 24/01/2022.

For the Tribunal