EMPLOYMENT TRIBUNALS

Claimant: Mr P Bakoukissa

Respondent: Jaguar Land Rover Ltd

Heard at: Birmingham

On: 17 October 2022 to 4 November 2022

Before: Employment Judge Meichen, Mrs D Hill, Mrs E Shenton

Appearances:
For the claimant: in person
For the respondent's: Mr J Heard, barrister

UNANIMOUS RESERVED JUDGMENT

(1) The claimant's claim of direct race discrimination is dismissed as the tribunal has no jurisdiction to hear it.

(2) The claimant's other claims fail and are dismissed.

REASONS

Introduction

1. This case came before the tribunal for its final hearing.

2. The claimant gave evidence and was cross examined. He called one witness who was briefly cross examined – Shaun Longford.

3. The respondent had 8 witnesses who were called and cross examined; Lourdes Cano Ramirez, Harry Baker, Adam Routledge, Nicolas Etheridge, Mark Hudson, Stuart Hately, James Berry, Kevin Howells. In addition the respondent relied on one witness statement where the witness was not called. This was James Havercroft and we took into account the fact he had not attended to give evidence when deciding what weight to attach to his evidence.

4. Before we set out the issues, the law, our findings and our conclusions we need to explain a number of issues which arose during this hearing.

Issues during this hearing

Background

5. There were two case management hearings in this case. At the last case management hearing on 22 October 2021 before EJ Algazy KC the issues were recorded and case management orders were made. Relevantly, the following orders were made:

Documents

17. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before 3 December 2021. This includes, from the claimant, documents relevant to all aspects of any remedy sought including any documents relating to mitigation of loss.

18. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

19. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

…

File of documents

21. The respondent must prepare a file of those documents [exchanged in compliance with the orders above] with an index and page numbers. They must send a hard copy to the claimant by 7 January 2022.

…

Witness statements

26. The claimant and the respondent must prepare witness statements for use at the hearing. ***Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.***

27. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

28. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

29. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.

30. The claimant and the respondent must send each other copies of all their witness statements by 18 February 2022.

6. In compliance with the above orders the parties exchanged documents at the end of 2021 and the hearing bundle was sent to the claimant by the respondent in January 2022. A further copy of the hearing bundle was emailed to the claimant on 30 September 2022. The length of the hearing bundle was around 1200 pages.

7. On Thursday 13 October 2022 the claimant sent a new bundle to the respondent. The length of the claimant's bundle was in excess of 700 pages. Some of the documents in the claimant's bundle were already contained in the hearing bundle and some were not. No cogent or reasonable explanation has been provided by the claimant as to why he suddenly provided a separate bundle shortly before the final hearing was due to start (on Monday 17 October).

8. The parties exchanged witness statements in February 2022. The claimant's statement was extremely short and unhelpful. It was less than one page in length and it did not specifically address any of the issues in his claim. The claimant informed the respondent that he intended to give an oral statement at the final hearing. This was not permitted by the case management orders which had already been made by the tribunal. The respondent's solicitors fairly and appropriately explained to the claimant that he would not be able to give an oral statement at the final hearing and that he should comply with the case management orders which had been made. They offered the claimant a short extension of time in order to update his witness statement. The claimant declined this offer and he did not update his statement. The claimant said he did not have anything else to add and he did not want to think about it. The result was that by the start of this final hearing the claimant had not prepared a meaningful witness statement. Again no cogent or reasonable explanation has been provided by the claimant as to why he did not comply with the case management orders and provide a proper witness statement.

9. At around the same time as he provided his bundle on Thursday 13th October 2022 the claimant disclosed the existence of two covert recordings which he had made whilst he remained employed by the respondent. The claimant

indicated he intended to rely on these at final hearing. We understand the two recordings were then provided to the respondent in advance of the hearing starting. As we explain further below the claimant then disclosed the existence of further covert recordings and he attempted to provide to the respondent 17 recordings at 4 am on the second day of the hearing. Again no cogent or reasonable explanation has been offered by the claimant as to why he did not reveal the existence of these recordings in accordance with his disclosure obligations and why he only disclosed some recordings immediately before the final hearing was due to start and then disclosed some more during the hearing.

10. The tribunal had to deal with these issues at the start of the hearing. This took some considerable time. We observe that each issue was solely caused by the claimant's unreasonable and effectively unexplained failure to comply with case management orders and very late provision of evidence in contravention of his disclosure obligations. How to proceed fell to be considered in that context, and we took the following legal principles into account.

Legal principles

11. As the presidential guidance on case management makes clear proper disclosure of documents, agreeing a bundle and preparing a witness statement are important case management steps:

Why have an agreed set of documents?

2. Early disclosure of documents helps the parties to see clearly what the issues are. It helps them to prepare their witness statements and their arguments. There is no point in withholding evidence until the hearing. This only causes delay and adds to the costs. It may put you at risk of having your case struck out.

3. Agreeing a set of documents means that all parties agree which documents are relevant and the Tribunal will need to see. It does not mean they agree with what the documents contain or mean.

4. It avoids problems at a hearing when a party produces a document which the other party has not seen before. This is unfair and may lead to the hearing being delayed or adjourned. This is costly to all concerned and may result in the offending party paying the costs of the adjournment.

5. An agreed set of documents – rather than each party bringing their own set of documents to the hearing – prevents uncertainty and delay at the hearing.
…
8. Any relevant document in your possession (or which you have the power to obtain) which is or may be relevant to the issues must be disclosed. This includes documents which may harm your case as well as those which may help it. To conceal or withhold a relevant document is a serious matter.

…
Why prepare witness statements?

11. It helps to write down what you have to say in evidence. You often remember much more and feel more comfortable when giving evidence having done so.

12. Early exchange of witness statements enables the parties to know the case they have to meet and what the issues are going to be. All the relevant evidence will come out at the hearing. There is nothing to gain (and much to lose) by withholding it until then.

13. Preparation of witness statements helps the Tribunal to identify the issues and to ensure that the case is completed in the time allowed.

12. Rule 41 of the Tribunal's rules of procedure enables the Tribunal to regulate its own procedure and conduct the hearing in a manner it considers fair having regard to the principles contained in the overriding objective. The overriding objective is to enable tribunals to deal with cases 'fairly and justly'. This includes, among other things, ensuring so far as practicable that the parties are on an equal footing, dealing with cases in ways that are proportionate to their complexity and importance, avoiding delay and saving expense.

13. Rule 41 also enables employment tribunals to admit evidence that would not be admissible before the ordinary courts. This allows the tribunal to decide whether any particular item of evidence should be admitted and, if so, what degree of weight should be attached to it.

14. The overarching factor that governs the admissibility of all types of evidence is relevance. For any evidence to be admissible it must be relevant to the issues that require adjudication by the tribunal.

15. In Vernon v Bosley 1994 PIQR P337, CA Lord Justice Hoffmann said *'the degree of relevance needed for admissibility is not some fixed point on a scale, but will vary according to the nature of the evidence and in particular the inconvenience, expense, delay or oppression which would attend its reception… although a judge [in a civil case] has no discretion to exclude admissible evidence, his ruling on admissibility may involve a balancing of the degree of relevance of the evidence against other considerations which is in practice indistinguishable from the exercise of a discretion'.*

16. Lord Justice Hoffmann was referring there to a judge in a civil court but in HSBC Asia Holdings BV and anor v Gillespie [2011] IRLR 209 Mr Justice Underhill the then president of the EAT said that there was no distinction in principle between the power in this regard of the civil courts and those of the Tribunal. He explained that *'evidence may be, as it is sometimes put, "logically" or*

"theoretically" relevant but nevertheless too marginal, or otherwise unlikely to assist the court, for its admission to be justified'. Tribunals therefore have a discretion not to admit evidence that is only marginally relevant.

17. Admissible evidence in the Employment Tribunal can include covert audio recordings. However it will usually be necessary for a party seeking to introduce evidence of covert recordings to provide transcripts and a clear explanation of why the recording — or particular parts of it — is relevant Vaughan v London Borough of Lewisham and ors EAT 0534/12. In Vaughan the EAT upheld a decision not to admit recordings when these steps had not been taken and the following relevant analysis was provided:

"Relevance is not a black-and-white concept:… It is necessary in the case of any piece of evidence to assess how relevant it is, and in what way, and also the extent to which the individual matters that may have been pleaded are themselves central to the allegations. This involves questions of degree and, to use the term with which we are all now familiar, proportionality. That being so, the Judge could get nowhere without sight of the transcripts of the recordings on which the Claimant sought to rely, so that an informed view could be taken whether it was indeed proportionate or, to put it another way, necessary in the interests of justice that the recordings be admitted in evidence."

18. The Tribunal has a discretion whether to permit supplementary statements and it is a discretion which should be exercised in accordance with the overriding objective and with consideration of prejudice and whether a fair hearing is possible, Oyesanya v Pennine Acute Hospitals NHS Trust EAT 0126/17. In Oyesanya the claimant sought leave to submit a supplementary witness statement but this was refused by an employment judge on the basis that the respondent stood to suffer greater prejudice by the admission of the additional witness statement than the prejudice the claimant would suffer by refusal. The EAT upheld the judge's decision.

19. A number of cases have considered the extent of the Tribunal's duty to assist parties who are not legally represented. In Mensah v East Hertfordshire NHS Trust [1998] IRLR 531 Sir Christopher Slade in the Court of Appeal said: *"I too would strongly encourage Industrial Tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person. There must, however, be a limit to the indulgence which even litigants in person can reasonably expect. The desirability in principle of giving such assistance must always be balanced against the need to avoid injustice or hardship to the other party on the particular facts of each case. This, in my judgment, is a very good reason for holding that the manner and extent of such assistance should generally be treated as a matter for the judgment of the Tribunal and not as subject to rigid rules of law."* The Court of Appeal in that case then went on to confirm a line of EAT decisions holding that it is the

responsibility of the parties themselves to present the case and put the relevant evidence before the tribunal.

20. In Radakovits v Abbey National plc 2010 IRLR 307, Lord Justice Elias also in the Court of Appeal commented that it might be proper for a tribunal to explain to an unrepresented party the issue that it has to determine and explain why, for example, that party may be prejudiced if he or she fails to give evidence. He went on to note, however, that the tribunal must not say anything about the evidence the party should give.

21. In McNicol v Balfour Beatty Rail Maintenance Ltd 2002 ICR 1498 the Court of Appeal rejected the suggestion that tribunals should adopt an inquisitorial and more proactive role, in particular in disability discrimination cases. Lord Justice Mummery reaffirmed the tribunal's role as being to adjudicate on disputes as presented to it by the parties. He stressed that it is not the tribunal's duty to obtain evidence.

Decisions

22. Against the background described above and with the above legal principles in mind we made the following decisions on how to proceed. We gave oral reasons for these decisions at the time so that the parties understood our approach. We also spent time discussing the liability issues with the claimant and identifying with him what he had to prove including with reference to the burden of proof provisions.

23. Regarding the claimant's failure to provide a meaningful witness statement the respondent objected to the claimant providing an oral statement and they also objected to any expansion of the claimant's short written statement. We agreed with the respondent that the claimant should not be permitted to provide an oral statement. We considered that this would be unfair and not in accordance with the overriding objective. The respondent would be taken by surprise by what the claimant might say and therefore potentially caused significant prejudice. We also considered that the claimant providing an oral statement would not work practically. This was a substantial 15 day claim and we considered that giving the claimant free reign to make an oral statement would be unlikely to provide us with cogent or comprehensive evidence on the issues which we had to determine.

24. Although it was not suggested by either party we considered other options. The claimant was unrepresented and so could not be examined in chief by a representative. We considered whether the panel could fairly elicit evidence through asking questions of (i.e. examining in chief) the claimant but we decided that this would constitute the panel inappropriately stepping into the arena and adopting an inappropriately inquisitorial approach. It would not be in accordance with the overriding objective. It would give the impression of the panel overly assisting the claimant and the respondent would be taken by

surprise by what the claimant may say. It would therefore prejudice the respondent. We acknowledge that in some cases such as a straightforward unfair dismissal a judge or panel could fairly elicit evidence through examination in chief but we do not think it would be fair to do so in this substantial discrimination case where detailed and sophisticated questioning would likely be required to elicit all the relevant evidence the claimant may wish to give. We should also say that we do not think this approach would have worked practically in this case because of the claimant's challenging behaviour, which we briefly explain below.

25. Importantly, allowing the claimant to provide an oral statement or answer extensive questions in examination in chief would be a breach of the case management order already made by the tribunal which made it clear that everybody who was going to be a witness at the hearing needed a witness statement (the purpose and form of a witness statement were also clearly explained as part of this order). There was nothing in the case management order which gave the claimant permission to make an oral statement or provide oral evidence in addition to or instead of providing a witness statement. We considered it would be unfair and prejudicial if the claimant was permitted to make an oral statement/answer questions after he had had the respondent's written statements for many months.

26. We disagreed with the respondent that we should not permit the claimant to expand his written statement. We took into account that the case management order provided that "*witnesses could add to their statements if the Tribunal agrees".* We observed that the claimant bore the primary burden of proof in relation to each of his claims. A further anomaly in this case was that the claimant's claim form contained no real particulars of claim. Instead, the claimant had simply identified the heads of claim he wished to make. This meant that the claimant's pleaded case was also completely lacking in any meaningful detail. In our view this made the claimant's failure to provide a witness statement all the more acute. In our judgement there was a risk of an unfair hearing as it could be argued that the claimant's case should necessarily fail as he had no meaningful pleaded case and no meaningful witness statement.

27. We proactively considered how we could proceed in a way which was fair to both parties. We observed that there were a number of documents within the hearing bundle where the claimant had provided further information about his case and the nature of his allegations at an early stage in the proceedings. The relevant documents were the claimant's email chain of 22 August 2020 which began at page 13 of the bundle and included the claimant's "to whom it may concern" document which began at page 15 of the bundle, the claimant's email chain of 3 September 2020 which began at page 36 of the bundle, the claimant's email chain of 19 February 2021 which began at page 50 of the bundle, the claimant's email chain of 24 July 2021 which began at page 70 of

the bundle, the claimant's email chain of 11 August 2021 which began at page 75 the bundle and the claimant's scott schedule which began at page 80 of the bundle.

28. Plainly the respondent would not be taken by surprise by anything said in those documents as they were already in the hearing bundle which had been prepared by the respondents and had been in existence since January. There would therefore be little to no prejudice to the respondent. The claimant confirmed that the documents we referred to above contained accurate further information which he wished to rely on support this claim. He agreed with the Tribunal's proposal that he rely on those documents as an extension to his short witness statement. We therefore decided that we would treat the contents of those documents as an extension of the claimant's witness statement. In our view this ensured that there could be a fair hearing, notwithstanding the fact that the claimant had unreasonably failed to comply with the case management order to provide a witness statement. It meant that the claimant had a meaningful witness statement which explained his case. We considered this step was in accordance with the overriding objective.

29. Regarding the claimant's bundle of documents we asked the claimant to identify the pages in his bundle which were not in the hearing bundle and on which he wished to rely at the final hearing. In response, the claimant identified the following pages. From volume 1 of his bundle page 117 and pages 201 to 211 and from volume 2 of his bundle pages 2 to 33, pages 36 to 40, pages 65 to 69 and pages 123 to 154. We therefore informed the parties we would make a decision on whether to admit those documents into evidence. There was no need to consider the remainder of the claimant's bundle as the claimant confirmed that it was comprised either of documents that were already in the hearing bundle or which he did not intend to rely on at the final hearing.

30. We gave the respondent time to consider whether they wished to object to any of the new documents being admitted into evidence and added to the hearing bundle. The respondent objected to the following pages from volume 2 of the claimants bundle being admitted into evidence pages 34, 35, 44, 50, 51, 63, 64, 112, 113, 114 and 115. The grounds for the respondent's objection were that these documents were irrelevant and/or were prejudicial to the respondent if they were admitted at such a late stage. We agreed with the respondent and we therefore did not admit the disputed documents into evidence. We considered that the disputed documents were either wholly irrelevant or of very marginal relevance and that it would be unfair and prejudicial to the respondent to admit them at such a late stage. Mr Heard gave cogent examples of issues raised by the documents which the respondent was not in a position to deal with because it had been taken by surprise. Again it was relevant that this problem had arisen solely because the claimant had unreasonably failed to comply with his disclosure obligations and the tribunal's case management orders and had unreasonably and for unexplained reasons only produced these

documents shortly before the hearing was due to start. We considered that the disputed documents were of minimal probative value, and to admit them at such a late stage would cause expense, inconvenience, delay and oppression to the respondent in the sense that they would be severely prejudiced. It would not be in accordance with the overriding objective.

31. The respondent did not oppose the remainder of the documents which the claimant sought to admit into evidence being added to the hearing bundle. We therefore admitted them into evidence and added them to the hearing bundle. This resulted in an extension to the hearing bundle of around 100 pages.

32. When we initially discussed the recordings situation with the parties on the first morning of the hearing we understood from the claimant that there were four covert recordings on which he wished to rely. There had been no attempt by the claimant to provide a transcript of these recordings or even to accurately identify what they were of. Similarly the claimant did not provide any cogent explanation as to why the recordings may be relevant. Again there was no cogent or reasonable explanation by the claimant as to why he had failed to disclose the recordings in accordance with his disclosure obligations and the orders of the tribunal. The claimant was also unable to cogently or reasonably explain why he had only disclosed the recordings immediately before the final hearing was due to start.

33. The tribunal decided that the appropriate first step was to direct the claimant to provide all four of the recordings to the respondent. We understood that the claimant had already sent the respondent some recordings by email but the respondent had had difficulty accessing them because of how they were sent. The respondent requested that the recordings were sent to their solicitors using a secure file sharing service used by the solicitors which should mean that the files could be easily opened. Following the initial housekeeping discussions on the first morning of the hearing the tribunal released the parties. Before doing so the tribunal directed that the claimant should provide the recordings to the respondent by 4 PM using the file sharing service. We decided not to sit on the second day but to use that as a reading day and this would also give the respondent the opportunity to listen to the recordings and decide what approach they wished to take.

34. The tribunal then discussed the recordings issue again with the parties on the morning of Wednesday 19 October. It transpired that the claimant had sent 17 covert audio recordings by email at around 4 AM on Tuesday 18 October. The claimant had not complied with the tribunal's direction to provide the recordings by 4 PM and to use the file sharing service. Further, there were now 17 recordings and this had not been explained by the claimant previously. Again we consider that the claimant was not able to give any cogent or reasonable explanation as to why he had not complied with the tribunal's directions and why he had not revealed the existence of the 17 recordings any earlier.

35. As a result of the way in which the files were sent the respondent had been unable to access all the recordings and in any event it had had insufficient time to review 17 recordings. The claimant had still not made any attempt to provide a transcript of the recordings or even clearly identify what they were of. The claimant had also not provided any cogent explanation as to why he considered the recordings may be relevant.

36. The respondent submitted that there would be overwhelming prejudice if the recordings were admitted at this late stage. We agreed. If the recordings were to be admitted it would delay and disrupt the final hearing, perhaps to the extent that the hearing would have to be postponed. It would also cause the respondent to incur considerable extra cost in reviewing and taking instructions on the recordings. Again the problem had only been caused by the claimant's unreasonable failure to comply with his disclosure obligations and the case management orders.

37. The tribunal heard representations from the claimant before we made any decision on whether to admit the recordings into evidence. The tribunal suggested firstly that the claimant may wish to address us on why he considered that the recordings may be relevant. The claimant said that some of the recordings were of his trade union representative. He suggested that they showed that the union was working in conjunction with the respondent. It was not clear how this would be relevant to the claimant's case as we did not have to determine any complaint which the claimant may have against his trade union.

38. The tribunal wished to ascertain if there was any recording which may be more directly relevant to the issues we had to determine. By this stage the tribunal had read into the case and we had noted that in the claimant's grievance he made reference to being able to obtain a transcript of a discussion which he had had with Mr Lee on 25 February 2020. The reference to the availability of a transcript suggested that this discussion may be one of the ones which the claimant covertly recorded. If such a recording existed it would be directly relevant as one of the issues in the case which we have to consider is what was said between the claimant and Mr Lee on 25 February 2020.

39. We therefore asked the claimant to clarify if the discussion he had with Mr Lee on 25 February was one of those which he had covertly recorded. The claimant said he did covertly record it. The tribunal then asked the claimant if the recording was one of the 17 which he had now sent to the respondent. The claimant said that it was not. We found this extremely surprising. The claimant said he had not tried to send the recording of the conversation on 25 February as the respondent was not calling Mr Lee as a witness. In the tribunal's view the absence of Mr Lee made the potential importance of the recording even more significant. The claimant then became equivocal over whether he still had

the recording. He said he was not sure whether he still had it and he would need to check. Again we found it extremely surprising that the claimant had apparently not checked if he had the one recording which was plainly and obviously directly relevant to his claim.

40. The tribunal was also concerned about the claimant's indication that he may not have provided all the covert recordings and that there may be more potentially relevant recordings on top of the 17 which he had already provided. The claimant confirmed that he had held some recordings back. The claimant said that he considered that they contained very sensitive information and he was not going to provide them as he already believe the tribunal was biased. He said he planned to release everything at a later stage and that he would not be submitting any more recordings during the hearing.

41. The tribunal next attempted to understand why the claimant had only provided the 17 recordings on Tuesday 18 October. The claimant's explanation was difficult to understand. He made reference to having moved to Scotland and attending University. It was not clear to the tribunal how either of those matters would have prevented the claimant from disclosing the recordings earlier. When the tribunal attempted to obtain more information from the claimant he became evasive. In particular when the tribunal asked the claimant where he was attending University (because we wanted to understand how his attendance at University may have affected his ability to disclose the recordings) he said he did not want to answer because he did not trust anybody. The claimant also made reference to the fact that he finds dealing with this case difficult and stressful. We took that into account but we do not think it amounts to a reasonable basis for the claimant's serious failures to comply with case management orders and disclosure obligations.

42. The tribunal also wished to understand why it had taken the claimant until 4 AM to send the recordings to the respondent. The claimant acknowledged that he was meant to send them by 4 PM but he said he had gone home and worked through the night to prepare the recordings. That begged the question of what work the claimant was doing on the recordings and it raised the concern that the claimant may have been editing the recordings before they were sent to the respondent. From the claimant's explanation it did appear that he had been editing the recordings before providing them to the respondent. Specifically, the claimant said he had taken out what he thought was not necessary. Further, the respondent said from the recordings they had been able to access it sounded like they had been edited. The tribunal sought to understand from the claimant what device he had used to covertly record as we wanted to understand if there was any possibility of recovering unedited versions of the recordings. The claimant declined to answer that question too.

43. The respondent submitted that in light of the claimant's failure to disclose all of the recordings and his apparent editing of the recordings before they were sent

to the respondent the claimant was in effect picking and choosing which evidence he chose to disclose and was still not acting in accordance with his disclosure obligations. They suggested that on top of the other issues surrounding the fairness of admitting the evidence at such a late stage the evidence was in any event compromised and therefore of limited value as the tribunal would not be getting the full picture. We agreed with those submissions.

44. The tribunal decided to refuse to admit into evidence any covert recording taken by the claimant. We took into account fairness, the relevant circumstances of the timing and manner of the disclosure, rule 41, prejudice and the overriding objective. The recordings had been disclosed extremely late. The claimant had presented no cogent or reasonable explanation as to why he had failed to comply with his disclosure obligations, failed to comply with the tribunal's orders and only provided the recordings immediately before and then during the hearing. The claimant had not provided a transcript of the recordings. The claimant had not provided any cogent explanation as to why he considered the recordings may be relevant. Because of the claimant's conduct we were not able to make full findings on the relevance of the recordings disclosed but the explanation he offered suggested that the recordings he had provided were only likely to be of marginal relevance. There would be an extreme prejudice caused to the respondent if the recordings were admitted at this late stage in light of the delay and expense that this would incur. The quality of the evidence was questionable in light of the fact that the claimant appeared to have picked and chosen which recordings he wished to disclose. The claimant had omitted to disclose at least one recording which was highly relevant. Furthermore the claimant had apparently edited the recordings which he had disclosed. In these circumstances we considered that the recordings which had been provided were of minimal probative value, and to admit them at such a late stage would cause expense, inconvenience, delay and oppression to the respondent in the sense that they would be severely prejudiced. In our view all of these relevant factors weighed heavily against admitting the recordings into evidence.

45. During the hearing the respondent sought to add a few further pages to the bundle which had not previously been disclosed. The claimant objected on the basis that the late submission of documents would prejudice him and inhibit his right to a fair hearing. Because of the strength of the claimant's objection and his emphasis on the fact that he was a litigant in person under extreme pressure the tribunal decided not to admit any documents produced late by the respondent into evidence.

46. The claimant also sought to admit a few extra documents during the course of the hearing. These included information from his GP which was directly relevant to one of the allegations which we have to determine about a prescription that the claimant obtained on 6 January 2020. This document was in fact only provided on the day of closing submissions. There was no cogent or reasonable explanation from the claimant as to why he had not obtained and provided this

document any earlier given that it was directly relevant to one of his allegations. Nevertheless the respondent did not object to the late admission of documents provided by the claimant including the evidence from the claimant's GP and we therefore decided to admit them into evidence.

47. We should record that in our view the failures by the claimant to comply with case management orders and disclosure obligations were extremely serious. We viewed the late production of a new bundle, the failure to provide a witness statement and the failure to disclose covert audio recordings as deliberate and contumelious failures by the claimant. As we have said we did not receive any cogent or reasonable explanation for the claimant for any of these matters. Therefore taken together they amounted in our view to a deliberate and calculated attempt by the claimant to ambush the respondent and/or disrupt the tribunal process. In our judgement the claimant's conduct reflected badly on him. It gave the impression that the claimant had failed to be straightforward with the respondent or the tribunal and this negatively affected our assessment of his credibility.

48. This was particularly the case in relation to the covert recordings. The claimant had failed to disclose the existence of the covert recordings for in excess of 2.5 years after he made them and kept them in his possession. He had failed to disclose the recording of the conversation on 25 February which was directly relevant to the issues which we had to determine. He had effectively ignored the case management order and his disclosure obligations to ambush the respondent. Furthermore, despite the fact that he was aware of our decision not to admit the recordings which he had disclosed and even after he had been asked not to the claimant on several occasions made reference to recordings he had made and his intention to reveal them for some future purpose when questioning witnesses. Even taking into account the claimant's status as a litigant in person this was not a reasonable or straightforward way to conduct litigation.

49. In our judgement we could have considered striking the claim out because of the claimant's conduct but we decided not to do that and instead to adopt what we think was the pragmatic approach which we have described above. In our view this ensured that there could be a fair hearing despite the problems caused by the claimant's conduct.

50. Arguably this approach was generous to the claimant. For example the Tribunal had been proactive and proposed solutions that were not suggested by the parties but which we think were advantageous to the claimant, such as allowing him to rely on additional documents as part of his witness statement. However we should record that from an early stage in the hearing the claimant repeatedly suggested that we were biased and that he could not get a fair hearing. The claimant did not put forward any cogent basis why he suggested that. He appeared to have made his mind up from before the hearing started that he

was not going to get a fair hearing and this was why he was still holding back some of his recordings to save for some future purpose. We attempted to reassure the claimant that we were approaching this case with an entirely open mind and that we were concerned to ensure that we heard the evidence and determined the case on its merits rather than striking it out, as we would have been entitled to consider.

51. Notwithstanding these reassurances the claimant's behaviour during the hearing itself was also challenging. Despite a number of interventions from the tribunal the claimant regularly interrupted and spoke over other people. He frequently made statements when he should have been asking questions. He swore repeatedly even after he had been asked not to. He made inappropriate and offensive comments such as comparing himself to a rape victim and referring to the sexual history of one of the respondent's witnesses and the partner of another witness. The claimant's attitude to the witnesses when he was cross-examining was such that both the tribunal and the respondent felt it necessary to warn the claimant that his attitude could be seen as intimidating and that if he continued consideration may need to be given to stopping the case and considering strike out.

52. The claimant's approach to giving evidence made it difficult to accept his evidence as reliable. He came across as evasive and argumentative. He rarely gave direct or cogent answers or explanations. Like his approach to the case preparation which we have described above we considered that the claimant's approach to giving evidence was not straightforward and it negatively affected our assessment of his credibility.

53. We acknowledge that the claimant was emotional and likely to have been feeling under pressure representing himself in a substantial case. Even making full allowance for those factors however the claimant's behaviour was in our judgement difficult and unreasonable. Our decision however remained not to consider strike out but to instead press ahead with determining this claim on its merits. In our view this was an example of the considerable leeway which the claimant was afforded during this hearing. The claimant however left us in no doubt that he saw things differently.

The issues

54. The liability issues the Tribunal will decide were determined at the case management hearing on 22 October 2021 before EJ Algazy KC. EJ Algazy KC set out the list of issues ("LOI") and at paragraph 9 of his Order he stated: *"The LOI stands as the issues for determination by the Tribunal at the Final Hearing and is annexed to this Order as Annex "A". If you think the list is wrong or incomplete, by reference to the pleadings, Scott Schedule and response only, you must write to the Tribunal and the other side by 4 November 2021. If you do not, the list will be treated as final unless the Tribunal decides otherwise.".* Neither side wrote to the Tribunal as directed by 4 November 2021. Neither side applied to us to vary the LOI. We therefore treated the LOI as final and the issues for us to determine were as follows.

Jurisdiction – time limits

55. The Claimant contacted Acas on 3 March 2020 and Acas issued the Claimant's early conciliation certificate on 30 March 2020. The Tribunal received the Claimant's ET1 claim form on 30 April 2020. Given those dates, any alleged act, failure or conduct that occurred on or before 3 December 2019 is potentially out of time.

56. Were all of the Claimant's allegations of discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EqA")?

57. Did any of the alleged discriminatory acts, failures or conduct complained continue over a period amounting to a series or acts or a course of conduct/failures or were the acts, failures or conduct a single isolated event?

58. Should any time limit be extended by the Tribunal on a "just and equitable" basis?

Direct race discrimination

59. The Claimant identifies as Black.

60. Did the Respondent subject the Claimant to the following less favourable treatment:

    a. The Claimant's unsuccessful application for Petrol and/or Diesel Team Leader or Launch Leader roles on or around 13 and 18 October 2017[1] ("Direct Race Discrimination Allegation 1").

    b. The Claimant not being interviewed for Launch Assistant (Electric Drive Unit & Battery pack) role on 12 December 2018 ("Direct Race Discrimination Allegation 2").

    c. The Claimant's unsuccessful application for Launch Planning Leader in 2018 ("Direct Race Discrimination Allegation 3").

    d. The promotion of another employee to Launch Product coach team leader (Electrification) in February 2019 ("Direct Race Discrimination Allegation 4").

    e. The Claimant's unsuccessful application for Launch leader electrification (Battery pack) in February 2019[2] ("Direct Race Discrimination Allegation 5").

    f. The Claimant being asked to "reapply" for a job he was already doing and change to a "lower tariff" when Nicholas Etheridge was promoted

[1] The claimant confirmed that these were the dates he was relying on following the case management hearing before EJ Algazy KC.

[2] This date appears to be a mistake. The respondent suggested it was a mistake during the hearing and the claimant did not disagree. Further, the agreed chronology refers to the claimant having applied for a Launch Leader position on 15 July 2019 and this is supported by a document in the bundle (p.1208). Therefore we have taken the date to be 15 July 2019 rather than February 2019. We note this is advantageous to the claimant because the race discrimination claim is out of time and this is the last act relied upon.

without having to reapply or change tariff on or around 12 November 2018 ("Direct Race Discrimination Allegation 6").

61. If so, did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances?

    The Claimant relies on the following comparators (which the Respondent contends are not appropriate comparators as their circumstances were not materially the same):

    a. Direct Race Discrimination Allegation 1: Mitch Colson, Nicholas Etheridge and Arminder Pahal.

    b. Direct Race Discrimination Allegation 2: Andrew Poole and Phillip Gudgeon.

    c. Direct Race Discrimination Allegation 3: Oliver Wragg.

    d. Direct Race Discrimination Allegation 4: Nicholas Etheridge and Arminder Pahal.

    e. Direct Race Discrimination Allegation 5: James Ball.

    f. Direct Race Discrimination Allegation 6: Nicholas Etheridge.

62. If so, was any such less favourable treatment because of the Claimant's race?

Victimisation

63. Did the Claimant do a "protected act" by:

    a. Emailing Paul Blackman on 30 September 2019.

64. Was the Claimant subjected to the following detriments:

    a. Being placed under investigation on 24 October 2019 for alleged gross misconduct ("Victimisation Allegation 1")

    b. Being left out of team meetings and updated on 28 February 2020 ("Victimisation Allegation 2").

    c. Lourdes Cano Ramirez and Qin Xian Lee having "premeditated conversations" about the Claimant on 20 August 2019 ("Victimisation Allegation 3").[3]

    d. Stress, decrease in morale and depression ("Victimisation Allegation 4").

[3] Victimisation allegations 2 and 3 appeared as alleged protected acts in the LOI appended to EJ Algazy KC's Order but all parties agreed at the hearing before us that this was a formatting mistake and they should appear as alleged detriments.

65. If so, did the Respondent subject the Claimant to any such detriment because of the protected act?

Harassment related to race

66. Did the Respondent engage in unwanted conduct related to the Claimant's race by way of the following alleged conduct:

    a. Qin Xian Lee stopping the Claimant to criticize him for doing his job and claiming that Asians face more discrimination than black people on 25 February 2020 ("Harassment Allegation 1").

    b. Did any such conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

    c. If so, was it reasonable for any such conduct to have that effect?

Constructive unfair dismissal

67. The Claimant resigned on 3 March 2020 and has the requisite service to bring an unfair dismissal claim.

68. Did the Respondent act in such a way as to commit a fundamental breach of the Claimant's employment contract? The Claimant relies upon a breach of the implied term of mutual trust and confidence in his employment contract by reference to the following allegations:

    a. Direct Race Discrimination Allegations 1 to 6 above ("Constructive Unfair Dismissal Allegation 1").

    b. That he was falsely accused of gross misconduct on 8 October 2019 following his email to Paul Blackman, as in Victimisation Allegation 1 ("Constructive Unfair Dismissal Allegation 2").

    c. That there was a premeditated investigation leading to his dismissal on 4 December 2019 and his acceptance to be reinstated on 4 February 2020 was given under duress and false pretence ("Constructive Unfair Dismissal Allegation 3").

    d. That he was prescribed Mirtazapine to help with his stress and anxiety on 6 January 2020 ("Constructive Unfair Dismissal Allegation 4").

    e. That he was investigated for an incident involving the police that happened outside of work when he failed to report for work on 10 February 2020 ("Constructive Unfair Dismissal Allegation 5").

    f. Harassment Allegation 1 ("Constructive Unfair Dismissal Allegation 6").

69. Did the Claimant resign in response to any of the foregoing breach or breaches?

70. What is the final act or omission on the part of the Respondent that the Claimant relies upon as constituting or contributing to the fundamental breach of contract? When did that last act or omission occur?

71. Did the Claimant delay before submitting his resignation on 3 March 2020, such that the Tribunal can conclude that he waived any such breach or breaches? The Respondent contends that the Claimant waived any such breach from 27 January 2020 onwards after his appeal meeting.

72. If the Respondent constructively dismissed the Claimant, was the dismissal fair in all of the circumstances?

Summary of relevant law

Constructive dismissal

73. The fundamental questions which we must ask ourselves have been settled since the case of Western Excavating Ltd v Sharp [1978] 1 All ER 713. They are as follows:

(i) Did the Respondent breach a fundamental term of the contract?
(ii) Did the Claimant resign in response to the breach?
(iii) Did the Claimant delay too long before resigning, thereby affirming the contract?

74. In this case the Claimant relies on an allegation that the Respondent breached the implied term of trust and confidence. The trust and confidence term was set out in Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462 as follows: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

75. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see Baldwin v Brighton & Hove City Council [2007] IRLR 232.

76. The Claimant argues that there was a series of acts making up the breach of the implied term. The question for the tribunal will therefore be *"does the cumulative series of acts taken together amount to a breach of the implied term?"* (Lewis v Motorworld Garages Ltd [1985] IRLR 465, per Glidewell LJ).

77. In cases where a series of acts is relied upon the tribunal must consider the "last straw" which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see London Borough of Waltham Forest v Omilaju [2005] ICR 481).

78. Tying together the case law identified above the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 clarified the approach to be taken by the tribunal as follows:

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation….)

(5) Did the employee resign in response (or partly in response) to that breach?"

Time limits

79. The constructive dismissal claim is in time. Some of the EqA claims may be out of time. Section 123 EqA states:

> *123 Time limits*
> *(1) Subject to sections 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.*
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

80. If any allegation made under the EqA is out of time and not part of conduct extending over a period bringing it in time then we only have jurisdiction to hear it if it was brought within such other period as we think just and equitable. We should remind ourselves that the just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. We should take into account any relevant factor. We should consider the balance

of prejudice. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit. The tribunal has a wide discretion but there is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather than the rule - see Robertson v Bexley Community Centre 2003 IRLR 434. There is no requirement that a tribunal must be satisfied that there is good reason for a delay in bringing proceedings - see Abertawe Bro Morgannwa University Local Health Board v Morgan [2018] IRLR 1050 CA.

81. Relevant factors which may be taken into account are set out in British Coal Corporation v Keeble [1997] IRLR 336 derived from section 33(3) of the Limitation Act 1980, which deals with discretionary exclusion of the time limit for actions in respect of personal injuries or death. Those factors are: the length and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by it; the extent to which the respondent had cooperated with requests for information; the promptness with which a claimant acted once aware of facts giving rise to the cause of action; and steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

82. Having referred to Keeble however the important point to bear in mind is that the Tribunal has a very broad general discretion and therefore we should assess all the factors which are relevant to whether it is just and equitable to extend time without necessarily rigidly adhering to a checklist. The factors which are almost always likely to be relevant are the length of and reasons for the delay and whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh). This was emphasised by Lord Justice Underhill in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

83. We also considered the case of Miller v Ministry of Justice UKEAT/0003/15 (15 March 2016, unreported), in which Laing J observed that there are two types of prejudice which a respondent may suffer if the limitation period is extended: firstly, the obvious prejudice of having to defend the claim which would otherwise have been defeated by a limitation period; and secondly the “forensic prejudice” caused by fading memories, loss of documents, and losing touch with witnesses. Forensic prejudice is “crucially relevant” in the exercise of discretion and may well be decisive. However, the converse does not follow: if there is no forensic prejudice to the respondent that is not decisive in favour of an extension.

84. The EAT has recently explained the extent to which the potential merits of a proposed complaint can be taken into account when considering whether it is just and equitable to extend time, in Kumari v Greater Manchester Mental Health NHS Foundation Trust 2022 EAT 132. The EAT held that the potential merits are not necessarily an irrelevant consideration even if the proposed

complaint is not plainly so weak that it would fall to be struck out. However, the EAT advocated a careful approach. It said:

> *"It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it [the tribunal] does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.*
>
> *So, the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse."*

The burden of proof

85. Section 136 EqA sets out the burden of proof provisions which apply to any of the claims under the EqA which we have jurisdiction to hear. Section 136(2) states: "*if there are facts from which the court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred".* Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision".*

86. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

87. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352

88. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

89. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden". The claimant must prove facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).

90. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).

91. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

92. We should make clear however that the statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Direct discrimination

93. Section 13 EqA provides that: *"a person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".* Section 23 EqA provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

94. In Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case

is, *'why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?'.*

95. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 Lord Nicholls said *'… employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant …'.

96. As was confirmed in Martin v Devonshire's Solicitors [2011] ICR 352 since Shamoon, the recommended approach from the higher courts has generally been to address both stages of the statutory test by considering the single 'reason why' question: was the treatment on the proscribed ground, or was it for some other reason? Considering the hypothetical or actual treatment of comparators may be of evidential value in that exercise.

Harassment

97. Section 26 EqA states as follows:

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

98. In GMB v Henderson [2017] IRLR 340, the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

99. The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the tribunal is obliged to take the complainant's perception into account in making that assessment.

100. A number of important authorities have given guidance as to how to interpret the test under Section 26:

a. *"… not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."* Richmond Pharmacology v Dhaliwal [2009] IRLR 336.

b. *"The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."* Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13.

c. *"When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable ... Tribunals must not cheapen the significance of these words ["violating dignity", "intimidating, hostile, degrading, humiliating, offensive"]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."* Grant v HM Land Registry [2011] IRLR 748 *CA*

Victimisation

101. Section 27 EqA states as follows:

(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—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

102. The words in subsection 2 (c) should be given a wide meeting. In Aziz v Trinity Street Taxis [1988] IRLR 204 the Court of Appeal stated that an act could properly be said to be done 'by reference to' the predecessor legislation to the EqA if it were done by reference to the legislation *'in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act'.*

103. Where section 27(1)(d) is relied upon if what is alleged would not be unlawful under the relevant legislation there is no protected act.

104. In Beneviste v Kingston University UKEAT0393/05 the EAT was of the view that the appellant had not done a protected act. She had referred to grievance and criticisms of management and complaints of harassment and victimisation in the broad sense but nowhere did she identify a protected act within the meaning of the legislation. The EAT held that the legislation requires an allegation of an act which would amount to a contravention of the legislation. The allegation does not have to allege a contravention or identify the legislative provision contravened, but what is alleged must amount to a contravention. It is not the purpose of the legislation to afford protection to employees for every allegation they make, but only for allegations which amount to contraventions of discrimination legislation.

105. This was confirmed in Durrani v L.B. Ealing UKEAT/0560/2012: *"there must be something to show it is a complaint to which at least potentially the Act applies".* In Waters v Metropolitan Police Commissioner (1997) ICR 1073 it was held that the allegation relied on need not state explicitly that an act of discrimination had occurred: *"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 …".* A claim for victimisation is not dependent upon the claim which gives rise to the protected act being successful (Garrett v Lidl Ltd UKEAT/0541/08).

106. In MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13 the Court of Appeal found that a detriment exists *"if a reasonable worker would take the view that the treatment was to his detriment".* A detriment must be capable of being objectively regarded as such- Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11: an unjustified sense of grievance cannot amount to 'detriment'. It is not necessary to demonstrate some physical or economic consequence for something to amount to a detriment as Lord Nicholls said in

Shamoon: *"while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so".* In Deer v University of Oxford[2015] EWCA Civ 52 it was held that the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

107. In terms of causation the protected act must be more than simply causative of the treatment (in the "but for" sense). It must be a real reason: *"the real reason, the core reason, for the treatment must be identified"* (Woods v Pasab Ltd (t/a Jones Pharmacy) [2012] EWCA Civ 1578). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of sufficient weight (O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615).

Reinstatement on appeal

108. As we shall explain the claimant was dismissed but he appealed and was reinstated. This scenario gives rises to a "vanishing dismissal". The vanishing dismissal has recently been described by the EAT as follows: *"If a person appeals against dismissal, succeeds in the appeal and is reinstated, the original dismissal "disappears", with the consequence that it cannot then found a claim of unfair dismissal. The legal underpinning of this concept has not always been clear."* (Marangakis v Iceland Foods Ltd [2022] EAT 161).

109. The concept was explained by the Court of Appeal in Folkestone Nursing Home Ltd v Patel [2019] I.C.R. 273, in particular at paragraphs 26 to 29 of the judgment. In summary: *".. if an appeal is lodged, pursued to its conclusion and is successful, the effect is that both employer and employee are bound to treat the employment relationship as having remained in existence throughout."*

Findings of fact

110. We make only such findings as we consider are necessary to determine the issues. We do so on the balance of probabilities.

111. The claimant was initially employed by the respondent on a fixed term contract for three months at the end of 2012. The claimant became a permanent employee of the respondent on 28 January 2015. The claimant was employed as a Product Coach and this remained his job until he left the respondent in March 2020.

112. The claimant wished to progress within the respondent and he applied for promotions. In October 2017 the claimant applied for Launch Leader positions. In October 2018 he applied for an Analyst role and in July 2019 he again applied for a Launch Leader position. The claimant was not successful in any of these applications. He remained employed at the level at which he had been recruited. This was an obvious source of frustration for the claimant.

113. The evidence we heard from the claimant's former colleagues painted a clear picture of the claimant, which we find was accurate. The picture was that the claimant was capable and could produce good work but his attitude could be difficult and that made him challenging to manage. The claimant had a problematic relationship with the following managers in particular: Qin Xian Lee, Lourdes Ramirez and James Berry. The claimant made clear to the tribunal the negative view which he held about each of those individuals. During his employment the claimant's behaviour towards these managers showed a lack of respect of them. He did not recognise their authority as he thought he was capable of operating at a higher level. This created the unfortunate consequence that the claimant was not seen as suitable for progression because of his difficult attitude. In this way it seems to the tribunal that the claimant was stuck in something of a rut. The claimant was frustrated by the situation but he could not see that the way out of it was to improve his attitude and in particular his challenging behaviour towards management.

114. The claimant spoke at length about his frustration about not progressing to Lourdes Ramirez and James Berry. We are satisfied that those managers attempted to provide the claimant with constructive advice however the claimant apparently came to believe his lack of progression was down to a conspiracy or bullying against him, that he may have been blacklisted and that it may have had something to do with his race. The claimant's concerns in this regard were entirely unsubstantiated and there was no evidence in support of them. The claimant did not raise a grievance about these concerns and in particular he did not raise a grievance alleging race discrimination.

115. On 20 September 2019 the claimant emailed Paul Blackman regarding "support and guidance". Mr Blackman was the Senior Manufacturing Programme Engineer and the claimant was in effect escalating his concerns by approaching Mr Blackman. The concerns which the claimant wanted to escalate to Mr Blackman were around his lack of progression. There was nothing in the claimant's email to Mr Blackman to suggest that he was making any sort of complaint about discrimination. We understand Mr Blackman met with the claimant around 3 October 2019. The claimant told Mr Blackman that he felt as though he was being overlooked and he referred to this as bullying. The claimant was evidently very frustrated. The claimant did not directly say anything about race discrimination when they met.

116. The claimant's role generally involved supporting the launch of new vehicles by creating and updating the work element sheets and the quality process sheets. The work element sheet gave a detailed description of work content and the quality process sheet gave a brief overview of jobs that are completed on a particular station. The claimant's duties also included evaluating new processes and identifying potential improvements/concerns.

117. In addition to their normal duties Product Coaches and other staff including managers may be asked to support work on the production line if there was a requirement for them to do so. Such a requirement arose on 8 October 2019 because of an understaffing issue on the line. The claimant was asked by his launch leader, James Berry, to support the line. The claimant was reluctant to do so.

118. The claimant was unhappy about being asked to work on the line. It seems that working on the line was generally seen as undesirable and the claimant believed that others should have been asked ahead of him. It appears extremely likely to the tribunal that the claimant's unhappiness about being asked to assist on the production line coupled with his ongoing sense of frustration about his lack of progression which had come to a head only a few days previously in the meeting with Mr Blackman led to the claimant being in a very negative place when he came to work on the production line on 8 October. This is also demonstrated by his behaviour on the day, which we shall now explain.

119. The claimant contacted the Product Coach Team Leader Nick Etheridge during the morning after he had been moved to the production line. The claimant contacted Mr Etheridge on a number of occasions by text and by phone complaining about the station he was working on, that he had not received adequate training and that his neck and back were hurting due to the process. It seems obvious to the tribunal that these matters contributed to the negative attitude of the claimant on 8 October.

120. The area of the line which the claimant was assigned to was supervised by Harry Baker who was the Team Leader for that area. The claimant and Mr Baker did not know each other until that day. Mr Baker assigned the claimant to a "freshman station" which is what the respondent does with people covering absences as the tasks are straightforward. The claimant was responsible for fitting bolts into an engine and scanning a QR code. The claimant requested from Mr Baker the relevant work element sheet and quality process sheet and the risk assessment for the station which he had been assigned to work on. The claimant then began working on the station and did not report any issues to Mr Baker.

121. After about four hours Mr Baker took the training log over to the claimant for him to sign. The claimant declined to sign the training log. He challenged Mr Baker over the content of the sheets and said they contained inaccurate information. The claimant also pointed out that the ergonomic risk assessment was out of date. Mr Baker acknowledged that some of the matters raised by the claimant were valid. In particular the cycle times were wrong on the worksheet and he knew the ergonomic assessment was out of date as it was something he was planning to address. Mr Baker had the impression that the claimant was looking for ways to avoid working on the line and he asked the claimant to keep

working notwithstanding the concerns that he had raised as he was holding up the production line.

122. At this point the claimant became aggressive. He confronted Mr Baker and said “Who are you talking to? Do you know who I am?”. He moved closer to Mr Baker and it seemed that he was squaring up to him. In response, Mr Baker told the claimant “You’re not going to touch me”. The claimant then said that he would see Mr Baker outside. Mr Baker told the claimant that he didn’t want him working in his area any longer. Initially the claimant did not move away but Mr Etheridge came to take him away. Mr Baker raised the incident with James Berry. It was reported to HR and investigated.

123. Mr Baker provided a statement on 10 October in which he outlined his version of events. Statements were also obtained from a number of eye witnesses. These included Lynn McDermott and Justin Harvey who had witnessed the entire incident and they supported Mr Baker’s version of events. In particular they supported the contention that the claimant had been the aggressor and had offered to see Mr Baker outside. Mr Etheridge also provided a statement on 21 October and as the claimant has pointed out his statement is arguably more in the claimant’s favour in particular because it does not suggest that the claimant offered Mr Baker to take it outside (albeit Mr Etheridge did not appear to have witnessed the entire altercation). Even taking this into account and viewing Mr Etheridge’s statement at favourably as possible to the claimant the weight of the evidence plainly indicated that the claimant had lost his temper and behaved aggressively to a supervisor including by squaring up to him and offering to see him outside. As the claimant accepted in his evidence Mr Baker, Ms McDermott and Mr Harvey had no reason to lie about him. The tribunal heard evidence from Mr Baker and we found him to be a straightforward and honest witness. In contrast we do not find the claimant straightforward or credible. One particular reason for that which is relevant to this incident is that, as we shall explain, the claimant later apologised for his actions on 8 October but he now claims he was not the aggressor and his apology was a lie. For these reasons we made the findings of fact about the events of 8 October which we set out above.

124. Mr Berry provided a statement on 23 October. He had not witnessed the incident itself but he gave evidence as to the build-up. In particular Mr Berry explained that Mr Ethridge had come to him earlier in the day and mentioned that the claimant was unhappy working on the line. This reinforces the tribunal’s impression as to the claimant’s general sense of displeasure on 8 October. Overall we consider there were clear reasons why the claimant became so frustrated that he lost his temper in the way set out above. Further, we observe that the claimant’s disrespectful and challenging attitude towards Mr Baker was consistent with the way the claimant had been acting to his own managers. These factors support our findings of fact as to the events of 8 October.

125. The claimant attended an investigation meeting with Mr Lee on 24 October 2019. Mr Lee determined that there was a disciplinary case to answer. A disciplinary hearing took place on 28 November 2019. The hearing was conducted by Lourdes Ramirez, Launch Manager. She was supported by Adam Routledge from HR. The claimant attended and was supported by Tony Austin from the trade union. The meeting was adjourned and reconvened on 2 December 2019 before being adjourned again and reconvened on 4 December 2019. On 4 December 2019 Miss Ramirez informed the claimant of her decision which was that he should be summarily dismissed for gross misconduct. Miss Ramirez explained the reasons for her decision in a detailed outcome letter sent to the claimant on 10 December 2019. In short Miss Ramirez upheld two allegations. These were firstly failure to comply with a reasonable instruction to continue to work on the track on 8 October 2019 and secondly that the claimant had acted aggressively on 8 October 2019 and this was a breach of the respondent's values and the code of conduct.

126. The claimant appealed the decision to dismiss him. The claimant's appeal was heard by Mark Hudson, Machining Engineering Manager. Mr Hudson was again supported by Mr Routledge from HR. The claimant was fully engaged in the appeal process and was supported throughout by Neville Bailey from the trade union. The first appeal meeting took place on 18 December 2019 where the claimant set out his grounds of appeal. The meeting was adjourned until 10 January 2020 when Mr Hudson confirmed to the claimant his investigation plan following consideration of the claimant's grounds of appeal and his review of the disciplinary documentation. Mr Hudson conducted an extensive appeal investigation. He conducted around 15 further interviews of witnesses. Mr Hudson concluded that there was inconclusive evidence to suggest that the claimant had failed to follow a reasonable instruction. He therefore did not uphold that allegation. Mr Hudson did find that the claimant had used aggressive and threatening behaviour towards Mr Baker. He therefore upheld that allegation.

127. The claimant's appeal was successful. Mr Hudson was of the view that the sanction of dismissal was too harsh taking into account the claimant's previous employment record and in light of his overturning one of the allegations. Mr Hudson therefore recommended that the claimant be reinstated providing the claimant met certain conditions. The conditions which Mr Hudson required the claimant to meet were that he recognised the seriousness of his poor behaviour, accept responsibility for his actions, realise his behaviour was unacceptable and apologise to all those involved namely Harry Baker, Nick Ethridge, James Berry and Mr Lee. Mr Hudson made it clear that the apologies would need to take place as part of a formal meeting and to be minuted. Mr Hudson also marked the seriousness of the claimant's misconduct by placing him on a final written warning. It is important to recognise that Mr Hudson's findings in no sense exculpated the claimant on the key allegation concerning his aggressive behaviour towards Mr Baker. On the contrary Mr Hudson said

about that in his written appeal hearing feedback that it was *"an extremely serious case of gross misconduct that will not be tolerated and the evidence demonstrates that on this issue Patrick is guilty."*

128. This outcome and the conditions were all made clear to the claimant in the final appeal meeting on 27 January. Mr Routledge explained to the claimant that he had two options which was to take the offer of reinstatement or to resign. The claimant was asked to consider what he wanted to do. Following the meeting Mr Routledge sent the claimant a summary of Mr Hudson's findings and the recommendation that he was making. The conditions were also set out. This was sent to the claimant at 4:30 PM on 27 January. The claimant was asked to confirm by close of business the following day whether he wished to accept the offer of reinstatement with the conditions outlined in Mr Hudson's recommendations.

129. At 11:48 AM on 28 January the claimant emailed the regional officer for the union. In that email the claimant voiced some concerns about the appeal process and adhering to the conditions which the respondent wished to put in place. It is clear from this email that the claimant had doubts about the reinstatement. It is also clear from this email that the claimant had taken advice on pursuing a claim relating to his dismissal in the employment tribunal. Moreover the claimant was aware of the three month time limit which he had to bring a claim. In his email the claimant said he had just over one month left to be able to pursue his case in the employment tribunal. This demonstrates that the claimant had already made up his mind that he was going to bring a claim and the claimant's oral evidence supported that. The fact that the claimant had made his mind up to bring a tribunal claim about his dismissal is further supported by the record of his consultation with his GP on 6 January 2020. This was the document that the claimant only disclosed on the day of closing submissions. The GP records that the claimant told him on 6 January that he believed he had been treated unfairly and discriminated against and that he was fighting the unfair dismissal and going for a tribunal.

130. On 28 January 2020 at 2:13 PM the claimant emailed Mr Routledge and Mr Hudson, copying in his union representative and the respondent's HR team. The claimant said that after careful consideration he would like to confirm that he accepted the offer to be reinstated under the terms which had been outlined in Mark Hudson's recommendation. The claimant also used the opportunity to thank Mr Routledge and Mr Hudson for their time and support. He said he just wanted to move on and he hoped the company would continue to support him. The claimant ended his email on a reflective note. He said he had taken a lot of learning from his experience and he could not change the past but he would look to change the future by working together. He said he was looking forward to returning and finally leaving this all behind him. The claimant did not ask for any more time to think about his decision and he did not mention in his email to the respondent any of the misgivings which he had expressed to the union.

Instead, his email to the respondent was entirely unequivocal that he wished to be reinstated, that he was grateful, that he accepted the conditions proposed by Mr Hudson and that he wished to draw a line and move on.

131. On 31 January and 7 February the claimant met with Mr Lee, Mr Baker, Mr Berry and Mr Etheridge. He apologised to each of those individuals. The claimant said to each of them that he believed his behaviour fell outside what was expected of him on 8 October in terms of company policy. As had been agreed these were formal meetings which were minuted and attended by Mr Hudson along with a representative from the trade union and Mr Routledge from HR.

132. The claimant has presented his case to the tribunal to the effect that he did nothing wrong on 8 October. He has suggested that it was Harry Baker and not him who was the aggressor and that he was an innocent victim. He believes that he was set up and that others conspired to have him dismissed as part of a premeditated plan. For these reasons the claimant says that the disciplinary investigation and his original dismissal were unfounded. These assertions beg the obvious question: why would the claimant apologise if he thought he had done nothing wrong? In his oral evidence in response to that question the claimant said he did not really mean it when he apologised. He said he was just "playing the game". He accepted this meant that he had lied. The claimant candidly explained that he had realised it would be better for him financially if he were reinstated.

133. The tribunal considers this is a matter which reflects extremely badly on the claimant's credibility. The claimant was entirely disingenuous with the respondent at the time of his reinstatement. The claimant did not mean it when he apologised. The claimant also did not mean it when he indicated that he wanted to put things behind him and move on. The thankful and reflective tone which the claimant adopted in his email to the respondent was false and done in bad faith. Instead the claimant had already decided that he was going to bring an employment tribunal claim and events following the claimant's return to work need to be considered in light of that fact.

134. Following his reinstatement the claimant returned to work. The claimant did that knowing that he wanted to bring an employment tribunal claim about his dismissal. The claimant believed that the deadline for him to start proceedings was 3 March 2020. The tribunal notes that we are aware that the claimant was covertly recording conversations upon his return to work as he has acknowledged that he recorded the conversation he had with Mr Lee on 25 February 2020. The tribunal considers that the claimant was looking for evidence which he thought may bolster the tribunal claim which he knew he was going to bring.

135. On 9 February 2020 the claimant was arrested on suspicion of having committed a serious assault. The claimant was arrested for an offence contrary to section 18 of the Offences Against the Person Act which is causing grievous bodily harm with intent. This is a serious offence which carries a maximum sentence of life imprisonment if convicted. The incident which gave rise to the claimant's arrest was unconnected with his employment. The tribunal has very limited evidence about the circumstances of the claimant's arrest and the incident which led to it. The claimant says that he was acting in self-defence and in the end the police took no further action against him. In any event on 9 February and following his arrest the claimant was detained by the police we understand overnight and released on bail the following day. As a result of the claimant's arrest and detention he was unable to attend work for his scheduled shift on 10 February and his sister phoned the respondent to explain the situation.

136. When the claimant returned to work Ms Ramirez completed a return to work interview. She was unsure how the absence should be recorded and so she contacted HR for advice. As a result of this Mr Routledge was informed of the claimant's arrest and detention. Mr Routledge determined that the matter required further investigation. He asked the claimant to complete a police consent form which would give the police the authority to release any information relating to his arrest to the respondent's investigation team. Mr Routledge explained and we accept that this is part of the respondent's usual process and the purpose was simply to establish the facts of the claimant's arrest. The claimant however claimed that the consent form he was asked to complete was not an official document from the respondent (which we find is not true) and he refused to sign it.

137. The claimant did attend an investigation interview concerning his arrest on 26 February 2020. The meeting was held with Ms Ramirez as investigation manager and Mr Routledge as HR support and the claimant was again represented by Neville Bailey from the trade union. At the start of the meeting the claimant asked what would happen if he refused to give any details but he then said he would cooperate and provide details. The claimant in fact provided very limited information about his arrest.

138. The claimant has made one allegation of harassment related to race which was said to have taken place on 25 February 2020. The claimant alleged that Mr Lee criticised him for doing his job and claimed that Asians face more discrimination than black people.

139. There was a paucity of relevant evidence presented to the tribunal about this allegation. Even in the documents which the tribunal deemed to form part of the claimant's witness statement he gave very little context or explanation as to this allegation. The respondent did not call Mr Lee and it was explained that this was because he has gone to China and is uncontactable. As we have said

Mr Lee was not interviewed in relation to the claimant's resignation/grievance where he raised this allegation. The tribunal has concluded that we do not accept the claimant's account of this incident for the following reasons:

a. Following the incident the claimant and Mr Lee met and shook hands. The claimant described fist bumping in his resignation/grievance as opposed to shaking hands but we do not think that makes any difference. Mr Berry gave evidence that was not challenged by the claimant that the claimant and Mr Lee met to make amends and that they shook hands (or perhaps fist bumped) to signify that resolution. In our judgement that resolution points away from what the claimant suggested as having occurred and instead strongly suggests that what occurred was a misunderstanding, as we explain below.

b. As we have explained the claimant had by around December 2020 already decided to bring a claim to the tribunal by 3 March. We know that upon his return to work the claimant was covertly recording conversations and we believe he was looking for evidence which might support his tribunal claim. We therefore treated the claimant's evidence about the events he relied upon after he was reinstated with particular scepticism. The claimant gave an account of the conversation on 25 February in his resignation letter but we treated that with caution in circumstances where it strongly appears that the claimant prepared a detailed resignation letter in order to bolster the tribunal claim that he knew he was about to bring.

c. The claimant has told us that he made an audio recording of the conversation on 25 February but he has never attempted to disclose this to the respondent or the tribunal including as part of the 17 recordings which were disclosed at 4 AM on the second day of this final hearing. It is obvious that the recording of 25 February would be directly relevant. We consider that if the recording supported the claimant's version of events he would simply have disclosed it.

d. The claimant made clear in his scott schedule (which we have taken with the claimant's agreement to form part of his witness statement) that Nicholas Etheridge was a witness to this allegation and in particular that he was in the vicinity to hear what Mr Lee had said and that the claimant brought him in as a witness to his conversation with Mr Lee so he could understand what was going on. Despite the fact that Mr Etheridge was a witness who had clearly been on friendly terms with the claimant and his evidence was generally helpful to the claimant he did not support this version of events. He said he did not hear what Mr Lee had said and the claimant did not report any allegation of discrimination to him. He was clear that if the claimant had made any allegation of discrimination or if

he had witnessed any such comment then he would have remembered it and he would have reported it at the time.

e. The claimant did not make any other allegation of discrimination against Mr Lee.

f. The claimant did not raise any complaint or grievance about the events of 25 February until he resigned.

140. For these reasons coupled with our other observations as to the claimant's lack of credibility and reliability as a witness we did not accept the claimant's version of events of 25 February. The tribunal instead considered that the best evidence which we had available to us as to what had taken place that day came from Mr Berry. Mr Berry was not present during the initial conversation between the claimant and Mr Lee but he spoke to Mr Lee about it immediately afterwards. Mr Berry explained that Mr Lee had said that he had been having another conversation with the claimant about his lack of progression and Mr Lee was aware of the claimant's belief that this had something to do with his race. Mr Lee said to the claimant that he had experienced discrimination as an Asian person and he did not think that was what was happening to the claimant. Mr Lee said that the claimant had misunderstood him and thought he was suggesting that Asian people face more discrimination than black people but that was not what he had said and the claimant had misunderstood. Mr Lee had in fact been attempting to reassure the claimant that there was no discriminatory agenda against him. Mr Berry went on to explain that the claimant and Mr Lee had a meeting afterwards in which the claimant had acknowledged the misunderstanding and this was why both parties had agreed to shake hands/fist bump and put it behind them. The tribunal considers that Mr Berry was an honest and straightforward witness. He gave his evidence in a careful and measured way and ensured he did not mislead the tribunal in any way including by accepting when he did not know an answer and by making concessions. We therefore find that his account as we have summarised it above represents what took place.

141. On 3 March 2020 the claimant contacted HR and resigned with immediate effect. The claimant submitted a lengthy and detailed resignation letter/grievance. Mr Routledge offered to have a meeting with the claimant to check that he was not resigning in haste and he also offered the claimant the opportunity to have an independent manager conduct the meeting. However the claimant declined that opportunity and he returned all of his belongings to reception and left the premises. On the same day the claimant commenced early conciliation with ACAS. This was three months after Ms Ramirez dismissed the claimant. This was of course no coincidence. As we have explained the claimant had taken advice and understood he had three months from the date of his dismissal to start proceedings. He resigned and contacted ACAS on what he thought was the last day he had on which to bring a claim in time. We find that the claimant resigned because he had already made his mind up prior to his reinstatement to pursue an unfair dismissal claim.

142. Following the claimant's resignation Craig Osman (Senior Manufacturing Manager) was appointed to consider his grievance. On 7 April 2020 Mr Osman sent the claimant a detailed grievance outcome letter. Mr Osman concluded that the claimant's complaints were either not upheld or had been answered during the disciplinary process. We should note that Mr Osman conducted the grievance during the challenging early stages of the lockdown caused by the Covid 19 pandemic and as a result of that he was not able to interview at least one key witness. That was Mr Lee who was instead asked to provide a statement. This was not ideal (especially because Mr Lee was not able to be asked about the claimant's allegation concerning 25 February) but we acknowledge the difficulties which existed at that time and in any event the claimant's employment had already terminated by that stage.

Conclusions

Direct race discrimination

143. The tribunal has concluded that the complaint of direct race discrimination was presented out of time and we do not have jurisdiction to hear it.

144. The allegations of direct race discrimination range between October 2017 and July 2019. Even if we were to accept that the acts were conduct extending over a period the last act was in July 2019 and the claim form was not presented until 30 April 2020. The claim is therefore at least six months out of time. We therefore only have jurisdiction to uphold this claim if we consider that time should be extended on a just and equitable basis. We have reminded ourselves that this gives us a broad discretion to extend time and we should take into account any relevant factor. We have to consider whether the claim was brought within such other period as we think just and equitable. The tribunal's considers that the relevant factors are these:

a. The claimant did not present any cogent evidence or argument as to why time should be extended on a just and equitable basis. When we asked him as part of closing submissions what he might rely on the claimant did not have an answer other than to assert it would be unjust not to accept his claim and there would be disadvantage to him but not to the respondent.

b. The claimant is intelligent and articulate. The claimant was advised and assisted by his trade union throughout and he therefore had access to professional advice. The claimant knew of the potential to bring an employment tribunal claim and of the three month time limit. This was evidenced by the documents in the bundle, for example the claimant's email to the union of 28 January.

c. The reason for the delay has not been explained by the claimant. The claimant did not present any evidence explaining why he had not brought his claim in time. We took into account that the claimant visited his GP on 6 January and was prescribed an anti-depressant. However there was no evidence to suggest that the claimant's illness in any way prevented him from bringing claim in time. We note that the claimant engaged thoroughly in the dismissal process and his appeal against dismissal and he then returned to work and, as far as we know, was able to work without taking any time off for illness.

d. We find that there was no good reason for the claim not to have been brought in time or earlier. It appears from the claimant's evidence to the tribunal and the fact he never raised a grievance alleging discrimination in relation to his lack of promotion that this was a claim the claimant never really believed in and that was why he did not bring it sooner.

e. The delay is substantial. As a result of the delay the allegation was somewhat stale even by the time the claim was submitted

f. There is a public interest in the enforcement of time limits in employment tribunals (this was described as "unexceptionable" in Adedeji).

g. We accept there is a general prejudice against the respondent if we accept a claim against it out of time (i.e. the first type of prejudice identified in Miller).

h. For the reasons we explain below the direct race discrimination claim was an extremely weak element of the claimant's case, and his oral evidence showed that even he did not believe in it.

i. We do not think there is a prejudice against the claimant in enforcing the time limits in these particular circumstances. The claimant's focus was on making a claim about his dismissal (this is why he started proceedings three months after he was dismissed). It is clear that the dismissal is the thing the claimant is really aggrieved about and the direct race discrimination complaint had the feel of something which was tagged on to the claim. This is supported by the fact that the claimant did not make any contemporaneous grievance alleging race discrimination about his failure to progress and his admission in cross examination that he did not actually believe that he had been subjected to direct race discrimination in relation to his promotion applications. The claimant was aware he could make a claim and he made an informed and we think tactical decision to focus on claiming in relation to his dismissal.

145. The tribunal has concluded that all of these relevant factors weigh against the granting of an extension. We find that there is no basis to grant an extension on just and equitable grounds. The claim was not brought within such

other period as we think just and equitable. Therefore we do not have jurisdiction to consider the claimant's claim.

146. We should state however that if we had found we had jurisdiction to hear the direct race discrimination claim then there is no chance it could have succeeded. The main reason for that is that in cross examination the claimant made it clear that he was not alleging that the job applications that he made were unsuccessful because of his race. The claimant said that it was not his case that he had been discriminated against because of his race in respect of those six job applications which made up the six allegations of direct race discrimination. The claimant had nevertheless completed the scott schedule and agreed to the LOI which contained those six allegations. In the tribunal's view this is a further matter which severely undermines the claimant's credibility. It shows that the claimant was prepared to bring a claim to the tribunal that he did not believe in.

147. The claimant did not withdraw his direct race discrimination claim and in his closing submissions he performed something of a U-turn and suggested that he would still wish to pursue this claim. The tribunal had from the outset of the hearing explained the burden which was on the claimant to prove the facts from which we could conclude that discrimination had occurred. The claimant relied on an assertion that *"the progression of black employees within Jaguar Land Rover is less than any other race".* This assertion was entirely unsubstantiated and no evidence was presented to support it. The claimant did not prove anything by making this baseless assertion. The claimant was asked if he relied on any other matter. The claimant referred to James Berry's evidence to the tribunal in which he had agreed that you could say that the claimant had been blacklisted because the managers did not think he was ready to be a C grade. Mr Berry made it clear that he was not agreeing to the claimant's word blacklisted on the basis it had anything to do with race but rather he was making the point that it was true that managers held a perception about the claimant that he was not ready for promotion and that was why he had not progressed as he wished.

148. The tribunal considers that there is nothing in either of these two points which could possibly amount to the claimant having proved facts from which we could conclude that discrimination had occurred. In fact the evidence of James Berry relied upon by the claimant in the tribunal's view supports our overall conclusion that the reason why the claimant was not promoted and did not progress was not because of race but because his managers did not believe he was suitable for promotion and the reason why they believed that was because of his poor attitude. The claimant had therefore failed to prove any facts from which we could conclude that discrimination had occurred, and his discrimination claim would necessarily have failed in any event.

Victimisation

149. The claimant relied on one protected act which was his email to Paul Blackman on 30 September 2019. The tribunal finds that this was not a protected act. The email makes no reference whatsoever to any possible

complaint of discrimination. The email was not bringing proceedings under the EqA or giving information or information in connection with proceedings under the EqA. There were no proceedings at this time and nor were any proceedings anticipated. The email makes no allegation of a contravention of the EqA and it does not do any other thing for the purposes of or in connection with the EqA. As there was no protected act as alleged by the claimant this means that the claimant's victimisation complaint must necessarily fail.

150. We should note that in his closing submissions the claimant referred to his meeting with Paul Blackman as opposed to his email to Paul Blackman as the protected act. This is not the case that we have to determine according to the final LOI. The claimant did not make any application to vary the LOI and it would be grossly unfair and unjust to do so at this late stage. We will therefore not vary the LOI but we make the following findings in any event. The meeting the claimant had with Mr Blackman was not minuted and Mr Blackman did not give evidence to the Tribunal. The claimant provided little to no evidence about the meeting with Mr Blackman and in any event we have found him to be wholly incredible. In his interview during the claimant's appeal Mr Blackman said that the claimant did not directly say anything about race discrimination (although he inferred that the claimant might be thinking about that based on his previous experiences). For these reasons we would conclude that the claimant did not do a protected act in the meeting with Mr Blackman either.

151. We should also note that in his submissions the claimant relied upon a private message sent by Ms Ramirez around the time he met with Mr Blackman. In that message Ms Ramirez referred to wanting the claimant to leave. The claimant suggested this showed that she *"planned retribution because of making the disclosures to Paul Blackman".* We disagree. We found Ms Ramirez to be an honest and straightforward witness She came across as candid and she made concessions when it was appropriate to do so. We therefore accepted Ms Ramirez's oral evidence about this message. She explained that she did want to the claimant to leave her team but this was due to the way his behaviour was affecting the relationships within her team. She did not want to see him dismissed. She referred to a long meeting she had had with the claimant where he explained his annoyance about this lack of progression and Ms Ramirez offered him constructive advice to the effect that if he focused on his work rather than complaining then good things would happen. The claimant however disregarded that and escalated his concerns to Mr Blackman. Ms Ramirez was frustrated by that response. The claimant did not express anything about race discrimination to Ms Ramirez and she was not aware that he said or might have said anything about race discrimination to Mr Blackman. For these reasons we find that Ms Ramirez's message does not assist the claimant's case. It had nothing to do with any alleged protected act to Mr Blackman.

152. We have also considered the claimant's allegations of detriment in any event. In short, we would have found that the claimant was not subject to any detriment because of the alleged protected act (i.e. the email to Mr Blackman). We would also have found the claimant was not subject to any detriment because of the subsequent discussion he had with Mr Blackman.

153. The first alleged detriment is that the claimant was placed under investigation on 24 October 2019 for alleged gross misconduct. We find that the reason why the claimant was investigated was because of his conduct on 8 October and the fact that the weight of the witness evidence suggested that the claimant was aggressive to his manager, had squared up to his manager and had offered him outside presumably for a fight. It was not because of the email which the claimant sent to Mr Blackman on 30 September or any subsequent conversation which the claimant had with Mr Blackman. In fact it had nothing to do with those matters. Further this allegation is out of time and we do not think it would be just and equitable to extend time for the reasons we have already explained.

154. The second allegation of detriment is that the claimant was left out of team meetings and updates on 28 February 2020. Very little evidence was presented by the claimant about this allegation but it relates to the time when the claimant returned to work following his dismissal and it appears he was left off some mailing lists and therefore was not updated and/or was not made aware of some meetings. The tribunal was entirely satisfied that this mistake was inadvertent. It arose from the fact that the claimant had been taken off the relevant mailing lists when he was dismissed and there was a delay in getting him back onto them. It was not done because of the claimant's email to Mr Blackman on 30 September or any discussion which the claimant had with Mr Blackman following that email. In fact there was no evidence at all that this had anything to do with those matters.

155. The third allegation of detriment was that Ms Ramirez and Mr Lee had premeditated conversations about the claimant on 20 August 2019. The context of this is that the claimant obtained by way of a subject access request a number of messages from the respondent's internal messaging system which showed the private conversations which his managers had been having about him. The conversation between Mr Lee and Miss Ramirez on 20 August 2019 shows that Mr Lee felt that they needed to do something about the claimant, that they were considering placing the claimant on a personal improvement plan ("PIP") and that the reason for that was to scare the claimant as they didn't like his behaviour. The objective behind the PIP was to improve the claimant's respect towards his managers. It was mentioned that the claimant was rude to his seniors and that he didn't respect Mr Lee or Mr Berry and was challenging everything. Mr Lee said that the claimant was getting on his nerves.

156. In the tribunal's judgement these messages show the claimant's managers' frustration with him and the reasons for that frustration. It is clear that they were seeking to take action against the claimant perhaps in the form of a PIP purely as a result of the claimant's behaviour which was rude, challenging and disrespectful. We do not find that the messages show that anything was premeditated. Rather they show that the claimant's managers were looking for a solution to try and address his poor behaviour. We accept Ms Ramirez's evidence that the claimant was not in the end placed on a PIP because the managers recognised it was not appropriate in circumstances where the claimant's work was not the issue.

157. We do not think this was a detriment because the claimant was not aware of the conversation at the time and a private conversation about another does not constitute a detriment where the conversation was simply the claimant's managers discussing how they might address the claimant's poor behaviour. In any event this matter cannot have been done because of the alleged protected act because it predates the alleged protected act. There is no evidence at all that the conversation took place because of the email which the claimant sent to Paul Blackman, or his subsequent discussion with Mr Blackman. Further this allegation is out of time and we do not think it would be just and equitable to extend time for the reasons we have already explained.

158. The fourth alleged detriment was stress, decrease in morale and depression. Little to no evidence or argument was presented by the claimant as to how and when he suffered this alleged detriment. The medical evidence produced by the claimant on the day of closing submissions refers to the claimant saying to his GP on 6 January 2020 that he believed he was treated unfairly and discriminated against and he was prescribed an anti-depressant. We have found that the claimant was not treated unfairly and he was not discriminated against. At most the evidence shows that the claimant had an unjustified sense of a grievance and this may have caused him to experience stress and depression as reported to his GP on 6 January 2020. This is not a detriment. Further there was no evidence to suggest that the alleged detriment was because of the alleged protected act.

Harassment related to race

159. For the reasons we explained in our findings of fact we found that the harassment allegation which the claimant makes did not take place. The initial burden was on the claimant to prove facts from which we could conclude that discrimination has occurred. The claimant has failed to prove the facts from which we could conclude that unlawful discrimination has occurred. We find that the words actually used by Mr Lee could not possibly have had the prescribed purpose or effect to constitute harassment. This is demonstrated in particular by the claimant's acceptance at the time that he had misunderstood and that he would shake hands/fist bump and move on. The words actually used by Mr Lee were an innocuous attempt by him to reassure he claimant that he was not being subjected to discrimination. As we have explained the claimant's

apparent belief that he was being blacklisted due to his race was far fetched and there was no cogent evidence for it. The real problem was the claimant's attitude. In those circumstances Mr Lee's reassurance was entirely appropriate. It was not harassment.

Constructive unfair dismissal

160. We find that the respondent did not breach the trust and confidence term. Our reasons which are based on the allegations of breach in the LOI are as follows.

a. Constructive dismissal allegation 1 was the claimant's allegations of direct race discrimination. We have found (and the claimant has in fact accepted in his oral evidence) that the reasons for his lack of progression had nothing to do with race. Instead the reason claimant's lack of progression was down to his manager's honest and reasonable perception of him as someone who was not suitable for promotion due to his attitude. This was a proper and reasonable basis for the respondent not to promote the claimant.

b. Constructive dismissal allegation 2 was a repeat of the claimant's allegation of victimisation detriment that he was falsely accused of gross misconduct on 8 October 2019 following his email to Paul Blackman. We have found that the claimant was not falsely accused of gross misconduct on 8 October 2019. The claimant was alleged to have committed gross misconduct because the weight of the evidence showed that he had behaved aggressively towards a team leader including squaring up to the team leader and offering to see him outside. There is no evidence that the allegation came about because of the claimant's email to Mr Blackman or his subsequent discussions with Mr Blackman. The claimant has made vague and unsubstantiated suggestions that the allegation of gross misconduct came about as a result of a conspiracy or a setup. There is no cogent evidence to support these suggestions. Moreover the fundamental difficulty with this suggestion is that the allegation of gross misconduct came not from the people who the claimant alleges were hostile to him (Mr Lee, Ms Ramirez and Mr Berry) but people who were unknown to the claimant and that the claimant accepted in his evidence no reason to lie (Mr Baker, Ms McDermott and Mr Harvey). As we have already said there is no evidence to suggest that the allegation of gross misconduct came about because of the claimant's email to Paul Blackman or any subsequent discussion the claimant had with Paul Blackman. It came about purely as a result of the claimant's aggressive behaviour on 8 October. The investigation, and indeed the decision to dismiss the claimant, were wholly justified on the basis of the evidence about the claimant's actions on that day.

c. Constructive dismissal allegation 3 contained two elements. The first element was that there was a premediated investigation leading to the claimant's dismissal on 4 December 2019. We do not find that the

investigation leading to the claimant's dismissal was in any way premeditated. It was simply a response to the claimant's behaviour on 8 October. The finding of gross misconduct was clearly justified in light of the evidence and we note that the key finding of gross misconduct by way of the claimant's aggressive behaviour was upheld on appeal. We consider that the sanction of dismissal was clearly one which was reasonably open to the respondent and Mr Hudson's opinion that a sanction of a final written warning should be substituted does not change that. Mr Hudson's decision was clearly made by a narrow margin as he still felt it appropriate to impose a final warning and record that the claimant's behaviour was very serious gross misconduct that could not be tolerated and he required the claimant to formally apologise.

d. In the presentation of his case the claimant focused his attention on the messages he obtained as a result of the DSAR which he argued showed Ms Ramirez and Mr Lee were conspiring against him to make false allegations. For this reason the claimant suggested the investigation was premeditated. The claimant also made wider allegations of unfairness.

e. We do not find that evidence shows that Ms Ramirez and Mr Lee were conspiring against the claimant or making false allegations. Instead the evidence shows that they had genuine behavioural concerns about the claimant prior to 8 October. The evidence we have seen and heard suggests these concerns were well founded. Ms Ramirez progressed her concerns along with information she had received about the 8 October incident to HR in a record sent on 11 October. This does not show that anything was pre-determined. It shows that Ms Ramirez wanted her concerns to be dealt with. We consider it would have been better if Ms Ramirez and Mr Lee had not been involved in the investigation or disciplinary given the extent of their pre-existing concerns about the claimant but this did not give rise to any unfairness. The case against the claimant was overwhelming as can be seen by the eyewitness evidence obtained at the time and the fact that he was still found guilty of the essential gross misconduct even after the extensive appeal investigation which was conducted by somebody with no pre-existing knowledge of the claimant. The claimant has not come close to showing that there was any premeditation in the investigation or disciplinary process.

f. The claimant's wider allegations of unfairness arguably went beyond the LOI but we found they were not made out anyway. The claimant alleged but did not demonstrate that CCTV footage was available but not considered. The claimant did not substantiate any suggestion that CCTV footage was available and we find that it was not. The claimant also alleged but did not demonstrate that relevant witnesses were not interviewed. The claimant mentioned Luke Eaton and Ricardo as the relevant witnesses. Mr Eaton was in fact interviewed on appeal and he had not witnessed the incident and did not support the claimant's allegation that there had been premeditation. Ricardo does not appear to have been interviewed at any stage but the claimant's own evidence

at the time was that he may have been in the vicinity but not close enough to hear anything (see p 410 of the bundle). For these reasons we would conclude that there was a fair investigation and disciplinary process in any event.

g. The second element to constructive dismissal allegation 3 was that the claimant's acceptance to be reinstated on 4 February 2020 was given under duress and false pretence. It may be worth observing at this juncture that although it is well established the vanishing dismissal concept can be seen as something of an oddity and it can lead to unfortunate consequences for unaware employees who do not actually wish to be reinstated (see Marangakis). That scenario did not arise in this case. As we have explained although the claimant's appeal against dismissal was successful he was still found guilty of gross misconduct and a final written warning was imposed. The appeal manager imposed conditions on the claimant's reinstatement, including that he apologise. These circumstances led to the reinstatement being described as an offer and the claimant was asked whether he wished to accept it (see in particular Mr Routledge's email to the claimant of 27 January 2020 at 16.30). Applying Folkestone however upon the claimant's appeal being successful his contract of employment was revived and there was no requirement for the claimant to accept or reject that. Instead, the claimant could have resigned and claimed constructive dismissal. The claimant was correctly informed by Mr Routledge that he could in the alternative resign.

h. The claimant chose not to resign. He never attempted to withdraw his appeal and he did not say he did not wish to be reinstated. Instead he clearly and unequivocally agreed to the reinstatement on the terms outlined and he complied with the conditions set. Therefore the tribunal's task was to consider whether the claimant's acceptance of the reinstatement on the terms put forward by the respondent was given under duress or on false pretences and if so whether this constituted or went towards a breach of the implied term.

i. We do not find that the claimant's acceptance of the reinstatement on 4 February was given under duress or on false pretences. The nature of the decision which the respondent was making was clearly communicated to the claimant and he was clearly informed as to the terms and in particular the conditions which he had to meet. The claimant took advice from the trade union and he thought about what he wanted to do. The claimant did not ask the respondent for more time or express any misgivings to them about the decision he made. The claimant plainly and unequivocally told the respondent that he wished to accept the reinstatement, that he agreed to the respondent's terms and that he was thankful and now wanted to put it behind him. There was no duress or false pretences by the respondent in this process. The claimant always had the option not to accept the respondent's clearly communicated terms. He could, for example, have refused to apologise. As the claimant effectively accepted in his evidence he in fact went along with the

apology and the reinstatement in bad faith because it benefitted him financially to do so.

j. We consider that the claimant was treated leniently by being reinstated. This is because the appeal manager upheld the central allegation that the claimant had behaved aggressively towards Harry Baker and he remained of the view that that was extremely serious gross misconduct that could not be tolerated. Furthermore in giving the claimant the opportunity to consider whether to accept the reinstatement it is arguable that the claimant was being treated more favourably than other employees in the context of a vanishing dismissal. The claimant took advice, reflected and decided to agree to the reinstatement because that's what suited him. As we have explained it was in fact the claimant who was acting in bad faith and using false pretences when he did that, and not the respondent. In these circumstances we saw no evidence of duress or false pretences by the respondent and nothing in the claimant's reinstatement overall which constituted or went towards a breach of the implied term.

k. Constructive dismissal allegation 4 was that the claimant was prescribed an anti-depressant to help with his stress and anxiety on 6 January 2020. We have found that the claimant did get such a prescription, but this was not an action done by the respondent. Insofar as this was a consequence of something done by the respondent the most that can be said is that it appears (from the medical evidence provided by the claimant on the last day of hearing) that it arose from the claimant's perception that he was being discriminated against and had been unfairly dismissed in December 2019. We have found that the claimant was not discriminated against and he was not unfairly dismissed in December 2019 and this was at most a result of an unjustified sense of grievance.

l. Constructive dismissal allegation 5 was that the claimant was investigated for an incident involving the police that happened outside of work when he failed to report for work on 10 February 2020. We consider that the decision to investigate the claimant for his arrest on 9 February was an appropriate, proper and reasonable action by the respondent, even taking into account that it was an incident that took place outside of work. It is relevant that the claimant had been arrested and detained by the police on suspicion of a very serious assault and he was already on a final warning for aggressive behaviour. In those circumstances it was in the tribunal's judgement entirely reasonable and proper for the respondent to perform a due diligence exercise to investigate the circumstances of the claimant's arrest and check the facts.

m. Constructive dismissal allegation 6 was the claimant's allegation of harassment related to race considered above. We have found that the harassment allegation did not take place as the claimant alleged and instead what took place was that the claimant misunderstood an innocuous comment made by Mr Lee.

161. In view of the above the Tribunal concluded that the respondent did not without reasonable and proper cause act in a way which was calculated or likely to destroy or seriously damage the relationship of trust and confidence. As there was no fundamental breach of contract by the respondent there was no dismissal and the claimant's claim of constructive dismissal must fail.

162. We should also mention however that we consider that by accepting the offer of reinstatement and agreeing to return to work under the terms proposed by the respondent the claimant must be taken to have affirmed the contract in relation to any breach concerning his dismissal or any preceding matter.

163. We also emphasise our finding that the claimant had decided by the end of December 2020 at the latest that he was going to bring a claim by 3 March 2020. That was the claimant's clear evidence in cross-examination and it is consistent with the contemporaneous documentation including the claimant's letter to his union on 27 January 2020 and the notes of his consultation with his GP on 6 February. It is also consistent with an email the claimant wrote to Mr Routledge on 8 January in which he referred to having a very tight deadline which the claimant accepted in cross-examination was a reference to bringing a claim by 3 March 2020. Also, in the appeal outcome hearing the claimant told the respondent he would be taking them to court. The tribunal therefore finds that the claimant resigned so that he could carry out his plan of taking the respondent to tribunal for unfair dismissal. It was a premeditated plan formulated before the claimant was reinstated and it had nothing to do with events after the claimant's reinstatement on 28 January. Accordingly events which took place after his reinstatement did not form part of the claimant's reason for resignation.

164. Finally, we reiterate that we found that the last straw relied upon did not take place and what took place was instead an innocuous misunderstanding.

165. For these reasons we consider that the constructive dismissal claim would necessarily have failed in any event.

Result

166. The result is that all of the claimant's claims are dismissed.

167. That concludes the Tribunal's judgment.

Employment Judge Meichen
8 December 2022