EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000268/2023

Final Hearing held in Dundee on 15 – 18 January 2024

Employment Judge A Kemp
Tribunal Member R Martin
Tribunal Member J McCullagh

Mr Baasit Kareem	**Claimant** **In person**
NCR Financial Solutions Group Ltd	**Respondent** **Represented by:** **Mr K Duffy** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the Claim does not succeed and is dismissed.

REASONS

Introduction

1. This was a Final Hearing held in person into claims for discrimination under sections 13, 26 and 27 of the Equality Act 2010 on the protected characteristic of race. The claimant is Black African. He submitted a Schedule of Loss for a sum of over £77,000.

2. The claims are all defended, and certain issues of jurisdiction were reserved to this hearing.

3. There had been a Preliminary Hearing on 30 August 2023 at which various case management orders had been made. Arrangements for a Final Hearing were then made.

Issues

4. At the commencement of the Final Hearing the Judge proposed to the parties that the following were the issues in the case. Neither had any comment or revisal to make with regard to them:

1 Did the respondent directly discriminate against the claimant because of his race contrary to section 13 of the Equality Act 2010?

2 Did the respondent harass the claimant by subjecting him to unwanted conduct related to his race contrary to section 26 of the Equality Act 2010?

3 Did the claimant do any protected act under section 27 of the Equality Act 2010?

4 If so, did the respondent victimise the claimant for doing so contrary to section 27 of the Equality Act 2010?

5 If any claim is successful to what remedy is the claimant entitled?

6 Does the Tribunal have jurisdiction for the purposes of section 123(3)(a) of the Equality Act 2010 in respect of any act prior to 26 February 2023?

Evidence

5. There was an agreed Bundle of Documents (or Inventory of Documents) before the Tribunal of 528 pages. Most but not all of it was referred to in oral evidence.

6. Evidence was given by the witnesses orally, commencing with the claimant, who called no witnesses. The respondent called the following witnesses: Andrea Stewart and Lucy Morrison (both colleagues on the team), Gillian McGovern (line manager), Lisa Dickson (investigating officer, along with HR), Kevin Horgan (dismissing officer) and Kerry Hume (appeal officer).

Preliminary Matters

7. The claimant initially sought a strike out of the Response, on the basis that the respondent had not provided its documentation timeously, either in breach of the order to do so under Rule 37, or under Rule 2 and the duty of co-operation. The respondent had however provided its documents on the last day it was permitted to do so by the case management order such that there was no breach of it, and it did not appear to the Tribunal that any matter had occurred which could justify strike out. That was explained to the claimant who then accepted it. The claimant also objected to certain productions lodged late by the respondent. It was accepted that some productions were indeed late, having been lodged in the previous week, but it did not appear to the Tribunal that there was any prejudice to the claimant, as the productions had not been sent to him at the time but were in the nature of internal communications within the respondent. The Tribunal considered it within the overriding objective to allow those productions.

8. Before the hearing of evidence the Judge explained to the claimant, a party litigant with no experience of Tribunal proceedings, about the leading of evidence, that documents required to be spoken to in evidence orally or would not be considered, that all evidence whether written or oral required to be before the Tribunal at this hearing as new evidence was allowed only in the most exceptional of circumstances, and about questioning of witnesses both in chief, cross examination (which he explained was to dispute any evidence of fact that was given that was contested, and to put to the witness any other matter that the witness was or ought to have been aware of that the witness had not covered in its evidence), that the Tribunal may ask questions and that there was a right of re-examination on issues raised in cross-examination or by the Tribunal.

The claimant was informed that all matters going to liability or remedy required to be raised. It was explained that after the evidence had been heard submissions could be made by each party to address the facts, what should be found and why, the law, and the application of the law to the facts.

9. The Judge explained also that the Tribunal could assist the claimant to an extent under the overriding objective to seek to put the parties on an equal footing and could ask questions to elicit facts under Rule 41 but that the Tribunal could not act as if his representative by entering the arena on his side. During the course of the hearing the Judge asked various questions of some of the witnesses to seek to elicit facts which he considered to be in accordance with the overriding objective.

Facts

10. The Tribunal found the following facts, which it considered to be the facts material to the issues before it, to have been established:

The parties

11. The claimant is Mr Baasit Kareem. His race is Black African.

12. The respondent is NCR Financial Solutions Group Ltd. It is a company operating globally providing equipment and services in relation to cash management. It has an office in Dundee at which the claimant worked, where it has about 600 employees.

Employment with the respondent

13. The claimant was employed by the respondent on 22 September 2021 as a Project Manager. He was provided with an offer letter which set out Particulars of his employment.

14. The claimant worked in the Currency Template Team of the respondent ("the team"). The numbers within the team varied, but was about eight during the claimant's employment. Initially the claimant's line manager was David Strachan and latterly it was Ms Gillian McCulloch.

15. The claimant was the only Black African member of the team. The respondent employs a range of nationalities and races, and that includes those who are Black African in other parts of its operation outwith the team. It operates globally.

16. The respondent operates a Code of Conduct and related documents. It has a zero tolerance approach to race discrimination. The Code of Conduct refers to the requirement for record keeping, and to non-discrimination and harassment. The document also states

> "We do not tolerate conduct that creates an intimidating or offensive work environment. We prohibit all types of harassment and bullying including physical, verbal and visual."

17. All staff undergo training on commencement of employment with regard to the Code of Conduct, which is repeated annually.

18. The respondent has a Disciplinary Policy and Procedure. It has provisions that include:

> "**Purpose and scope**
> …..We will always try to apply the following disciplinary and appeals procedure to help us achieve these standards and to resolve any difficulties in a consistent and fair way. In certain circumstances it might be necessary for the Company to depart from the approach advocated by this procedure….
>
> **Role of manager/supervisor**
> …..To raise any matters of misconduct by emailing details to HR via HR Central "submit a HR case"…..
>
> **General principles**
> …..All stages of this process will be carried out by a member of management. At every stage in the procedure the employee will be advised of the stage of the process, the nature of the complaint against him or her, the possible outcomes of the relevant stage and will be given the opportunity to state his or her case before any decision is made……

Written records and Minutes of meetings

…..Confidentiality of information gathered and recorded should be maintained at all stages of the procedure, in line with Data Protection Principles. All copies of information gathered in line with this procedure should be emailed to HR via HR Central "submit a HR case" to be placed in the personnel file…..

Gross Misconduct

[Examples of offences]

…Verbal abuse while on duty….

Disciplinary sanctions

Where there has been a minor breach of discipline or in cases of poor performance, conduct or attendance, you will normally be given an informal warning and given advice on how to improve before there is a need to consider the formal disciplinary warnings described below…..

Stage 1 – verbal warning

If conduct or performance does not meet acceptable standards the employee may be given a verbal warning. The Employee will be provided with a written confirmation of the verbal warning. A copy of this written warning will be emailed by the disciplining manager to HR via HR Central "submit a HR case" to be placed on the employee's personnel file.

Dismissal without notice

Summary dismissal may be justified in cases of gross misconduct without recourse to the full disciplinary procedure. If, on completion of the disciplinary hearing, the company is satisfied that gross misconduct has occurred the result will normally be summary dismissal without notice….."

Initial events

19. The claimant initially performed his role well for the respondent. He was a positive influence on the team of which he was a part.

20. The respondent operated a practice after restrictions were eased following the Covid-19 pandemic whereby staff spent some time at the office and some time working from home. Not all the team worked in the office at the same time accordingly. The team of which the claimant was a part was located near to the area where the HR team worked.

21. From in or around June 2022 the claimant commenced to make a series of allegations to other members of the team. The allegations were not factually true. They led to an increasing level of stress and anxiety for other members of the team, who reacted to them to some extent. The allegations made by the claimant were –

(i) Someone had reported the team for talking too much
(ii) Someone had reported the team for going for coffees too often
(iii) Someone had reported the team for not dressing appropriately
(iv) Ms Dickson (Executive Engineering Director) and Mr Strachan (the claimant's line manager) were not happy with the team going to the canteen for lunch
(v) Adam Crighton (Vice President of the respondent) had moved closer to the team's area in the office in order to monitor the team
(vi) Mr Strachan was shaking his head and fuming because someone had left their desk
(vii) That the claimant refused to go for lunch or coffee breaks as Mr Crighton was watching him and the team
(viii) A girl from HR was stalking him, was wearing short skirts on purpose, and he had to enter and leave the building by a different door to avoid her
(ix) Everyone in the team hated him as he had been chosen to go on a site trip
(x) Staff of the respondent were following him in his car and showing up outside his house
(xi) Someone from engineering had moved to his street to spy on him
(xii) A colleague had damaged the external door to his home.

22. On 9 September 2022 Ms Dickson organised a race night for her son's dancing class, and invited a number of the team of which the claimant was a member to come, as well as others not from the respondent. The

claimant attended. During the evening there was a discussion between the claimant and another male employee of the respondent during which the claimant and other employee each showed those they were with on their mobile telephones photographs of their respective girlfriends. All present including the claimant had an enjoyable evening.

23. Mr Strachan spoke to the claimant on 30 September 2022 about some of the allegations that the claimant had made as set out in paragraph 20. Initially the claimant refuted them, but latterly he admitted doing so and broke down. They had a long discussion during which the claimant indicated that he had earlier been on medication to treat paranoia. Mr Strachan suggested that he seek medical assistance, and explained that the behaviours were unacceptable and had to change.

24. On 17 October 2022 the claimant had a meeting with Ms Dickson, who was the line manager of Mr Strachan, who informed him that his behaviour at work was not acceptable. That behaviour included some of the allegations made at paragraph 20, but also speaking to himself, becoming agitated and apparently angry when at work. The claimant became upset when speaking with Ms Dickson. He referred to mental health issues he had had. She referred to the employee assistance programme and sought to support the claimant. She referred to the fact that her daughter was a part-time wheelchair user and had experienced discrimination herself, so that she was aware of how serious the impact could be.

25. The claimant thereafter had a period of absence from work to seek to improve his mental health at her suggestion, being absent from 19 – 25 October 2022 and then on holiday until 11 November 2022.

26. On 1 November 2022 Mr Strachan moved to another post and Ms Gilian McGovern became his line manager.

27. On 14 November 2023 Ms McGovern met the claimant and arranged a form of lighter duties for him to return to in order to assist him. She highlighted to him that the behaviours he had exhibited earlier had to stop.

28. On or around 23 November 2022 the claimant showed Ms McGovern photographs of damage to his front door, and suggested that it might have

been made by members of the team. Ms McGovern spoke to him about it and said that he should not make such accusations without there being evidence of it. She advised him about the employee assistance programme that the respondent offered its staff. She sought to offer him support for mental health issues he referred to. Ms McGovern kept a note of that interaction with the claimant, and further interactions referred to below, on a system called One Note. The records she made are accurate.

29. On or around 1 December 2022 the team had a Christmas party at the office canteen, which the claimant attended. He alleged to Ms Lucy Morrison, a colleague in the team, during the course of that event that she was racist. She was upset by that, and told Ms McGovern who advised her to try and avoid further discussion. After the party the claimant sent by text a link to an article about racism to Ms Morrison (which text was not before the Tribunal). He then sent her (on a date not given in evidence but likely to have been a day or so later) a message on Teams about whether she had received the text, and they exchanged messages during which Ms Morrison was supportive of him and suggested that “if something happened in work then you must report it.” She added that if there was “anything we can do then please let us know, we are all here for you.” He replied “its all good. I’m getting over everything slowly but surely. I just want everyone to understand.”

30. On or around 8 December 2022 the claimant attended the team Christmas lunch in the canteen. About half way through that he began to talk out loud to himself, and seemed to Ms McGovern to be angry and frustrated. She asked him to step into the corridor, where he said that he felt overwhelmed. She said that how he had acted was not acceptable, but that he did not need to go back in. He however did so, then continued to act similarly. He returned to his desk, where he started to throw items around his desk and swear incoherently. Ms Dickson was not present but learned of that and later that day met with him. He then alleged that there had been racial bullying. Ms Dickson paused the meeting to allow her to have HR to attend given that allegation. Ms Dickson said that she would investigate the allegation if he provided further detail of it. He did not but said that it was about how he felt about society in general. She told him

that his behaviour in throwing items at his desk and swearing was unacceptable.

31. On 15 December 2022 the claimant met Ms McGovern and Ms Dickson who asked him about his earlier allegation of racism. The claimant indicated that the issue was one in society rather than the respondent itself or its staff, and referred to a document. Ms Dickson advised the claimant to seek medical assistance, and again advised him about the employee assistance programme of the respondent. After the meeting the claimant emailed Ms McGovern and Ms Dickson with the document which was titled "let's talk about it". He stated "the attached was documented as a generic feeling around society."

32. On 16 December 2022 Ms McGovern emailed the claimant and stated "….At the meeting we had discussed that NCR will never accept racism or bullying and that we will always initiate a formal investigation when allegations are made. However to do this we would need to to formally document the facts to initiate the investigation, Can you please confirm if you wish this formal investigation to go ahead?....."

33. The claimant replied that day stating "…I would prefer the formal investigation do not go ahead & would hope all members/colleagues including myself are made aware and understand NCR's rules, values, expectations and consequences around workplace attitude and behaviours. I hope this concludes this ongoing informal investigation."

34. The claimant was allowed a form of extended leave over the Christmas and New Year period in the hope that that may improve his mental health. Ms Dickson and Ms McGovern explained about providing particulars of the racism he felt had occurred so that it could be investigated. Ms Dickson informed him that she took such matters very seriously and would not tolerate racism. Ms McGovern sent him an email the following day to explain matters to him and record his agreement to seeking occupational health advice. He stated in an email the same day that he did not want there to be a formal investigation.

35. On 9 January 2023 Ms McGovern met the claimant after he returned to work following the leave. She informed him that the outbursts that had

occurred at work prior to the break were not acceptable. He explained that he had seen his doctor, and had started Cognitive Behaviour Therapy, and felt positive about the new year.

36. On 10 January 2023 the claimant acted in a disengaged manner at a team meeting. Ms McGovern asked him to speak in the corridor outside, and he said that he had been racially abused. He confirmed that it was not in the workplace. She asked why it was relevant to the meeting they attended. She reminded him to remain professional during work meetings. He signed a mandate that same day to allow an Occupational Health Report to be obtained. An appointment was arranged for 16 February 2023.

37. On 20 January 2023 the claimant was at the office. He started to bang on and kick his desk, was speaking to himself, and shouted “bunch of fucking retards, just you wait, just you fucking wait”. Ms Morrison was present alone with the claimant in the office, and was scared by the behaviour and comments. She became very upset. She went to the toilet, where she spoke by telephone to Ms McGovern, who contacted Ms Dickson. Ms Morrison then went to a separate meeting room as advised by Ms Dickson. Ms Dickson spoke to Adam Crighton, the Site Leader and most senior manager in the Dundee office, who attended and spoke to the claimant and informed him that his behaviour was not acceptable. Ms Dickson then arrived at the office and spoke to the claimant about his behaviour and said that it was not acceptable.

38. Ms Dickson liaised with HR with regard to the matter, and met the claimant in the following week to discuss the support that could be offered to him, discussed occupational health advice and the employee assistance programme, offered to contact his parents, and stated that his behaviours could not continue.

39. On 9 February 2023 the claimant was at the office, became agitated and said loudly “these retards are going to get it…..I am going to fucking do you in”. There were four members of staff who heard that who consulted Ms McGovern about it as they were extremely concerned at the comment. Ms McGovern then spoke to the claimant who was confrontational in his response. Ms Dickson arrived shortly afterwards and told him to go home.

One member of staff left work early that day as they felt so uncomfortable. By that stage two of the staff on the team had becomes so anxious and concerned by the claimant's behaviour that they had consulted their GPs and received medication. One female member of staff was so concerned that she was being escorted to her car when leaving the office by another member of staff. A number of the team were scared of the claimant, and concerned at what may happen next as a result of his behaviour.

Investigation

40. The claimant was suspended from work on 13 February 2023 by Ms Dickson at a meeting they held that day. It was confirmed by letter of that date. That letter referred to sources of assistance for the claimant. The claimant was required to leave his laptop at the office which belonged to the respondent. Doing so is standard practice at the respondent when an employee is suspended.

41. The claimant attended the Occupational Health (OH) appointment on 16 February 2023 and thereafter a report was issued on 21 February 2023. It was seen by Ms McGovern and Ms Dickson. It stated that he was fit for work, and was likely to be a disabled person under the Equality Act 2010. It included the following answer to a question (the question appearing in bold below) –

> "**When Baasit is having an emotional outburst, peers become alarmed to the degree of being placed in a state of fear. If Medigold Health [the OH provider] confirm that Baasit is fit for work, can Medigold provide recommendations of how peers should best manage any future emotional outbursts?**
> I acknowledge that this can be a difficult situation but Mr Kareem's perception is that these do not occur and he advised that no one has provided feedback to him when such an event occurs. It is his perception that in the event of such a scenario, he would prefer his peers to inform him of his status immediately so that he could take corrective action."

42. The respondent commenced an investigation into the allegations against the claimant. Ten witness statements were taken, some of which were

anonymous as those concerned did not wish to give their name for fear of reaction by the claimant. Some were taken by Ms Dickson, and some by HR.

43. The claimant met the investigating officer, Ms Dickson, on 7 March 2023. The note of that meeting is a reasonably accurate record of it (although it contains an error as to the date). The claimant did not remember the incident on 9 February 2023 or that on 20 January 2023. He said in relation to the incidents in December 2022 that he did not know what triggers his behaviour. The claimant discussed the OH report and accepted that the comment that no one had provided feedback was not fully accurate as he had been provided that by managers, but his point was that his peers had not done so. When asked about the impact on others he said that if it did he did not mean to cause an impact, and "maybe I need to take responsibility for [it]".

44. Ms Dickson prepared her own witness statement which also contained a summary of the evidence she had obtained or been provided with. She concluded with her view that the respondent "need[s] to move to a disciplinary hearing."

Disciplinary process

45. The claimant was invited to a disciplinary hearing by letter dated 6 April 2023 from Mr Kevin Horgan, Executive Director Engineering. He did not have a prior knowledge of the team of which the claimant was a part. The letter had a number of attachments to it including the witness statements, note of the meeting with the claimant, and the respondent's policy. Reference was made to the OH report which the claimant had earlier been provided with a copy of. He was informed of his right to be accompanied, and that one outcome could be summary dismissal. The documents were sent to Mr Horgan by HR.

46. The allegations were set out and were said to constitute a breach of the policy section 5.5 of

- "A serious breach of NCR's Code of Conduct
- A serious breach of NCR's values

- Verbal abuse while on duty
- Breach of trust regarding your employment contract."

47. A disciplinary hearing took place between the claimant and Mr Horgan with Ms Tough of HR taking notes, and it being recorded, on 12 April 2023. A transcript of the meeting is an accurate record of it. The hearing was adjourned so that Mr Horgan could carry out some further investigation. He did so, speaking to and emailing Gillian McGovern, Lisa Dickson and Adam Crighton, and the meeting was reconvened on 19 April 2023, the claimant having been invited to it by letter dated 17 April 2023.

48. At the reconvened meeting the claimant was informed of the outcome of those further investigations and given an opportunity to comment. He did not wish to do so. After an adjournment he was informed by Mr Horgan that he was being summarily dismissed. The transcript of that meeting is an accurate record of it.

49. The dismissal was then confirmed to the claimant by letter dated 24 April 2023, which set out in full the reasons for the dismissal. He was dismissed for gross misconduct. The mitigation that the claimant offered was not accepted. The claimant had said that he cannot recall the events that were said to have placed other employees in a state of fear. Mr Horgan rejected that. It was noted that there were "multiple statements from witnesses confirming that each of these incidents occurred." The alleged racism was addressed which was a serious allegation made "without any substantiation whatsoever." He referred to the duty under the Health and Safety at Work etc Act 1974 which "includes protecting them [staff] from workplace violence. He referred to the impact on staff. He informed the claimant of his right of appeal.

50. The claimant appealed the dismissal by letter dated 25 April 2023. In that he set out three grounds of appeal which were (i) he disagreed with the way the disciplinary action was taken (ii) the outcome was too harsh and (iii) he wished to provide new evidence.

Appeal

51. The appeal was heard by Ms Kerry Hume, Vice President of Human Resources for the respondent, with a colleague from HR taking notes, although it was also recorded. She had the authority to reverse the decision had she wished to do so. The claimant was invited to a hearing by letter dated 3 May 2023. The hearing took place on 11 May 2023. A transcript of the hearing is an accurate record of it. During the appeal the claimant alleged that Ms Morrison had referred to posting online about him to Ryan Grant at a meeting between them that he had overheard, and that Mr Grant had said "that's so bad, stop it." Ms Hume was concerned at that allegation, as if true it was a serous matter.

52. Following the appeal Ms Hume spoke to Ms Dickson, Ms McGovern, Mr Ryan Grant and Ms Morrison. Mr Grant and Ms Morrison denied that they had had a conversation whereby Ms Morrison had admitted posting a message online about the claimant and his relationship status, or that Mr Grant had replied about it as the claimant had alleged. Both offered to show Ms Hume their mobile telephones. Ms Hume noted their comments at the time by hand, but those notes were not before the Tribunal.

53. On 24 May 2023 the claimant was informed by letter that his appeal had been refused. The letter doing so set out the reasons for that decision. She did not accept that the disciplinary process was not followed. She did not feel the outcome was too harsh. She did not find the new evidence correct, and considered that his statements were untrue. She also addressed a matter not within the appeal letter but raised in the appeal hearing, which was to the effect that the claimant had been coerced into taking a female employee Stephanie Amar on a date by Ms Morrison and Ms Stewart. She believed that to be untrue. She did not uphold his allegation of racial discrimination, referring to the email he sent on 16 December 2022. During the appeal hearing Ms Hume asked him "By racially abusing, you're saying that by Andrea and Lucy" to which the claimant responded "No, no, no. I was just feeling like if it was." Ms Hume said "Society" and he said "Yeah, yeah. Not Lucy and Andrea."

Early Conciliation

54. The claimant started early conciliation on 26 May 2023. The Certificate was issued on 7 June 2023. The claimant presented his Claim Form on 7 June 2023.

Other matters

55. The respondent has a policy to promote diversity and inclusion which it seeks to apply in practice. As a part of that it has developed in the Dundee premises Culture Crews, being groups of staff meeting regularly to promote areas, one of which is for diversity issues. It arranges other regular informal meetings to discuss diversity issues which it calls "diversiteas".

56. The claimant's net pay with the respondent was £2,138.03 per month.

57. The claimant applied for a number of positions after dismissal and commenced better paid employment than when with the respondent in June 2023. He remains in that employment.

58. The claimant completed CBT in September 2023.

Submissions for claimant

59. The following is a very basic summary of the claimant's submission. He had been honest and reliable. The respondent's witnesses had been inconsistent, inaccurate and dishonest. The claimant had discussed matters on 12 September 2022 with Mr Grant, who had provided a statement which was not in the Bundle nor had he been called as a witness. He discussed the allegations he made and asserted that they were true and accurate. The alleged matters from in around September 2022 had not been documented until March 2023. There had been a breach of the record-keeping requirements, and the disciplinary procedure. Ms Dickson had shown consistent bias. She said that there had been several verbal warnings but the evidence was not complete. She had exaggerated her findings. Details had not been shared with HR Central. Mr Horgan's decision was an absolute disgrace. The procedure was not full and fair. Ms Hume exaggerated and made excuses for not

following procedure. She lied about details. The allegation that the claimant had tried to go home with Ms Morrison in the appeal decision letter was not in Ms Morrison's initial statement. The dismissal and appeal decisions were lazy and spineless. The respondent had used out of a fag packet evidence. The claimant had been caused harm, feelings of being sad, alone and isolated during and after employment. The respondent did not terminate his employment under the disciplinary policy. He asked the Tribunal to raise awareness of race discrimination.

Submissions for respondent

60. The following again is a very basic summary of the submission. Mr Duffy set out a submission initially on the applicable law, and referred to some of the case law referred to below and to the EHRC Code of Practice. On the facts he went through the chronology, and identified eight occasions when the respondent had had a management intervention with the claimant. He argued that there had not been any shift in the burden of proof. He argued that any matter prior to 26 February 2023 was out of time, and the claimant had not established that it was just and equitable to extend time. He had not addressed that in evidence or submission. He addressed the claimant's allegations, including the timing of some of them, such as that the reference to "the black guy" having been said or included in an online post only appeared at the Further and Better Particulars on 26 September 2023. He addressed the events on 9 February 2023, and argued that conduct was the sole reason for dismissal. It was the last straw for the respondent. The claimant did not take responsibility for his actions. Any comparator would have been treated the same. The claimant's various allegations of detriment, or matters that amounted to harassment, were all untrue. Allegations had been fabricated. There had been no protected acts. The social race night on 9 September 2022 was not a work event at all, and vicarious liability did not arise from it. If there was any breach of the disciplinary procedure that was nothing to do with race. It was irrelevant. The claimant's evidence was not credible or reliable but that of all the respondent's witnesses was. The Claim should be dismissed.

The law

61. The Equality Act 2010 ("the Act") provides in section 4 that race is a protected characteristic. The Act re-enacts large parts of the predecessor statute race discrimination but there are some changes.

62. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> 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."

63. Section 23 of the Act provides

> "**Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of sections 13,14 and 19 there must be no material difference between the circumstances relating to each case…."

64. Section 26 of the Act provides

> **"26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ……
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> (5) The relevant protected characteristics are

….race…..”

65. Section 27 of the Act provides:

“**27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

……

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) 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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”

66. Section 39 of the Act provides:

“**39 Employees and applicants**

…….

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…….”

67. Section 109 of the Act provides:

“**109 Liability of employers and principals**

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer….."

68. Section 123 of the Act provides

"**123 Time limits**

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…….

(3) For the purposes of this section—

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

(b) failure to do something is to be treated as occurring when the person in question decided on it."

69. Section 136 of the Act provides:

"**136 Burden of proof**

If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

70. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if

relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

71. The provisions of the Act are construed against the terms of European Union Directive 2000/43 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin. The Directive is retained law under the European Union Withdrawal Act 2018.

Direct discrimination

72. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15.*** The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

73. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

74. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority it was held that an unjustified sense of grievance could not amount to a detriment. In ***R (ex part Birmingham) v EOC [1980] AC 1155*** it was held that it was not enough for the claimant to believe that there had been less favourable treatment. The test is an objective on – ***HM Land Registry v Grant [2011] ICR 1390***.

Comparator

75. In ***Shamoon*** Lord Nichols said that a tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

76. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***.

77. The EHRC Code of Practice on Employment states at paragraph 3.23 that the circumstances of the claimant and comparator need not be identical but nearly the same, and it provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

78. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.'

79. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

80. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal.

Harassment

81. Guidance was given by the then Mr Justice Underhill in ***Richmond Pharmacology v Dhaliwal [2009] IRLR 336,*** in which he said that it is a

'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose or effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not *per se* a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

82. Para 7.9 of the Equality and Human Rights Commission Code of Practice states that the provisions in section 26 should be given 'a broad meaning in that the conduct does not have to be because of the protected characteristic'. This was applied in ***Hartley v Foreign and Commonwealth Office UKEAT/0033/15*** where it was held that whether there is harassment must be considered in the light of all the circumstances; in particular, where it is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording. The test for “related to” is different to that for whether conduct is “because of” a characteristic. It is a broader and more easily satisfied test – ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and another EAT 0039/19.***

83. There can be harassment under this provision arising from an isolated incident; for an example, see ***Lindsay v London School of Economics [2014] IRLR 218.*** It is not necessary for the claimant to have expressed discomfort or air views publicly ***Reed and Bull Information Systems Ltd v Steadman [199] IRLR 299.***

Victimisation

84. There are two key questions – (i) has the claimant done a protected act (ii) if so did he suffer a detriment because he had done so, which is a causation test - ***Greater Manchester Police v Bailey [2017] EWCA Civ***

425. Guidance on the issues that arise is in Chapter 9 of the EHRC Code of Practice.

85. What amounts to an allegation for these purposes in predecessor legislation was addressed in ***Waters v Metropolitan Police Commissioner [1997] IRLR 589*** in which the Court of Appeal said in relation to predecessor provisions:

> "The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b)."

86. In ***Durrani v London Borough of Ealing UKEAT/0454/2012*** the EAT held that "it is not necessary that the complaint referred to [the protected characteristic, in that case race] using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies." There the claimant had used the word "discrimination" but when asked whether that was race discrimination had stated that it was more of unfair treatment generally.

87. In ***Fullah v Medical Research Council EAT/0586/12*** it was held that context was relevant and that "An employer is entitled to more notice than is given by a simple contention that there is victimisation and discrimination."

88. On the issue of detriment the question is - "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" as explained in ***Shamoon.*** It is to be interpreted widely in this context – ***Warburton v Chief Constable of Northamptonshire Police EA-2020-000376*** and ***EA-2020-001077.***

Course of employment

89. ***Jones v Tower Boots [1997] ICR 254*** in relation to a predecessor provision to section 109 stated that a purposive interpretation was required which gave the term a broad meaning. The EHRC Code of Practice:

Employment gave guidance at paragraph 10.46 that it included a social function organised by the employer.

Burden of proof

90. There is a two-stage process in applying the burden of proof provisions in discrimination cases, arising in relation to whether the decisions challenged were "because of" the relevant protected characteristic, as explained in the authorities of ***Igen v Wong [2005] IRLR*** 258, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If she does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved the guidance from those authorities.

91. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***

92. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was

> already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

93. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

94. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

95. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***.

Jurisdiction

96. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387.*** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96***).

97. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). All of the circumstances may be considered, but three issues that may normally be relevant in this context are firstly the length of and reasons for the delay, secondly prejudice to either party (particularly whether a fair hearing of the case is possible) and thirdly the merits of the claim.

98. There is a divergence of authority in relation to the first aspect. There is one line that even if the tribunal disbelieves the reason put forward by the claimant as to delay it should still go on to consider any other potentially relevant factors: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.*** A different division of the EAT decided in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** in which the Judge added that she did not "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong

merits of a claim can rescue a claimant from the consequences of any delay."

99. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

100. The EAT in ***Rathakrishnan*** concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

101. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held similarly:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

102. That was followed in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act referred to, as form of template for the exercise of discretion.

103. The Inner House of the Court of Session held in the case of ***Malcolm v Dundee City Council [2012] SLT 457*** that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of this discretion, in its review of authority. It referred *inter alia* to the cases of ***Chief Constable of Lincolnshire v Caston [2010] IRLR 327*** and ***Afolabi v Southwark London Borough Council [2003] ICR 800.*** In ***Malcolm*** the delay had been of the order of a month, but it is notable that whether a fair trial was possible or not was not considered to be a

determinative issue, which the Tribunal considers also supports the conclusion in the preceding paragraph.

104. The Court of Appeal in ***Morgan*** commented on the issue of prejudice and whether the delay prevented or inhibited the employer from investigating the claims while matters were still fresh. In ***Adedeji*** the court stated that there would be prejudice if the evidence was less cogent, but also had the effect of requiring investigation of matters that took place a long time previously. In each case it stated that those were factors to be taken into account, but did not suggest that they were determinative issues.

The EHRC Code

105. The Tribunal also considered the relevant terms of the Equality and Human Rights Commission Code of Practice on Employment, under section 15(4) of the Equality Act 2006 some of which are referred to specifically above.

Observations on the evidence

106. **The claimant** genuinely believed when giving evidence to us, we concluded, that the matters of which he complained took place. We considered however that his evidence was not reliable, and that there were so many issues in that regard that we could not accept as proved a fact if it came only from his own evidence.

107. Firstly he did not provide any evidence in the nature of a screen shot or similar for the posts he alleged had been made in relation to him, or other social media matters he claimed he saw, for example a photograph of his face with an emoji imposed on it of an animal. It appeared to us contrary to common sense that if someone in the claimant's position did see such posts or such an image, particularly after becoming concerned at posts about him earlier as he alleged, he would not have taken a screen shot or some other copy of it to have evidence of it. His position was that it was not his responsibility, but the initial burden of proof falls on him. That the allegations were made without any evidential support of that nature was a particular concern, quite apart from the evidence from those who denied acting in that manner.

108. Secondly, he denied acting as the respondent alleged which was in a manner showing increasing levels of aggression in language and behaviour, in the face of evidence from a number of parties that he had done so. His position before us was that the respondent's witnesses were lying. That is however contradicted by his own statements disavowing discrimination by Ms Stewart and Ms Morrison, referred to below. In his evidence before us he alleged that both of them had referred to him as "the black guy" in posts or orally or both. Each denied doing so, but if they had said or written that it is very hard indeed to understand why he did not raise that with the respondent at the time, or when Ms McGovern emailed him on 16 December 2022 about commencing an investigation, or when there was an investigation by Ms Dickson, or during the disciplinary hearing, or in his appeal letter, or in the appeal hearing, or even in the Claim Form. It is also in our view entirely inconsistent with his position before us that he had Teams messages exchanged with Ms Morrison shortly after he alleged racism by her in December 2022, which messages we consider would not have been in the terms that they did on his part had she used the term "the black guy" about him.

109. Thirdly there were other material inconsistencies in the evidence he gave. As an example, in the transcript of the first disciplinary hearing, which the claimant accepted was accurate, the claimant mentioned that he became anxious and scared at work. When then asked about the statement of Adam Crighton, which Ms Tough read referring to a comment "I made him aware that his behaviour was not acceptable in the office, he acknowledged this" the claimant replied that he thought it was just Adam checking on him. He did not dispute that he had acknowledged matters. When Ms Tough asked him if the statement was not correct he said "No, he told me I was banging my desk and stuff", and later said "I'm not disagreeing with anything." In relation to the incident on 9 February 2023 he said "I don't remember". Later he said that if he had upset someone at work he apologised, adding "It's not something that I mean to [do]". He later said that he remembered some of the events on 20 January 2023 but not the incident when he banged his desk and made the comments alleged. He commented that the incidents and allegations had not been

documented, and said “It’s not something that I do mean to or on purpose or anything. I didn’t even know somebody was in a state of fear…”

110. When asked about making allegations as to racism and then the emails on 16 December 2022 he said “I never said I remember saying someone being racist or the team being racist. Racism isn’t just something exactly somebody said or something somebody’s done. Its, it could be an attitude towards somebody, it could be an opinion towards somebody, it could be a feeling towards somebody as well. And so I’m not saying there’s an exact ‘somebody said something’ ‘somebody done something’. I’m just saying like, yeah, this is the general society.” His allegations at the time the respondent asked him about it were to the effect that society in general was racist. The “let’s talk about it” document he sent was of that nature. He appeared to move from allegations against specific people, to society against in general and back to individuals, during the whole process. That happened for example when he interacted with Ms Morrison at and after the race night, but also in the appeal hearing for example.

111. The comments at the disciplinary and appeal hearings are not consistent with what the claimant said in his evidence to us, such as the use of the term “the black guy”, or that witnesses are lying and exaggerating or fabricating events.

112. Similarly in this context the claimant in our view contradicted himself at various stages of the process. At a number of times during the investigation, disciplinary process and appeal he said that he could not remember matters. He told Mr Strachan, according to Mr Strachan’s statement, that he had acted as alleged after first refuting that. He referred to taking responsibility when discussing matters with Ms Dickson at the investigation meeting. He did not mention some of his allegations until in these proceedings, with that as to “the black guy” term he said had been used not even being mentioned in the Claim Form itself. Some he mentioned only in the appeal letter, and others not in that letter but in the appeal hearing. This is all in the context that his explanation for not making allegations at the time was so as not to cause disharmony in the team. But that explanation does not make any sense either when called

to a disciplinary hearing at which he is aware he may be dismissed, or after the dismissal.

113. Somewhat similarly he both alleged that witnesses were lying, and said that he could not recall the incidents alleged by the respondent. It appeared to us fundamentally inconsistent to take those two positions. Putting matters simply if he could not recall an incident he is not able to say whether a witness to that incident was being truthful or not, or accurate or not. The number and variety of the inconsistencies or contradictions in his evidence we considered to be material.

114. Fourthly he made claims that by gesture or use of sign language staff at the respondent passed a message with regard to him, such as to set him up on a date with a colleague, or to continue posting about him, or mock his suggestions or opinions. It was not easy to understand how that could have happened. He could not explain it when giving evidence. He was asked to demonstrate one of the gestures he saw, but said that he could not do so.

115. Fifthly he claimed that Ms Morrison had had a conversation with another employee Ryan Grant and had admitted posting about the claimant online, but Mr Grant told Ms Hume that he had not according to her evidence. Mr Grant did not appear before us but we accepted the evidence of Ms Hume that he had told her that. Ms Morrison had also denied that conversation both before us and before Ms Hume. The allegation about the conversation between Ms Morrison and Mr Grant was not made until during the appeal hearing itself, however, and was not within the appeal letter. For what was, if true, such an obviously important matter, particularly in the absence of any written record of the alleged posts, and this being raised by him after the dismissal decision, the failure to refer to it within the appeal letter was we considered not consistent with reliability. Whilst the respondent did not call Mr Grant to give evidence, neither did the claimant, who might have been expected to where that evidence would be of such assistance to him if true.

116. Sixthly the claimant has had mental health difficulties, including feelings of anxiety and low mood, and has received treatment including medication

(Fluoxetine) in 2019**,** and during his employment with the respondent had Cognitive Behaviour Therapy. His mental health difficulties were also referred to in the OH report, and in discussions with Mr Strachan, Ms McGovern and Ms Dickson.

117. Seventhly the claimant's assertions that he had raised matters with Mr Strachan and Ms Dickson in February 2022 was contradicted by Ms Dickson in clear terms before us. Although Mr Strachan did not give evidence Ms Dickson gave evidence about the statements obtained, one of which was from him, which amounted to hearsay evidence which we accepted. We considered from all the evidence before us that Mr Strachan's statement taken for the investigation was most likely to be accurate and the claimant's allegation that it was not was not reliable.

118. Eighthly the claimant alleged that after Ms Morrison and others posted about him online he was verbally abused in the city of Dundee and had a head injury during an amateur football match. His argument was that those events happened because of the posts. On what basis those involved, who were not employees of the respondent, came to know about the alleged posts, recognised him, and acted because of them, was not explained. Even if there had been such posts, and we considered that it was established in the evidence that there had not been, it appeared to us to be very unlikely indeed that there could have been such a causative link between such alleged posts and those events (if they occurred, and as the only evidence was from the claimant we did not find it proved that they had). It defied common sense in our view to suggest that the later event was caused by the posts. Rather similarly he argued that he had in effect been coerced into going on a date with a member of the HR team, but neither Ms Stewart nor Ms Morrison who are said to have done so knew her, and Ms Hume explained that she her employment had ended during the three month probationary period. The claimant then argued that they had done this to prevent him from progressing at the respondent as a distraction – which we regarded as contrary to common sense too.

119. Finally he said that there had been a female only platform at the respondent used in posting about him, but could not say what it was, and none of the witnesses knew what was being suggested. They denied using

any such platform. We concluded from the evidence before us that there was no female-only platform at the respondent.

120. Taking all of these issues together, then adding in the views about the respondent's witnesses to which we refer below, we concluded that the claimant's evidence was not reliable to the extent described above.

121. **The respondent's witnesses** were all, we considered, credible and reliable. **Ms Stewart** and **Ms Morrison** were clearly upset at being accused by the claimant of acts including referring to him as the black guy, posting messages about him, as well as other matters, and the suggestion that he had been harmed by their behaviours. We accepted their evidence in full. We considered that the evidence, which included for example contemporaneous Teams messages from Ms Morrison, strongly supported her evidence that she had been supportive of him, and had not acted as he alleged, matters addressed further below. That was also the sense of the contemporaneous notes kept by **Ms McGovern** his line manager. We considered that she was a careful and considerate manager who sought to assist him where she could. When he had shown her photographs of his damaged front door and suggested that the respondent's staff had caused it, she asked him to show her the evidence for that. Doing so was appropriate, as was her comment that it was not appropriate to make allegations without some form of evidence. Similarly we regarded the evidence of **Ms Dickson** as that from a particularly considerate and effective manager. She clearly had attempted to support the claimant until the incident on 9 February 2023 at which point she considered that action required to be taken. She had initially regarded him as a good member of the team, and that the initial behaviours were out of character. She was aware from him of his mental health difficulties, and sought to help him in that regard. She strongly denied any suggestion of race playing the slightest part in her decisions, and we accepted her evidence entirely. Whilst there might have been formal action taken earlier, either by Ms McGovern or Ms Dickson or both acting together, and we noted that Ms Hume said that if there was criticism of the respondent it included that, we concluded that the reason it was not to any extent because of race but was as the respondent, and in particular

Ms McGovern and Ms Dickson, sought genuinely to understand and support the claimant's mental health issues.

122. **Mr Horgan** had before him a substantial body of evidence indicating that the claimant had acted as alleged. He was we considered faced with little realistic choice from the material before him, which included that the claimant said that he could not recall events, but where the events he believed had occurred had been said to have caused such a level of harm to other staff to require medication, accompaniment going from the office to a car, and similar matters. He referred in his evidence to the duty of care to those staff in circumstances when on 9 February 2023 the claimant had issued what was a threat of violence when in the office. That was against the background of earlier incidents that were escalating in seriousness. We accepted his evidence that only the culmination of the behaviours leading to the events on 9 February 2023 were what led to dismissal, and that race played no part in the decisions. Whilst this was his first involvement in a dismissal and later Tribunal proceedings, he had support from HR.

123. **Ms Hume** conducted an appeal which addressed all the matters raised. She investigated them further and effectively. Had she found evidence of someone posting a matter in relation to the claimant's private life as he alleged before her we accepted her evidence that she would have regarded it as serious. Her conclusion that it had not happened was based on evidence she herself gathered, as we address further below. We considered that her evidence was clear and convincing. She also very candidly accepted that there were some matters from which the respondent could learn, and some aspects not fully compliant with procedure. That acceptance was we considered to her credit. We were also impressed with her evidence as to how the respondent sought to address issues of diversity and inclusion, and her own role in that.

Discussion

124. The Tribunal will address each issue separately. It reached an unanimous decision.

Did the respondent directly discriminate against the claimant because of his race contrary to section 13 of the Equality Act 2010?

125. There is no evidence before the Tribunal that it accepted that there was direct discrimination as alleged. Not only has the claimant failed to prove facts from which an inference of direct discrimination might be drawn but the Tribunal accepted the respondent's evidence that the acts alleged by the claimant as detriments had not taken place, and that the sole reason for dismissal was the claimant's conduct particularly on 9 February 2023, but also that leading up to it as the respondent alleged, and not to any extent whatsoever because of his race. For example, it was alleged that Ms Morrison had posted about the claimant online, including as to an online poll about his relationship status, and had referred to him as "the black guy". She denied having done so, denied knowing about any supposed female only site he said she had used in doing so and denied doing so in other locations such as Snapchat or LinkedIn. She offered to show managers her phone on two occasions to demonstrate that. Ms Stewart similarly denied acting as alleged. The claimant did not provide any evidence of the alleged postings. He might have provided a screen shot of what he saw, but did not. He alleged in the appeal hearing that there had been a discussion with Mr Grant when Ms Morrison had admitted making a posting about him, but when asked by Ms Hume about that Mr Grant denied that he had held such a conversation. Mr Grant did not give evidence before us but Ms Hume did, and we accepted her evidence. That detail clearly supports Ms Morrison's assertion similarly that such a conversation had not taken place, and that in turn supports the evidence of Ms Stewart.

126. The claimant further did not raise specific allegations against the respondent of race discrimination when he could have done so, for example during the investigation process, or the discipline process. When the matter was raised with him earlier, at a meeting on 15 December 2022 and an email the following day, he replied to state that he preferred that a formal investigation did not go ahead. He had sent a "let's talk about it" document to Ms McGovern and Ms Dickson which made more general

comments about racism in society. At the appeal hearing he disavowed any allegation against them, and agreed with Ms Hume using the word "society".

127. Whilst he did say to Ms Morrison that he considered her to be racist he did not elaborate on why that was when he could have done so, and there was no basis we found in the evidence for him to make such an allegation. She did not describe him as "the black guy". She did not post messages about him, his relationship status, or invite the public to vote in a poll about him as he had alleged. Her messages to him after that indicate her concern and support for him, but also his messages in reply are entirely inconsistent with her having been acting in a racist manner towards him as he alleged. She was upset by the allegation, and upset substantially by his behaviours in the office thereafter. Her evidence on that we accepted, and considered entirely genuine her comments about the impact of his behaviours on her. She had clearly been very scared by his conduct latterly but had also earlier sought to assist him where she could. We considered that that evidence of her being very scared was not an exaggeration.

128. There was a similar sense from the evidence of Ms Stewart, who also rejected in clear and convincing terms the allegations he made against her, either of using the term "the black guy" or posting about him. She explained the very limited use of social media, and that she had not done so since March 20212.

129. Ms Dickson was the third person said to have posted about him online, and denied in the most emphatic terms having done so, and explained how little social media posting she does, and that it is restricted to family matters on Facebook.

130. The evidence of those witnesses was also supported by the witness statements taken by Ms Dickson or HR which referred to the acts of the claimant, and the impact that they had. It was a substantial body of evidence.

131. Other allegations were made by the claimant. They included that Ms Stewart and Ms Morrison had harassed him by in effect coercing him

to go on a date with a colleague. His position was not consistent with common sense, or the description of how matters took place he later gave in his evidence. His position was also largely it appeared to us based on his view of gestures having been made, rather than explicit words used, which we did not consider reliable evidence. Another allegation was of discussion of his private life without his consent at the race night, which again was denied. The evidence from the respondent's witnesses was that the night had been an enjoyable one and that during it the claimant himself volunteered to show a photograph of his girlfriend. The breach of privacy he alleged was denied by the respondent's witnesses. In any event this was not in any sense a "work night" or similar, but a private event which included but was not limited to some work colleagues.

132. The allegations as to making gestures behind his head, as he put it, or using a form of sign language to convey instructions or comments or similar to other staff were also denied. That has been commented on above.

133. The Tribunal therefore had to make a choice between believing the claimant, who in evidence alleged that the respondent's witnesses were lying, and the respondent's witnesses and documentary evidence, which evidence was in our view compelling, consistent, and convincing. We concluded that it was most likely that the matters of which the claimant complained before us had not happened.

134. There were other matters of which the claimant complained. One was that his laptop was retained when he was suspended such that there had been predetermination of the dismissal. We did not accept that there had been any predetermination, it was simply a standard part of the process as Ms Dickson explained. Another was that the respondent breached its own policies firstly by not documenting the events from June 2022, secondly by not taking formal action at that time, thirdly by not giving him a written copy of any verbal warning and fourthly by not taking action short of dismissal such as a warning. The first point we did not accept as appropriate, as initially matters were not viewed as formal disciplinary matters. The second point is seeking to blame the respondent for not acting formally earlier with the suggestion that if it had taken place he may

have stopped acting as he had. But his position has been that he did not act as alleged, that witnesses were lying, and also that he could not recall doing so. It appeared to us that there was nothing in that point.

135. The third matter is true if each discussion with a manager is indeed a formal verbal warning under the policy. It may not have been, for example Mr Crighton in an email to Mr Horgan explained that it was a conversation not a formal matter. Although this matter was not explored in evidence or submission, we also noted in our deliberations the full terms of the policy. They included a provision for informal verbal warning, which was distinguished from a formal verbal warning. The former need not be confirmed in writing to the employee, and HR, but the latter required that. We concluded that there had been informal verbal warnings given which were in each case simply a discussion with the claimant by managers seeking to correct, and perhaps also understand, his behaviour. Our view was that each such informal verbal warning did not require to be documented in writing (and that in this regard the claimant's argument is therefore wrong).

136. If one or more was to be regarded as a formal verbal warning however then the policy did require written confirmation, which did not take place, but that does not mean that that was evidence of race discrimination. As the case law makes clear, it is not enough to show some form of unreasonable treatment and the protected characteristic. What matters is the full circumstances bearing on what happened. Here the respondent was seeking to help him, recognising his mental health difficulties, and delayed formal action until it became, for them, unavoidable to commence formal disciplinary action after the 9 February 2023 incident.

137. Similarly whilst there could have been formal action taken earlier, or commenced earlier, that it was not was not we considered evidence of any race discrimination. We considered that it was more the reverse – the respondent treated the claimant less unfavourably than might have been done. The claimant did have mental health difficulties, he told the respondent about that on occasion, particularly with Ms McGovern and Ms Dickson, and they sought to be supportive for him. That was in the context of his earlier having been a good team member, who had latterly

consulted his doctor and commenced CBT. It is in strict theory true that if there had been a formal process and written warning of some kind the claimant would have had that to consider, but as he stated that he could not recall the incidents of his behaviour it appeared to us that that would not have made or could have made any difference, such that it was not properly described as a detriment. It was more beneficial than detrimental.

138. It is we considered also relevant that in neither his evidence nor submission did the claimant directly address the incidents of his behaviour. He sought to concentrate on arguments over record keeping and procedural requirements. His position was either that the respondent's witnesses were lying, fabricating events or exaggerating them, or that he could not recall them. There was an inconsistency in that. He would require to recall an event to be able to allege that someone who spoke about it was lying.

139. His arguments also concentrated on the timing of matters between the series of untrue allegations referred to in September 2022 and the investigation in March 2023. That ignored however the intervening events. That included the repeated behaviours at a number of meetings, which he was told were unacceptable. He acknowledged before Ms Dickson when they met on 7 March 2023 that managers had discussed them with him – although the OH report indicated otherwise. The incident on 20 January 2023 was, we considered, a serious one. Ms Morrison was justifiably very scared by it. No employee should have to suffer that level of fear from a colleague at work, yet even then action was not taken formally by the respondent. They acted only after the more serious incident on 9 February 2023, when the words used were ones of violence and threat. These individual matters were glossed over in the claimant's evidence and submission, as if his stating that the respondent's witnesses were lying was a complete answer. If they had been lying matters would have been different, but we were entirely satisfied that they were not.

140. We consider that Mr Horgan dismissed the claimant not because of his race, in any way whatsoever, but because of his belief that the claimant's conduct which had impacted to such a serious extent on the other staff in the team merited dismissal, in our view. That was the only reason why the

dismissal occurred. The claimant was asked about a comparator, and referred to other team members. None of them acted as he did however, and they are not appropriate comparators because of that. If an hypothetical comparator is used we consider it entirely clear from the evidence we accepted that such a person, in the same position as the claimant in all essentials but not sharing his protected characteristic, would also have been dismissed.

141. The appeal was refused, and that was not affected by race to any extent whatsoever similarly. We accepted Ms Hume's evidence of what witnesses including Ms Morrison and Mr Grant had told her, and we did not consider that Mr Grant not appearing before us was a matter that should lead to another conclusion. The claimant could have called him or sought a witness order. The claimant argued that Ms Hume's letter referred to Ms Morrison stating that he had tried to go home with her after the September 2022 race night, and that that had not been in her initial statement. That is true, but she did comment about that in her evidence, and rather brushed it off. Her doing so enhanced our view of her credibility and reliability.

142. The burden of proof had not shifted under section 136, but even if it had the respondent in our view had clearly discharged it.

Did the respondent harass the claimant by subjecting him to unwanted conduct related to his race contrary to section 26 of the Equality Act 2010?

143. For essentially the same reasons as above, we considered that the respondent had not harassed the claimant. The respondent did not create the kind of environment that section 26 refers to. So far as the claimant considered that it had, his perception was not a reasonable one looking at matters objectively. From all the evidence before us we considered that the respondent went out of its way to engender an open and inclusive workplace, and that their statements in the Code of Conduct were acted on in practice. We noted for example the evidence given as to diversity and inclusion initiatives which many of the witnesses were actively and enthusiastically engaging with before and after these events. In any event what happened was not related to his race to any extent whatsoever.

Did the Claimant do any protected act under section 27 of the Equality Act 2010?

144. We did not consider that the claimant had proved that he had made any protected act. At no stage did he raise a claim in sufficiently clear terms that the respondent (or any of its employees) had breached the 2010 Act. His allegations were generalised ones about society in general. When asked about that in the hearing his reply was that the respondent was a part of society. That is certainly true, but that does not mean that the allegations of racism in society amount to ones against the respondent under the Act.

145. The closest matters got to a protected act were when firstly the claimant spoke to Ms Morrison and alleged racism on 15 December 2022, and secondly at a meeting later that day with Ms McGovern and then also with Ms Dickson, but after that latter meeting the claimant did not wish to particularise the allegations or have a formal investigation, as he stated by email after being offered to have such an investigation, and as for the former matter it was said only to her and not followed up either with a grievance, or complaint or other such action. There was also an email exchange on or around the following day which made clear that Ms Morrison and the team would support him, and that if he had been the victim of racism he should report it. He did not. At no stage did he raise any form of grievance. It is we considered not possible to reconcile the terms of those messages with an allegation that Ms Morrison had been racist towards him, nor is it possible to do so when considered with the email he sent on 16 December 2022 or the comments in the appeal hearing. In the Claim Form he said that he did not wish to cause disharmony in the team, or in effect to get someone into trouble, but that argument is inconsistent with the fact that he had by the appeal stage been dismissed, and even then disavowed racism by Ms Morrison or Ms Stewart.

146. Whilst we did not consider that any of the allegations of racial discrimination were merited, for completeness we should add that we did not consider that they were at any stage made in bad faith for the reasons given above.

If so, did the respondent victimise the claimant for doing so contrary to section 27 of the Equality Act 2010?

147. We were satisfied that the respondent did not victimise the claimant for doing a protected act even had there been a protected act. The only reason for their actions including the dismissal and rejection of his appeal was the claimant's increasingly aggressive and concerning, behaviours. The impact on staff was becoming progressively more serious. If anything the respondent delayed longer than might have been considered appropriate by many employers in taking formal action, but that was, they explained in a manner that we accepted in evidence particularly from Ms Dickson, because they were concerned about the claimant and his mental health. They sought an Occupational Health report which followed a consultation with him on 16 February 2023. It was dated 21 February 2023 and referred to the claimant not having recollections of the incidents that had been alleged at which he had been aggressive or used threatening language. It advised an opinion that the claimant was likely to be a disabled person under the 2010 Act. The disciplinary hearing took place after the occupational health report was received and after the investigation was complete, which was we considered understandable given the desire by Ms Dickson to seek to support the claimant, even although many employers might well have acted formally earlier, either in or around September 2022, or shortly after the events of 20 January 2023. The suggestion of a lack of management support we reject.

148. The decision to dismiss was taken by Mr Horgan. He was independent of Ms Dickson. He explained his rationale for doing so in the letter of dismissal, and before us. We were satisfied that his evidence was credible and reliable. He gave his explanations clearly and candidly. The evidence from the investigation by Ms Dickson included both ten witness statements and the comments from the claimant in his interview with her. The hearing held with the claimant was reasonably long, and gave the claimant the opportunity to comment. The witness evidence was consistent that some employees were scared, had altered their behaviours in some respects, and one was considering leaving the respondent because of it. In light of the circumstances, it appeared to us that it was only the behaviours of the

claimant in acting aggressively, and making threatening comments on more than one occasion, that was the reason for dismissal. Race played no part whether consciously or sub-consciously in the dismissal.

149. In so far as the appeal is concerned we considered that Ms Hume came to her decisions in a manner that was not affected by the claimant having mentioned race discrimination at any stage. She did not accept his evidence, and agreed with the decision to dismiss for the behaviours referred to. She was unsure whether the incident of 9 February 2023 alone was sufficient for dismissal, but in any event it is not a matter in isolation. There had clearly been a pattern of increasingly concerning behaviours, leading up to that on 9 February 2023 which involved language of violence. That is, we considered, a clear act of gross misconduct.

If any claim is successful to what remedy is the claimant entitled?

150. This matter does not now arise.

Does the Tribunal have jurisdiction for the purposes of section 123(3)(a) of the Equality Act 2010 in respect of any act prior to 26 February 2023?

151. We considered that there were no acts extending over a period, as there were no acts for the purposes of the claims made, but had the point been relevant we would have considered that it was just and equitable to extend jurisdiction partly as the claimant has mental health difficulties, partly as he is a party litigant, and partly as there was no suggestion of prejudice to the respondent which was able to present its evidence fully.

152. The Tribunal considers that the line of authority set out in ***Rathakrishnan*** is that which accords with the statutory definition, and is supported by the Court of Appeal authorities referred to in the two most recent paragraphs. It considers therefore that no single factor is determinative. The claimant's position was not directly addressed in his evidence, but we consider that that too is not determinative. The merits of the claim we have rejected. Nevertheless we exercised our discretion to allow the claim to be pursued and do not reject it (for events prior to 26 February 2023). We note that what is potentially outwith jurisdiction is only what are alleged to be detriments, as separate claims, and not matters of evidence that might be

relevant to the lawfulness of the dismissal which the respondent, correctly, conceded was within the jurisdiction.

Conclusion

153. Claims of race discrimination are serious matters for both parties. They require careful consideration of the evidence placed before the Tribunal, and the application of the law to the facts as found. If the claimant's allegations before us had been accepted we would not have hesitated to find that there had been race discrimination. But the evidence before us was, we concluded, entirely clear and led to our findings that there had not been race discrimination in any way. We were unanimous in our view that the evidence was that there had been no direct race discrimination, harassment in relation to race or victimisation of the claimant by the respondent. The dismissal was not unlawful, and given the circumstances before Mr Horgan, which included what the claimant had said to him which did not directly challenge the allegations as to his behaviour, the terms of the OH report, and the impact on staff, most obviously from the evidence of the fear induced in Ms Morrison in her witness statement but not restricted to her, a decision most employers in the same situation would in our view have taken.

154. Sadly, it is possible that the claimant's mental health issues are an explanation for his making allegations of matters said to have happened at the respondent that simply did not occur. We did not however have much in the way of professional evidence before us about his mental health such that commenting beyond that being a possibility is not, we consider, appropriate. We did not consider that the claimant had been acting in bad faith or that he had simply given evidence he knew to be untrue. He did we consider genuinely believe when giving evidence to us that he was doing so accurately.

155. What is also sad is that so many of the respondent's staff endured such a level of fear and distress at work. That was most evident from Ms Morrison's evidence before us, but also that from Ms Stewart, Ms McGovern and Ms Dickson. Those witnesses also handled the

suggestions put to them in cross examination in a very measured way, despite the obvious difficulties for them when doing so.

156. There were some matters where the respondent, as Ms Hume accepted as referred to above, can improve its practices and procedures. The disciplinary policy was not fully followed in compliance with its strict terms as (i) the respondent's witnesses giving evidence on warnings did not appear to be clear as to whether a verbal warning had been informally given or formally given: if a formal verbal warning was issued, it was not confirmed in writing to the claimant and sent to HR and (ii) some meetings (such as that on 15 December 2022 or the appeal investigation meetings held by Ms Hume) were not documented at least in the documents before us.

157. There are further matters on which we consider comment is appropriate (iii) where there was a pattern of an increasing seriousness of behaviour it is not easy to understand why a formal investigation was not commenced earlier, even allowing for concerns over the claimant's mental health. He could, for example have been suspended or placed on more informal leave pending OH advice or otherwise given the concerns of other staff as to the impacts of matters on them, either on the return to work on 9 January 2023 or on the following day when despite Ms McGovern's comment about not repeating behaviours he did so, and more obviously on or shortly after 20 January 2023 after the more serious incident that day (iv) Ms Dickson was both investigator in part, and witness, which is not best practice (v) The OH report suggested that seeking a GP report may be beneficial, but appears not to have been sought and the reason that was not done was not clear from the evidence and (vi) Ms Hume appeared to know some of the background to matters, as her office was close to that of the team, and one of her staff had consulted her about one of the allegations made by the claimant, and as best practice it may have been better to have had someone entirely unconnected to the matters being addressed to hear the appeal.

158. Best practice is not however the test in law in the case before us. This case was not one of unfair dismissal, for which the claimant did not have the necessary service, nor one of disability discrimination, in which again

the tests are entirely different to best practice. The allegations before us were of discrimination on the protected characteristic of race. The claimant had not demonstrated a prima facie case, and in any event the respondent proved that the decisions taken had not been affected by race or any allegation as to race discrimination to any extent whatsoever. Our comments in the two preceding paragraphs do not affect those conclusions.

159. We have therefore dismissed the Claim.

Employment Judge: **A Kemp**
Date of Judgment: **23 January 2024**
Entered in register: **24 January 2024**
and copied to parties