



EMPLOYMENT TRIBUNALS

Claimant: Olufemi Ogunfuwa
Respondent: London Underground Ltd

Heard at: East London Hearing Centre
On: 09-12 May 2023
Before: Employment Judge Housego
Members: Ms S Moores-Gould
Ms K Fulton

Representation

Claimant: Andrew Otchie, of Counsel
Respondent: Tim Welch, of Counsel

JUDGMENT

The Claims are dismissed.

REASONS

Basis of claim and defence

1. The Claimant describes himself as Black African. The Respondent (“LUL”) runs London’s underground railway system. The Claimant was a service manager with LUL. He started work with LUL in 1995. On 11 July 2018 someone in his team (“Person 1”) complained about him, alleging inappropriate behaviour. On 16 July 2018 the Claimant was suspended on full pay. Almost two years later (20 April 2020) he returned to work, having been given a retrospective final written warning (which had expired when given). He was demoted from his managerial position and posted to another station far from his previous workplace and his home. He says this was very unfair for many reasons, and attributes that unfairness to his race and gender. The Respondent says that fair or unfair, race and gender had nothing to do with it. They say that it was reasonable to find that he had acted as alleged, and that the sanctions were fair, and less than a gross misconduct summary dismissal, which could have been imposed.

Law

2. Race and sex are characteristics protected by the Equality Act 2010¹. The Claimant asserted that the treatment he received was direct race and sex discrimination².
3. The test for a claim that the Claimant has suffered unlawful discrimination is whether or not the Tribunal is satisfied that in no sense whatsoever was there less favourable treatment (compared to someone else) which was tainted by race or sex discrimination. It is for the Claimant to show reason why there might be discrimination, and if he does so then it is for the Respondent to show there was none. The Tribunal has applied the relevant case law³, and has fully borne in mind, and applied, S136 of the Equality Act 2010. Discrimination may be conscious or unconscious, the latter being hard to establish and by definition unintentional. It is the result of stereotypical assumptions or prejudice.
4. A claim for unlawful discrimination must be brought within three months of the matter complained of, extended by the Acas early conciliation period, unless acts before that date are part of a series of acts extending into the (extended) three-month period. If allegations are out of time, time can be extended if it is just and equitable to do so.

Evidence

5. The Tribunal heard oral evidence from the Claimant.
6. For the Respondent the Tribunal heard oral evidence from:
 - 6.1. Fernando Soler, Service Control Manager, Jubilee Line;
 - 6.2. Jason Persaud, who suspended the Claimant, and started to investigate, at the time Area Manager Oval and Clapham North and line manager of the Claimant;
 - 6.3. Carl Painter, Area Manager Kennington, who took over from Jason Persaud when Person 1 complained that as the Claimant's manager Jason Persaud might not be an impartial investigator; and
 - 6.4. Aisha Tague, who took the Claimant's appeal.
7. There was a bundle of documents of 475 pages.

Issues

8. The parties had agreed the issues, as follows (with corrected dates):

¹ S11 Equality Act 2010

² S13 Direct discrimination: (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

³ The law is comprehensively set out in Royal Mail Group Ltd v Efofi [2021] UKSC 33 (23 July 2021)

IN EAST LONDON EMPLOYMENT TRIBUNAL BETWEEN

MR O OGUNFUWA

-and-

LONDON UNDERGROUND LIMITED

**FINAL LIST OF ISSUES FOR THE FULL MERITS HEARING ON 9 TO 12
APRIL 2023**

Jurisdictional points – Section 123 of the Equality Act 2010

1. Can the Claimant show that he presented his claim within 3 months (plus such extension as applicable because of the period of early conciliation) of any act of discrimination; and if not;

2. Can he show that any act or omission complained of formed part of an act extending over a period that ended no earlier than 3 months (plus such extension as applicable because of the period of early conciliation) before he presented his claim? If not;

3. Can he show that it would be just and equitable to extend time for presenting any complaint?

Direct Discrimination claims brought under Sections 13 and 39 of the Equality Act 2010

4. Can the Claimant establish as a matter of fact that the Respondent subjected him to the following treatment:
 - a. Suspending him from his ordinary duties in July 2018; and

 - b Not communicating with him about his suspension/disciplinary action between July 2018 and December 2018; and

 - c Interviewing the colleague ‘Person 1’ who had complained about him without notifying or informing him; and

 - d Interviewing employees with no first hand or relevant knowledge of the events; and

 - e Failing to interview black witnesses who had relevant knowledge of the events¹; and

f Concluding that there was a disciplinary case to answer in August 2018; and

g Concluding that the Claimant had acted improperly towards Person 1 and imposing a disciplinary sanction of a final written warning and a demotion on 20 November 2020; and

h Dismissing the Claimant's appeal against the outcome of the disciplinary process on 3 September 2020?

5. Can the Claimant establish that the acts set out above were a detriment for the purposes of Section 39 of the Equality Act 2010?
6. Is so, by reference to a hypothetical comparator, or if identified any actual comparator, can the Claimant prove facts from which the tribunal could, in the absence of any explanation from the Respondent, infer that the reason for the treatment was because of race and/or sex? If so,
7. Can the Respondent show that the reason for any treatment was in no sense whatsoever because of race and/or sex?

Harassment claim brought under Sections 26 and 40 of the Equality Act 2010

8. Did the Respondent engage in unwanted conduct by failing to complete the Claimant's disciplinary process within a reasonable time?
9. If so, did such conduct relate to the Claimant's (1) race and/or (2) sex?
10. If so, did such conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile or humiliating environment for the Claimant?²

¹Amendment granted by EJ Crosfill §21.3 of the Order promulgated on 21 May 2021 [43] (*NB the issue of jurisdiction/time limits remains to be determined at the final hearing*)

²Amendment granted by EJ Crosfill §21.5 of the Order promulgated on 21 May 2021 [43] (*NB the issue of jurisdiction/time limits remains to be determined at the final hearing*)

The hearing

9. I made a full typed record of proceedings which records the evidence fully. It was not possible to start the hearing on 09 May 2023 as no members had been appointed to sit to hear it. This was arranged during the day, and the hearing started at 10:00 on 10 May 2020, with two members from another region attending remotely. One witness for the Respondent (Aisha Tague) was to give evidence remotely and so the Tribunal was already set up as a hybrid hearing.
10. I had been sent the documents the previous week. The members had been sent them on 09 May 2023 and so it was not necessary to spend the morning on 10 May 2023 reading the papers, as had been envisaged in the timetabling of the hearing.
11. Mr Otchie asked that a document in the bundle of documents be removed.

It was a letter from solicitors to the Claimant dated 26 July 2019. Mr Welch opposed this application. He said that it was put in the bundle of documents by the Claimant, and this was not a mistake as parts had been highlighted. Mr Welch said that although this waived privilege, he was not asking for any other document to be disclosed. The Tribunal refused Mr Otchie's application. There was no reason to exclude the document solely because the Claimant had changed his mind (or that Mr Otchie would rather it was not present).

12. The hearing started at 10:00 on Wednesday 10th May 2023. Mr Soler was booked on a flight to Spain on 10th May 2023 and had to leave the Tribunal by 2pm on 10th May 2023. Application was made for him to give evidence by video. The Tribunal was assured that the relevant permissions existed generically. The Tribunal was minded to grant that application, which was not opposed.
13. The Claimant was sworn and adopted his witness statement. I then noticed that an email had arrived in my inbox from the Tribunal which stated that the consent of the Spanish authorities for evidence to be given from Spain had not been obtained. I so informed the parties. Mr Welch applied for Mr Soler's evidence to be interposed as Mr Soler was present in the Tribunal. Mr Otchie opposed this application. The Tribunal granted the application. Cases of discrimination require the best evidence. There was prejudice to the Respondent in refusing the application as Mr Soler was the principal decision maker. There was no real prejudice to the Claimant (as Mr Otchie accepted during his closing submissions. Interposing Mr Soler also gave the Claimant's Counsel the opportunity to cross examine him. Mr Otchie was offered, but did not need, a break before Mr Soler gave his evidence.
14. Friday 12 May 2023 was a day when the rail unions were on strike. The day was conducted entirely remotely, save that I was in the Tribunal. The evidence concluded before lunch on 11th May 2023. Mr Welch supplied written submissions before 09:00 on 12th May 2023. Mr Otchie's submissions were oral, and Mr Welch responded to them.
15. In his closing submissions Mr Otchie applied to amend the date of issue 4 f to 22 October 2019 from 21 August 2018, so that it referred to Mr Musa sending the case to a disciplinary hearing and not to Mr Brown approving the suspension. The Tribunal refused this application. Dates in 4 g and 4 h had been corrected at the start of the hearing (the year 2019 was erroneous and was 2020). It was not appropriate to amend an issue in the case during closing submissions.
16. Judgment was delivered orally.

Submissions

17. The submissions can be read in my record of proceedings (and Mr Welch's full submissions are in written form) by a higher Court if required. The main thrust of the submissions is below.
18. The Claimant points to a large number of factors which he says was unfair (the Respondent does not accept that these are all factually accurate):

- 18.1. Person 1 was interviewed by Carl Painter before he knew anything about an allegation.
- 18.2. The letter of suspension dated 18 July 2018 stated that the investigation was being carried out by an Accredited Manager, and this was not true, and Jason Persaud (who wrote the letter) knew it.
- 18.3. In the LUL harassment policy it clearly states that this should only be done by an “Accredited Manager”, and Jason Persaud was not accredited.
- 18.4. Carl Painter took over, and he was not accredited either. Jason Persaud should not have stood down at Person 1’s request.
- 18.5. That an Accredited Manager (Olewole Musa) later signed off the report does not cure the issue – the person who signed it off was never the Investigation Manager.
- 18.6. He was keen on mediation and so was Person 1, but although this was being set up it was later blocked.
- 18.7. Jason Persaud and Carl Painter interviewed white people who had no direct involvement but did not interview black people who could give direct evidence which would have been supportive of the Claimant.
- 18.8. There was supposed to be regular review of his suspension, but this did not happen, so he was suspended for months without any contact at all from LUL.
- 18.9. While he was suspended instead of the rota saying “not available” it said that he was suspended. This was not supposed to happen given that the letter suspending him said it was not judgmental and was precautionary. This resulted in extensive gossip about him which was very hurtful and damaging.
- 18.10. He was accused of breaking the terms of his suspension by going to LUL offices when all he did was meet his union representative, which they later accepted was not a breach of his suspension terms.
- 18.11. The whole process took nearly 2 years which was totally unacceptable.
- 18.12. One person made an accusation, but although he had a completely clear record in his employment from July 1995, her word was taken over his.
- 18.13. There was no independent evidence.
- 18.14. LUL refused to look at cctv for the day in question, on the grounds that it was not what he did, but how it made Person 1 feel, which cctv would not show.

- 18.15. There was double and anonymous hearsay taken into account – a colleague, who was unconnected with the Person 1 allegations, told the investigator that someone had told her that the Claimant had told this other, unnamed, person that his wife would not give him the type of sex he wanted, and could she oblige? This was not only very unfair, but also fell within the definition of harassment, the Claimant being the victim.
- 18.16. Other matters were brought up, from the past, which were not disciplinary matters at the time.
- 18.17. There was no other allegation save that of Person 1, and it was unfair to take account of things brought up by others from years ago, second hand, when no action had been taken at the time by the people said to have been affected. It was not acceptable to justify this by assuming that the people had been too frightened to do so. There was nothing from any of them about such stale allegations, which were not even allegations, but rumour.
- 18.18. This double hearsay, and other hearsay, was taken to show that *“there appeared to be a pattern of ‘predatory’ behaviour towards women by the Claimant and that his behaviours were offensive, intimidating and an abuse of his power and authority”* (Grounds of Resistance paragraph 9) which was unfair, and as it influenced the outcome this tainted the whole process.
- 18.19. The person taking the appeal (Aisha Tague) refused to review the evidence, when that is the whole point of an appeal – to see whether the outcome is soundly based on the evidence considered by the decision maker.
- 18.20. Ms Tague should have herself raised the possibility that the Claimant was accused, the allegations found proved, and he sanctioned because of his race or gender.
- 18.21. It emerged in the hearing that Person 1 has fibromyalgia and problems with anxiety. This may have meant that her distress was more a result of her anxiety than the result of anything the Claimant may have done.
- 18.22. Demotion should, according to policy, be for a maximum of 52 weeks with a review at the end. His demotion was outside policy as it was permanent, and he was not permitted to apply for promotion for 24 months.
- 18.23. Underlying everything was a stereotypical assumption that he, as a tall black man, was likely to be a sexual predator, and unconscious bias was present throughout the whole process.
19. The Claimant says that a white person, or a woman accused of a similar matter would not have been treated in this way.
20. LUL say:

- 20.1. There is a shortage of Accredited Managers, and it is usual for someone else to do fact-finding, and then that fact-finding is signed off by an Accredited Manager. While this is regrettable it is a generic problem, unconnected with any protected characteristic.
- 20.2. The outsourced resolution management company was no longer used because of budget cuts, so this was not specific to the Claimant.
- 20.3. It is not unusual to speak first to an accuser prior to telling the person accused, and in fact was good policy.
- 20.4. Cctv did not cover the places where the incidents were said to have occurred.
- 20.5. The suspension was necessary and accorded with policy.
- 20.6. The delays were unfortunate, but because of pressure on Accredited Managers, of whom there were too few, not unusual.
- 20.7. The allegations were serious and were of gross misconduct, so summary dismissal was a possible outcome. That a lesser sanction was imposed is indicative of underlying fairness.
- 20.8. Even if there was consideration of hearsay in the initial decision, the person taking the appeal expressly disavowed reliance on it.
- 20.9. It was not unfair to take account of the fact that there had been previous concerns about the Claimant in deciding whether the allegations of Person 1 were more likely than not to be true.
- 20.10. Many of the people involved in the process were themselves black, or not white. This did not indicate any likelihood of prejudice against the Claimant because they, like he, are black (or not white).
- 20.11. There was nothing to suggest that the Claimant was treated worse than a woman would be treated.
- 20.12. Given the way the case had been put, with no allegation that Mr Soler, Mr Asare or Ms Tague were racially motivated, or made their decision because of the Claimant's gender, the claims were very out of time, the Claimant clearly having been advised of the time limit in an interview with a solicitor on 12 July 2019. He was represented by a very experienced RMT union representative, and it was inconceivable that the union representative had not advised him about time limits
- 20.13. It was not credible that the Claimant was not trained in equality diversity and inclusion, as all the other witnesses were clear that this is an integral part of all LUL training, particularly for managers.
- 20.14. The evidence of the Claimant was not coherent, and he conflated

alleged unfairness with discrimination on the basis of race or gender.

- 20.15. The Claimant had not put forward an allegation of discrimination at any time before filing his claim, and it was suggested that he did this because he did not want to resign and claim constructive dismissal. He had put forward his claim as if it was an unfair dismissal claim but attached a discrimination label to it. There was no causative link shown or agreed between unfairness and a protected characteristic.
- 20.16. The case of CFLIS (UK) Ltd [2015] ICR 1010 at 35-36 and 46 made it clear that a “composite” approach was an error. Each person involved needed to be assessed and could not be affected by the actions of others.
- 20.17. Reference to Person 1 having issues with anxiety was clutching at straws – anxiety did not make people lie.
- 20.18. While the way the claim was put by the Claimant during cross examination was not entirely clear, plainly it was out of time and there had been no application for an extension of time, nor any reason why it was just and equitable for time to be extended. Extension of time was an exceptional course, and not warranted in this case.

Facts found

21. The Claimant started working for LUL in July 1995 as a Customer Services Assistant. He has worked for them ever since, always in customer services. In 2018 he was a Customer Services Manager, grade 1, based at Oval and Clapham North, but also Old Street and Angel (all on the Northern Line).
22. The Claimant had an unblemished record in his 23 years to 2018, save for an advice letter about inappropriate behaviour in 2011.
23. Person 1 was new to LUL in February 2018 and was a Customer Services Assistant. On 11 July 2018 she reported the Claimant to Carl Painter. She alleged that the Claimant:
 - 23.1. In her first week said “Wow (4 times) you are the most beautiful woman I have ever seen.”
 - 23.2. The same day followed her into the control room and took two deep breaths of her scent.
 - 23.3. Two months later, she not having seen him in between, he asked her if she recalled what he had said, and she had said that she did remember and that it was inappropriate.
 - 23.4. On 10 July 2018 he ran his hands down her shoulders and arms, and then on hearing that she had been nominated for an award said that she should get her photo taken so that he could see it on the notice board every day.

24. She reported this on 11 July 2018 when she became tearful when the Claimant called Kennington Control to ask them to send her over with some box seals that were needed. Another employee took them. Colleagues saw that she was tearful, and she told them why: the allegations above.
25. On 12 July 2018 Carl Painter interviewed Person 1 about this and reported it to Jason Persaud.
26. On 16 July 2018 Jason Persaud wrote to the Claimant. His letter, handed to the Claimant by Jason Persaud, suspended the Claimant on full pay.
27. On 21 August 2018 an Accredited Manager, Joe Brown, approved the suspension.
28. Cctv was not retained. The incidents were said to have happened in the staff area of the station which does not have cctv.
29. Nothing happened for many months.
30. The Claimant sought legal advice. His solicitor wrote to him on 26 July 2019, referring to meeting him on 12 July 2019. The letter sets out what the Claimant might do if he wished to claim unfair constructive dismissal. It set out time limits. It set out time limits for a claim of race discrimination.
31. The Tribunal rejected the Claimant's evidence that he had never heard of the possibility of making a claim for race discrimination or sex discrimination until Acas told him of the existence of such rights. First it is inherently improbable that he would not have heard of that right, secondly as a manager within LUL for many years it would have come to his notice, and thirdly the whole tenor of the solicitor's letter is that all possible avenues of claim, including race discrimination, were discussed on 12 July 2019. The Tribunal accepted the evidence of Mr Soler and Mr Persaud who said that there is regular and frequent diversity training, which also pervades the culture of all LUL does. The Claimant was undoubtedly trained in equality diversity and inclusion.
32. The investigation report referred to an incident in March 2018 when the Claimant and a (white) colleague had spoken to a female passenger, who had complained about them. She said they had asked inappropriate questions of her, including trying to get her telephone number. No action had been taken.
33. It also included an allegation from a (white female) colleague that in 2015 the Claimant had said to her that "*I want to mix my chocolate with your vanilla*", but that she had not reported it at the time.
34. It also included an allegation from another white female colleague that some years ago another (unnamed) colleague had told her that the Claimant had said to the unnamed colleague that his wife would not fulfil his sexual wants in particular ways and asked if she would oblige. [As this is a publicly available document the precise offensive nature of this anonymous double hearsay is not given.]

35. On 22 October 2019 Olewole Musa, an accredited manager, signed off an investigation report on the basis of information provided by Jason Persaud and Carl Painter, and decided that the information was such that there would be a disciplinary hearing on 30 October 2019 and 13 November 2019.
36. On 20 November 2019 Mr Soler and Mr Asare took the disciplinary hearing. The Claimant objects to the length of time they took but does not say they were motivated by race or gender, save for the same stereotypical assumption that he says infected everyone involved.
37. On 09 April 2020 the result was sent to the Claimant. He was given a 12 month final written warning, backdated so that it had already expired, demoted from manager to supervisor, and moved from the Northern Line to Acton.
38. The demotion was outside policy because it was permanent and because the Claimant was not allowed to apply for promotion for 24 months.
39. On 14 April 2020 the Claimant appealed the outcome, both as to the finding that he was guilty of harassing Person 1, and as to sanction. In that appeal document, which ran to 8 pages he referred to new evidence, and cited names, but nowhere did he state that white people were interviewed but black people were not interviewed.
40. On 20 April 2020 the Claimant returned to work, based at Acton, in a role as a supervisor not as a manager.
41. On 14 May 2020 the appeal hearing took place. Aisha Tague took the appeal, the Claimant having objected to the appointment of Marcia Williams to do so (the Tribunal was not told why).
42. At the hearing Ms Tague said that she needed to make further enquiries and detailed with the Claimant what they were. She undertook them, and the Claimant wrote to her on 11 May with further observations. In this letter he stated that he liked Acton, as he had done in the appeal document.
43. On 10 July 2020 this claim was filed. The disciplinary decision was sent to the Claimant on 09 April 2020. The Claimant started work again on 20 April 2020. The Acas period was 12 May 2020 – 12 June 2020. Three months plus 31 days (Acas early conciliation period) back from 10 July 2020 is 11 March 2020, which is the last date which is within time. The parties thought this was February 2020, but the time frames are such that the exact date makes no difference.
44. The appeal decision was sent to the Claimant on 03 September 2020.
45. The appeal was properly conducted. The Claimant does not say that Aisha Tague was motivated by considerations of race or gender, but that she should have raised the possibility of there being racial or gender prejudice, and herself was subject to the same stereotypical unconscious bias as everyone else involved.

Conclusions

46. The Claimant relies on a hypothetical comparator. The Tribunal notes that the claims are of both race and sex discrimination and considered both claims. As (ultimately) put, the Claimant says that he was the victim of a stereotypical assumption that as a black man he is likely to be a sexual predator, and that unconscious bias infected all involved in the process. The claimed assumption is based on a conjunction of race and gender, and so they are not entirely separate.
47. The Respondent says that the claim is out of time and that it is not just and equitable to extend time. The Claimant says everything was a series, and that extended past the issue of the claim to the appeal decision.
48. The decision of the disciplinary panel was communicated to the Claimant on 09 April 2020 which means it was more than 3 months plus the early conciliation period before the claim was issued.
49. The conduct of the appeal was not an act of discrimination.
50. It was not put to Mr Soler that his actions were racially or gender motivated. The limit of the allegations were that Mr Persaud and Mr Painter may have been affected by subconscious bias arising from a stereotypical assumption that a tall black man would be likely to harass females sexually. Their role ended with the signing off of the report by Mr Musa. This was 22 October 2019. The claim was not filed until 10 July 2020. There was nothing of which the Claimant did not know between those dates.
51. The Tribunal rejects the submission that Mr Soler and Mr Asare (and Ms Tague) were guilty of subconscious bias. This is an assertion which has no foundation at all.
52. The claim is therefore out of time.
53. The Claimant knew about the time limit as he was told about it on 12 July 2019 by a solicitor. No reason other than ignorance of the time limit (until, he says, Acas told him of it) is advanced by the Claimant. The Tribunal did not accept that was the case. He knew all about the possibility of discrimination claims and that they have a three-month time limit. His solicitor had told him. In these circumstances it would not be just and equitable to extend time.
54. Further, the Claimant was advised by an experienced trade union representative who would surely have told him about the possibility of a discrimination case had the Claimant raised any issue such as he now raises, and of the time limit.
55. The claims must therefore be dismissed as out of time.
56. Nevertheless, having heard all the evidence the Tribunal also considered the claim had it not been out of time.
57. It is important for the Claimant to appreciate that the Tribunal is not deciding

whether what happened was fair or unfair, but whether any unfairness it finds occurred was tainted by race discrimination or sex discrimination.

58. What the Tribunal is deciding is whether the Claimant suffered less favourable treatment than another, and if so whether the reason for that less favourable treatment was, in some part, his race or sex.
59. It is most unfortunate that the inordinate delays, coupled with an offensive double hearsay and anonymous allegation and other matters from long past, have led to the Claimant feeling that he was treated unfairly.
60. The Claimant simply does not understand that LUL could find that he had been guilty of inappropriate behaviour towards Person 1. He says there were no eye witnesses, so it was her word against his, and he should be believed after his 25 years' service. He attributes the conclusion that he was guilty to his ethnicity and gender.
61. The reasons LUL (Mr Soler, Mr Asare and Ms Tague) thought it more likely than not that these were truthful allegations were:
 - 61.1. There was no reason for Person 1 to invent this.
 - 61.2. Colleagues had seen Person 1 upset soon afterwards, and she had told them why.
 - 61.3. The Claimant had telephoned to ask Person 1 to bring something over to him, and there was no reason why it had to be anyone specific.
 - 61.4. There was no reason for Person 1's colleagues to be other than truthful.
 - 61.5. There were other matters which indicated that the alleged behaviour of the Claimant towards Person A was similar to other allegations. These were not taken to disciplinary action but were relevant as a background of similar matters tended to show that Person 1's allegation was not inherently implausible.
62. The Claimant is mistaken in saying that white witnesses were interviewed and black witnesses were not. The number was broadly similar (the Tribunal went through them all in the hearing). The Claimant said that PS (who is black) was not interviewed, but she was. He said that her witness statement should not have been taken into account, because she did not see him do anything to Person 1. PS saw Person 1 upset, and Person 1 told her why – it was the matters of which she then complained, and contemporaneous with the last matter. That is relevant – she was upset, she said why, and it was the allegations for which the Claimant was disciplined. That Person 1 may be a person troubled by anxiety does not lessen the probative value of that evidence. Mr Chibula is black and was interviewed about the March 2018 customer complaint. The Claimant's objection to this is that he did not have any connection to Person 1, but that is different.

63. The Claimant objects to the evidence of two white female colleagues. Likewise, they both saw Person 1 upset and she told them why. That also lent support to Person 1's account. They told of similar matters affecting them in the past, from the Claimant. That also is relevant background.
64. There is nothing to suggest that the two white female and one black female colleagues colluded with Person 1 (a new employee apparently not known to any of them before she started working for LUL) to fabricate or embellish an account to get the Claimant into trouble.
65. It was reasonable to take into account the complaint from March 2018. The Claimant accepted (at the time, and in the hearing (if after some prevarication)) that the complaint was partly about him, but that he denied it, as he denied all Person 1's allegations. All he would concede is that he is a tactile person and perhaps Person 1 had misconstrued his welcome when he may have touched her. The person who dealt with the March 2018 customer complaint, Mr Chibula, was interviewed and he is black. It was reasonable to take it into account even though there was no finding of fact or disciplinary procedure in respect of it. A member of the public had made a not dissimilar complaint against the Claimant not long before. When assessing whether Person 1's complaint was more likely than not to be true it is relevant to consider whether there have been other similar allegations (the Claimant seeks to do the same thing in reverse by claiming that it is unlikely because of his long service).
66. One of these two white female colleagues said that an unnamed person had told her that the Claimant had, in 2015, spoken to her about sexual matters. This was double hearsay from an anonymous source and 3 years before. It should not have been entertained in any way. It is of a different order to witnesses saying that they too had experienced something similar. Mr Soler said that it did not weigh with him at all, and the Tribunal accepted that was the case. The Tribunal found him to be an impressive witness, as were the other witnesses for LUL.
67. There is no evidence remotely supportive of the Claimant's assertion that he is the victim of unconscious bias, being the influence of a stereotypical assumption that he, a tall black man, is likely to be of a sexually predatory disposition.
68. For these reasons the Tribunal finds that the conclusions of the disciplinary hearing and appeal were reasonable, and evidence based.
69. The Tribunal assessed the oral evidence overall. The Claimant's oral evidence was confused and at times incoherent, save for his assertions that the process was unfair (correct) and that it was wrong to believe Person 1 over his denial when there was no eye witness (incorrect). In contrast, the witnesses for LUL clearly wholeheartedly believed in the principles of equality diversity and inclusion and acted accordingly. Their evidence was clear, coherent, plausible and credible. They readily accepted the issues with the unacceptable time this took, and apologetic about it (although for the most part it was not their fault. They were witnesses of truth.

70. There are other reasons why race and gender were not relevant to the decisions.
71. The policy of LUL is that bullying and harassment matters are dealt with by accredited managers. They fulfil this role in addition to their normal duties. There are very few of them. LUL has ended the outsourcing of investigating such matters, so accredited managers now have to investigate as well as adjudicate. It is not possible for them to do all this, so the practice has evolved of non-accredited managers doing the investigation which is then signed off by an accredited manager. This does not seem to accord with LUL's policy, but it is not discrimination as it happens in every case.
72. The delay was unacceptable. Unfortunately, this is commonplace, and not connected with any protected characteristic of a person facing disciplinary action. Part of the delay was that Mr Soler and Mr Asare pondered long over the outcome, not helped by Mr Soler being unable to leave Spain from early 2020 for well over a year by reason of Covid-19.
73. Mr Painter is white. He spoke with conviction of his passion for equality diversity and inclusion, and abhorrence of unlawful discrimination. He had been an accredited manager, and so was trained in the role, relinquishing it when his wife was pregnant and the role was taking too much of his time.
74. Mr Persaud's parentage is half white English and half Guyanese/Indian. Plainly he also lives and breathes the ethos of equality diversity and inclusion. He was trying to help to the extent that he volunteered to become an accredited manager so that he would be able to investigate.
75. Mr Musa signed off the investigation report. The Claimant had no issue with Mr Musa and said that both of them were of Nigerian heritage and spoke the same dialect. The possibility of Mr Musa being prejudiced against the Claimant by reason of a protected characteristic is non-existent.
76. The disciplinary panel was of two people, Mr Soler and Mr Asare. Mr Asare is black, of Ghanaian heritage. There is no reason why he would be prejudiced against the Claimant. Mr Soler's commitment to equality diversity and inclusion was passionate, and even the Claimant did not suggest that he was directly motivated by race or gender. He is Spanish.
77. Given the facts and conclusions above it is unsurprising that Ms Tague dismissed the appeal. She was thorough and took time to deal with points raised by the Claimant. Her heritage is half black Caribbean. She understood the issues: she had joined as a Customer Services Assistant and risen to a very high level in LUL. She took the appeal because (the Tribunal was not told why) the Claimant objected to the person first tasked with hearing it.
78. The Tribunal rejected the submission that Ms Tague should have asked herself whether a protected characteristic was the reason the Claimant was accused, the allegations found proved and the sanction imposed. It was never suggested by the Claimant before he filed this claim. It is not for a person hearing an appeal to seek out grounds of appeal not put forward by

an appellant, still less when there is nothing to indicate any possibility of such other ground. As set out above, the Claimant did not say in his appeal that white witnesses had been interviewed and black witnesses had not. It is not for the person hearing an appeal to advance grounds not put forward by the appellant.

79. There is nothing to indicate that there is any likelihood of any of the people involved having any wish to discriminate against the Claimant by reason of his race or gender (or for any other reason).
80. The ethnic makeup of the staff of LUL is diverse. It varies with the line, as people tend to work near where they live. About half of the staff on the Northern Line, on which the Claimant worked, are black, of African or Caribbean heritage. While that does not make discrimination impossible, it does make it less likely. There is no suggestion or evidence of a pattern of discrimination against black people. The trade union representative made an observation that one station was “toxic” for black people but without elaborating, and the Tribunal saw no evidence of entrenched discrimination.
81. The Claimant’s case is that Jason Persaud and Carl Painter provided evidence which led to the wrong outcome, and that they were motivated by race or gender. There is nothing to suggest that there was anything in the Claimant’s assertion that white people colluded together to make a false allegation against him, and that black people who could have given evidence to exonerate him were deliberately excluded. The reasons why this did not happen are set out above. It is notable that one of the (black) people the Claimant said should have been interviewed and was not, PS, was interviewed. Her evidence was unhelpful to the Claimant, as it was that Person 1 was upset and told PS that was because of the matters for which the Claimant was disciplined.
82. Since Mr Soler and Mr Asare concluded that the allegations of Person 1 were more likely than not to be true, their evidence (which the Tribunal accepted) was that this was gross misconduct and would be expected to lead to summary dismissal. They did not dismiss the Claimant. If they were discriminating against the Claimant they would have dismissed him. Instead, they gave him a final written warning for 12 months, backdated and so expired when given (and so only a matter of record), demoted him (to remove power imbalance between him and others) and found another role for him (to remove him from the vicinity of Person 1). He was not barred from applying for promotion after a 24 month period had elapsed from his return to work on 20 April 2020. Contrary to what he said in evidence to the Tribunal, in writing to Ms Tague he said that he liked Acton, as he did in the appeal document.
83. While the demotion did not accord with policy it was not, in the Tribunal’s judgment, unfair to do this where it was an alternative to summary dismissal. That, of course, is not really the point, which is that for it to be a significant fact it would have to have been motivated, at least in part, by considerations of race or gender. There is no evidence that it was so motivated.
84. Since demotion was a lesser sanction than dismissal it was better treatment not less favourable treatment.

85. In any event the sanction was not too severe. It was the sanction for which his trade union representative asked during the disciplinary hearing. This is not indicative of discrimination.
86. The delay is (as the witnesses for the Respondent accepted) unconscionable. This is systemic. It has nothing to do with the characteristics of anyone facing a bullying or harassment allegation. Since it affects everyone it is unrelated to a protected characteristic. It is not harassment as defined in the Equality Act 2010.
87. For these reasons there is no evidence that could lead a Tribunal to find that considerations of race played any part in the decisions made by the Respondent. Accordingly, the Tribunal finds that the burden of proof does not pass to the Respondent.
88. More technically, the Tribunal does not find that the Claimant suffered less favourable treatment than a hypothetical comparator by reason of race or gender. There was, in short, no less favourable treatment, because there is no evidence that anyone else (of whatever racial background or gender) would have been treated any differently by reason of their race or gender. Nor was he harassed within the meaning of the Equality Act 2010 by reason of delay.
89. The claims are therefore dismissed.

**Employment Judge Housego
Dated: 12 May 2023**