



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Prexy Simbol

AND

Respondents

Mr Jonathan Tilley (1)

Mr James Lyall (2)

Mr William Sharp (3)

John Lewis Plc (4)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON**

24 and 25 October 2022
In Chambers 26 October 2022

EMPLOYMENT JUDGE N J Roper

MEMBERS Ms R Clarke
Mr H Launder

Representation

For the Claimant: In person

For the Respondent: Mrs G Holden of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims are all dismissed.

REASONS

1. In this case the claimant Mr Prexy Simbol claims that he has been discriminated against because of a protected characteristic, namely his race. The claim is for direct discrimination, harassment; and victimisation. The respondents deny the claims.
2. With the consent of the parties Mr Launder attended the hearing remotely by Cloud Video Platform. All of the parties otherwise attended in person.
3. We have heard from the claimant. For the respondents we have heard from Mr Jonathan Tilley (the first respondent); Mr James Lyall (the second respondent); Mr William Sharp (the third respondent); Ms Donna Bowen; and Ms Rosaleen McConnachie.

4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We had grave concerns about the claimant's credibility for the reasons set out in detail at the end of our findings of fact. Bearing in mind these concerns whenever there was a conflict between the claimant's evidence and that given by the respondents, or alternatively a conflict between the claimant's evidence and the contemporaneous documents, we preferred the evidence of the respondents which, for the record, in all respects was consistent with the contemporaneous documents to which we were referred.
5. Against this background we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
6. The Facts:
7. The fourth respondent John Lewis plc is the well-known national retailer which also owns the national supermarket chain Waitrose. It is known as the John Lewis Partnership. It is well known for engaging what would otherwise be its employees as Partners in its enterprise. It has a number of policies, procedures and initiatives in place to encourage the self-development and promotion of its Partners. Each partner has a Performance Development Plan (PDP) which follows discussions with the relevant managers about current levels of performance, and aspirations for development and promotion, with appropriate training on offer. There is also a Human Resources Department referred to as Personnel, Policy and Advice (PPA), and an Occupational Health Department referred to as Partnership Health Services (PHS). From the procedures which we have seen the Partnership is a caring and supportive employer.
8. The claimant Mr Prexy Simbol is Filipino. He commenced employment with the fourth respondent Partnership on 29 November 2018 and remains in their employment. It is clear from the claimant's CV that he has no experience in management, either in the retail context or otherwise. The claimant works as a Supermarket Assistant at the Exeter branch of Waitrose. The management structure/hierarchy consists of Supermarket Assistants; Team Leaders; Assistant Team Managers; Team Managers; Deputy Branch Manager; and the Branch Manager. The first respondent Mr Jonathan Tilley was a Team Manager at the Exeter Branch and was the client's line manager. The second respondent Mr James Lyall and the third respondent Mr William Sharp were both Deputy Branch Managers at the Exeter Branch at the relevant times, but they have both since moved to other branches.
9. The respondent has an apprenticeship programme under which it encourages and supports its Partners to participate in training under its Retail Management Scheme. There is a progression in apprenticeship levels from Level 2 through Level 3 and on to Level 4. Candidates are not precluded from applying to enter at any level, depending upon their experience, but the normal convention and presumption is that candidates will enter at the appropriate level, and then progress accordingly. Spaces on this apprenticeship scheme are limited and there is no guarantee that an applicant will be awarded a position. It is the responsibility of an applicant's manager to assess that applicant's suitability for the scheme.
10. In 2019 the claimant applied for the Level 4 apprenticeship. He was not supported in that application because he had no management experience, and his application was unsuccessful. Instead, he was offered a Level 2 apprenticeship. The claimant declined that offer and contended then that the decision to reject this application was because of his race. This was despite the fact that the claimant had been told that Level 2 was the most appropriate level when he had just joined the business in 2019.
11. The claimant renewed his application for Level 4 in October 2020. At that time Mr Lyall was responsible for that programme at the Exeter Branch. The claimant did not discuss this application with Mr Lyall in advance, nor did he discuss this with his line manager Mr Tilley. Mr Lyall obtained feedback from Mr Tilley. Mr Lyall rejected the claimant's application for Level 4 because he lacked the relevant management experience. Nonetheless the claimant was offered the Level 3 Apprenticeship, but he rejected this offer. He alleged on 1 November 2020 that the reason he was unsuccessful was because the colour of his skin and his accent. The claimant accepted at this hearing that if he had undertaken the Level

- 2 and then the Level 3 opportunities which had been offered to him, he would probably by now have progressed to Level 4. We accept Mr Lyall's evidence that his decision to reject the claimant's application for level 4 was because of a fair assessment of the claimant's abilities and lack of management experience at that time, and it was not in any way a decision which was made or tainted by the claimant's race or nationality.
12. Meanwhile the claimant's line manager Mr Tilley had become concerned about the claimant's attitude at work. He was upset at the claimant's allegation that his failure to be appointed directly to the level 4 apprenticeship was in any way connected to his race, when to his mind it was clear that the claimant was not sufficiently qualified to enter at that level, and had ignored advice which would otherwise have supported him to develop gradually from Level 2. He sought advice from the PPA department, and he began to compile a record of the claimant's unacceptable behaviour. This document was an open Word document, and Mr Tilley added an explanatory paragraph beside each relevant date as and when it happened. This document was therefore a succession of contemporaneous notes, with the first entry on 18 March 2020, and the last entry on 7 November 2020. The claimant accuses Mr Tilley of lying, and of fabricating this document. Mr Tilley denies this and asserts that it is an accurate record of the events as and when they occurred, as advised by the PPA department. We accept Mr Tilley's evidence in this respect we find that this document is an accurate summary of events as they occurred during that time. We refer to this document as Mr Tilley's Record of Events.
 13. The following entries were included in Mr Tilley's Record of Events. In early 2020 an investigation was under way in connection with the claimant's sickness absence. On 18 March 2020 another Partner complained to Mr Tilley that the claimant had taken a photograph of him which he had not authorised, and that he felt uncomfortable. PPA recommended the commencement of a serious misconduct investigation, but they advised holding this in abeyance pending completion of any sickness investigation. On 20 March 2020 Mr Tilley asked the claimant to attend a sickness investigation meeting and the claimant objected in a loud voice. When Mr Tilley asked him not to shout at him, he loudly exclaimed "Fuck". Mr Tilley waited until the next shift for the claimant to calm down so they could have a meeting to clear the air, and the claimant threatened that it "would all come up in the court case". The claimant was subsequently absent because he was shielding during the Covid pandemic.
 14. From September 2020 the respondent advertised the vacant position of Assistant Team Manager (Nights), referred to as ATM. The claimant was still a Supermarket Assistant, and the next level up in the hierarchy was Team Leader. The normal progression for a Supermarket Assistant would therefore be to seek development and promotion to Team Leader, and then develop this relevant management experience by seeking promotion to Assistant Team Manager (ATM).
 15. On 3 September 2020 the claimant emailed Mr Tilley to inform him that he wished to apply for the ATM Nights position. They met in mid-September 2020. Mr Tilley explained that the claimant was not ready for the role because he had no management experience. The claimant was not a current Team Leader (TL) and he could not exhibit any evidence from his PDP that he was progressing towards this, which was a more junior management position. Nonetheless Mr Tilley explained to the claimant that this would be the best course of action, and that he would support the claimant in trying to become a TL, which was the course his own career path had followed.
 16. The claimant enquired about the application process and Mr Tilley explained that candidates were screened, might be offered an interview, and that the best performing candidate would normally be offered the job, save that if none of the candidates met the minimum necessary criteria then no appointment would be made and the job would be readvertised. Despite advising the claimant that he had insufficient management experience Mr Tilley offered to assist him in the preparation of any application. The claimant declined. The claimant asserted that he was bound to be rejected because of the Partnership's "bias against him", which assertion Mr Tilley rejected.
 17. The claimant raises an allegation of race discrimination against Mr Tilley arising from this meeting. He asserts that Mr Tilley said to him that he needed to be "high calibre" to apply

- for the ATM position in the context Mr Tilley was telling him that he (the claimant) was not high calibre which is the same as being told that he was a “lower species”. The claimant also asserts that Mr Tilley would not have said this “if I was a white partner”.
18. Mr Tilley accepts that he had a detailed discussion with the claimant about the ATM position and made it clear that it required management experience and that only those candidates which met the necessary criteria would be appointed. He made it clear to the claimant that in his opinion the claimant did not yet meet these higher criteria. He does not recollect using the phrase “high calibre”, and in any event denies making any derogatory or offensive remark to the claimant in the context that he the claimant was of insufficient calibre or from a lower species. We accept Mr Tilley’s evidence to this effect.
 19. In the event the claimant applied for the ATM (Night) position. Mr Tilley and Mr Lyall were the interviewing panel. The respondent has a standard process under which each of these two managers asked the same interview questions against the same job criteria and completed a marking process. Their marks were then compared, and a final mark was agreed. The claimant made no complaint at that stage that Mr Tilley had made the comments alleged at their recent meeting and should not be involved in the interview process, and he raised no complaint about Mr Lyall being involved.
 20. Three candidates were interviewed. The claimant scored the second highest score in this process. However, Mr Tilley and Mr Lyall agreed that both the claimant and the candidate with the lowest score did not meet the minimum criteria and could not be appointed. They appointed an applicant with the highest score, who did meet the necessary minimum criteria, and we have been asked to refer to him as the Comparator.
 21. The claimant accepted in his evidence that the interviews and scoring process were transparent and that the standard process been applied equally to all three candidates. He also agreed that the person who had achieved the top score in the interview process should be successful. He also agreed that comments made by Mr Tilley and Mr Lyall during the interview process which fed into his scores were both reasonable and reflective of his lack of management experience. He also agreed that the conclusions which Mr Tilley and Mr Lyall made were reasonable taking account of the information which they had.
 22. Nonetheless the claimant asserts that the appointment of the Comparator as the successful candidate was discriminatory on the grounds of the claimant’s race. Despite being asked to re-consider this allegation carefully, the claimant continued to assert that the Comparator had never applied for the position in the first place, and that Mr Tilley and Mr Lyall had deliberately manufactured a dishonest and non-existent application and interview process involving the Comparator. The claimant asserted that the interview notes prepared by Mr Tilley and Mr Lyall during their interview with the Comparator were untrue, and deliberately and dishonestly fabricated by Mr Tilley and Mr Lyall in order to defeat his appointment as being the best candidate on the grounds of his race.
 23. Mr Tilley and Mr Lyall deny this and confirm that they did interview the Comparator. Mr Sharp in his evidence also confirmed that he saw them both interviewing the Comparator. We have no hesitation at all in rejecting the claimant’s serious and unfounded allegations in this respect, which are not supported by any evidence. We find that Mr Tilley and Mr Lyall carried out a fair and reasonable interview process in accordance with the Partnership’s normal procedures. We find it was appropriate to offer the Comparator the ATM position because his was the best score. We accept their evidence that the claimant and the other candidate did not score as highly as the Comparator, and in any event did not score highly enough to satisfy the minimum requirements for the position. This was an entirely reasonable conclusion based on the claimant’s continuing lack of management experience. The decision to appoint the Comparator rather than the claimant was based on clear and reasonable contemporaneous evidence, and we are satisfied that this decision had nothing to do with the claimant’s race.
 24. The Comparator was offered the position, initially as a secondment, which is the Partnership’s standard procedure and is beneficial to both parties because it serves as a form of trial period for the promotion. As it happens the Comparator also successfully applied for an alternative position with the Partnership’s Head Office, and then declined to take up the ATM position. The claimant tried to re-apply for the ATM position, but his

- application was automatically rejected. This was because the Partnership's standard procedures dictate that if a position is not filled then the original recruitment process remains open, and unsuccessful candidates are not allowed to reapply until a different recruitment process is commenced.
25. Meanwhile further difficulties with the claimant continued as recorded in Mr Tilley's Record of Events. At the end of September 2020 Mr Tilley recorded that the claimant spoke loudly and was confrontational. On 3 October 2020 the claimant spoke sarcastically and undermined two managers. On 7 October 2020 Mr Tilley informed the claimant of the outcome of the ATM interview process and the claimant alleged that Mr Tilley had been biased against the claimant and had predetermined that the claimant would be unsuccessful in his application. Mr Tilley denied that allegation and offered feedback on the process, but the claimant refused and required only "official" feedback from the resourcing centre. Mr Tilley explained how he could proceed with that request. Later that evening the claimant had an altercation with his Team Leader at which the claimant was said to have been confrontational. When challenged by Mr Tilley the claimant turned his back and walked away loudly complaining.
 26. On 14 October 2020 the claimant informed Mr Tilley that he had applied for the apprenticeship position (for which see above) without seeking to discuss the matter with Mr Tilley his line manager first, and without telling him what level of apprenticeship he had applied for. The claimant accused Mr Tilley of not caring and not being sincere about helping him. On 21 October 2020 the claimant emailed Mr Tilley asking why he "could not be a manager", which Mr Tilley forwarded to Mr Sharp because he felt this to be inappropriate. This resulted in a meeting between the claimant and Mr Sharp on 30 October 2020, and from which a further allegation of race discrimination arises.
 27. The third respondent Mr Sharp, from whom we have heard, was the Deputy Branch Manager at the claimant's branch at that time. He was aware of the difficulties which Mr Tilley and Mr Lyall had been facing with the claimant and he agreed to meet with the claimant as a neutral party to seek to address these ongoing management issues. At that stage the claimant had refused to communicate with Mr Tilley or Mr Lyall in person. Mr Sharp explained to the claimant the importance of engaging with his managers and that his ongoing refusal to meet with his managers was unacceptable. He also raised concerns about the tone of some of the claimant's emails and explained how these could come across as being aggressive. The claimant raised an issue that Partners should have time scheduled in their rotas for work in order to improve their PDP. Mr Sharp required a reply to the effect that it is not normal for Partners to require such time to be planned and its each individual partner's responsibility to keep their objectives and training up to date. In any event this is something which should be discussed with the relevant line manager when quarterly and end of year performance reviews are conducted.
 28. Mr Sharp concluded the meeting when the claimant confirmed that he understood everything which Mr Sharp had raised. Mr Sharp describes it as a coaching and development conversation, conducted in private, with the aim of providing constructive feedback and clarity on expectations of a partner's behaviour. It was not a formal warning.
 29. The claimant now alleges that Mr Sharp was "aggressive and confrontational" during this meeting, and that this was on the grounds of the claimant's race. However, the claimant has not explained how this meeting was said to have been either aggressive or confrontational. Mr Sharp denies that he was in any way aggressive or confrontational. Given the context of the meeting and the claimant's previous behaviour we find Mr Sharp's explanation to be much more credible, and entirely consistent with the Partnership's approach to constructive resolution of employment issues. We reject the claimant's assertion that Mr Sharp was in any way aggressive or confrontational during this meeting.
 30. Following this meeting there was a further meeting between the claimant and Mr Tilley on 7 November 2020. Mr Tilley had invited the claimant to a meeting in order to complete his Wellness form and his PDP. The claimant wished to change the focus of the meeting to discuss why he was not supported in becoming a manager and he required Mr Tilley to email him with an answer in writing because the decision was "to do with his race and the way that he spoke to people". The claimant also threatened that he would "take you all to

- a tribunal". (This is the protected act relied upon by the claimant for his victimisation claim). Mr Tilley objected to the allegations of race discrimination and reminded the claimant that he would support him in an application to become a Team Leader, and that any application to a higher level would be unlikely to be successful because of his lack of managerial experience. Mr Tilley went on to seek to complete the PDP form, but the claimant refused to discuss it with Mr Tilley. He told Mr Tilley: "Just rate me whatever you think" on the basis that he had the best PDP and it did not really matter what he said. Mr Tilley offered to sit down and go through the PDP form together with the claimant, but he refused and said that he did not wish to talk to him. The claimant then left the meeting.
31. Mr Tilley was clearly becoming upset and exasperated at this stage. He recorded that the unfounded allegations against him were taking a toll on his mental health and were affecting his home life. He referred the matter to the PPA department for advice, and a disciplinary investigation was commenced against the claimant.
 32. At this stage it was clear that three separate matters had each fed into this disciplinary process. In the first place the claimant's relationship with Mr Tilley had become untenable particularly after the claimant's failure to secure the ATM Night role. Secondly, Mr Sharp, a more senior and neutral manager, tried to intervene to improve relationships but this had proven unsuccessful. Thirdly the claimant had refused to engage in the PDP process despite the best efforts of Mr Tilley and the intervention of Mr Sharp.
 33. A disciplinary investigation was then commenced by Ms Donna Bowen, a Team Manager, from whom we have heard. She did not know the claimant and had not directly managed him. She obtained written statements from Mr Tilley and Mr Sharp. She then had an investigation meeting with the claimant on 28 November 2020. The purpose of the meeting was to ascertain why the claimant had refused to engage with his line manager Mr Tilley and complete his PDP. This was contrary to the Partnership's general expectations that partners work with and cooperate with their respective line managers.
 34. Ms Bowen recalls that the claimant was brusque in his approach and it was difficult having him focus on the reasons for his refusal to attend the PDP meeting. The claimant did not make any allegations about his race nor the prospect of any potential employment tribunal proceedings. When the claimant was asked to comment on the statements which Mr Tilley and Mr Sharp had produced, he merely responded that they were lying.
 35. The claimant also raised an underlying health condition and Miss Bowen was concerned that this might be a mitigating factor and suggested referral to PHS, the Occupational Health Department. After further discussions Mi Bowen met again with the claimant on 9 December 2020 and they agreed the wording for a referral to PHS to advise upon whether his underlying health condition had affected his refusal to meet with his manager. The claimant subsequently refused to proceed further with that referral to which he had earlier agreed.
 36. Mr Tilley had produced a written statement dated 17 November 2020 setting out his version of the events of the meeting with the claimant on 7 November 2020. His statement is consistent with his contemporaneous notes in his Record of Events. He concluded by saying that the claimant's "behaviour was completely out of line and I've personally had enough of being accused of abhorrent behaviour and dereliction of my responsibilities as a people manager without evidence, or even engaging in discussion to begin to try to resolve the issues."
 37. Mr Sharp also produced a short statement dated 20 November 2020 in which he confirmed that at the meeting on 30 October 2020 he informed the claimant that his current behaviour was not acceptable and that he must not refuse to meet with his line manager or any other manager because this was against the Partnership behaviours. He also confirmed that he had told him that his aggressive tone in his emails were not acceptable.
 38. The claimant asserts that these statements were untrue and deliberate lies, and now also asserts that Mr Tilley and Mr Sharp colluded with Ms Bowen to manufacture a dishonest and unfair disciplinary investigation and process. We have no hesitation in rejecting these serious allegations which are not supported by any evidence. The evidence of Mr Tilley Mr Sharp and Ms Bowen before us was measured and credible, and entirely consistent with the contemporaneous documents which provide a clear record and explanation for the

- context of the claimant's behaviour, and the wholly reasonable conclusion that it merited a disciplinary investigation.
39. Ms Bowen concluded that the claimant had not demonstrated that he had taken any responsibility for his actions or behaviour in refusing to discuss his PDP with his line manager despite requests to do so. She had no reason to believe that either Mr Tilley or Mr Sharp had lied in their statements. She had also delayed the matter to consider an occupational health report, but the claimant had subsequently refused to engage with that process. She concluded that there was a disciplinary case to answer, and she recommended that the disability procedure was commenced.
 40. Ms Rosaleen McConnachie, from whom we have heard, is another Team Manager with the Partnership. She conducted the disciplinary process against the claimant. On 10 February 2021 she wrote to the claimant inviting him to a disciplinary meeting on 19 February 2021. She followed this up with an email on 13 February 2021 to check that the claimant had received the invitation. Because of the Covid pandemic it was suggested that the meeting would be by video, and on 19 February 2021 Ms McConnachie wrote to the claimant inviting him to join the meeting by telephone if that was preferable. He responded to the effect that he would not attend the meeting because the occupational health referral to PHS was not correct and required confirmation that the disciplinary meeting was nothing to do with his race. Ms McConnachie's clear understanding was that the disciplinary process was to explore why he had failed to comply with a reasonable management request to discuss his PDP with his line manager, and that he had refused to engage with the PHS referral because he now believed that the wording of the referral was not quite the same as the wording he had agreed with Ms Bowen.
 41. Despite Ms McConnachie sending numerous emails to support and encourage the claimant to join the disciplinary hearing, he failed to attend. Ms McConnachie decided to give the claimant another opportunity to attend, or alternatively to submit written representations if he preferred to do so. On 24 February 2021 the claimant then forwarded written representations, and he stated that he would prefer to rely on these rather than to attend a disciplinary hearing. He questioned why the wording of the disciplinary matter had apparently changed from a criticism of his behaviour to a failure to comply with a reasonable management request. Ms McConnachie did not consider there to be any difference, but in any event invited the claimant to accept another opportunity to be referred to PHS if he felt that this would be helpful. She requested his written consent to make the second referral but the claimant failed to respond. On 24 February 2021 the claimant provided a further statement but subsequently refused to confirm whether Ms McConnachie should take this as his written representations rather than his earlier document.
 42. The disciplinary hearing was postponed. Following a further exchange of emails it took place on 5 March 2021. Again, the claimant failed to attend. Ms McConnachie concluded on the information before her that the claimant had failed to comply with a reasonable management request and issued a first written warning. In our judgment that was an entirely reasonable conclusion to reach on the information available, particularly given the claimant's unreasonable reluctance to engage fully with the process.
 43. The claimant was afforded the right of appeal against that decision. He submitted an appeal on 12 March 2021 alleging dishonest collusion between Ms Bowen, Ms McConnachie, Mr Tilley and Mr Sharp. He also asserted that this alleged dishonest behaviour, and the disciplinary decision, were discriminatory on the grounds of his race. This led to two further investigations and hearings, namely the appeal against the disciplinary decision, and a separate investigation into the allegations of alleged discrimination. The second investigation concluded that all relevant processes had been followed appropriately and rejected all allegations of discrimination.
 44. The claimant's appeal against the disciplinary decision was heard by Mr Lomas, who allowed the claimant's appeal. It was Mr Lomas who decided that there should be a second investigation into the allegations of discrimination, and he did not deal with those allegations himself. He concluded that there were insufficient examples of the claimant failing to comply with a reasonable management request, and he also decided that

- insufficient reasonable effort had been made to resolve the matter informally. For the record, and on the basis of the contemporaneous documents and statements which we have seen, we find that conclusion be extremely surprising to say the least. Be that as it may, the fact that the claimant's appeal was successful shows that the Partnership has procedures in place which are thorough and considered, and with which employees are able to be supported where they choose to engage in those procedures.
45. The claimant has asserted that the disciplinary process which was adopted was unfair and that this unfairness was imposed upon him because of his race. However, apart from the allegations of lying and collusion, which we have rejected above, the only allegation of unfairness appears to be that Ms Bowen should have followed up the occupational health PHS referral. We reject that allegation of unfairness. The claimant consented to the original referral, and then refused to pursue it. He was subsequently offered the opportunity of being referred again, but he did not accept that offer. Ms Bowen did not have the PHS referral before her despite her best attempts, simply because the claimant refused to engage with that process. The absence of an appropriate report was entirely due to the claimant's actions, and nothing to do with his race.
 46. For the record, we consider that the disciplinary investigation by Ms Bowen, the disciplinary hearing conducted by Ms McConnachie, and the independent review and decision on appeal, demonstrated an exemplary process.
 47. The claimant first commenced the Early Conciliation process with ACAS against the first three respondents on 2 December 2020 (Day A). ACAS issued the Early Conciliation Certificate in respect of the first three respondents on the same day, namely 2 December 2020 (Day B). The claimant presented these proceedings on 26 April 2021. The fourth respondent was subsequently added as a party with the consent of all parties on 22 September 2022.
 48. The claimant's credibility:
 49. In the first place, the claimant has made at least three allegations of dishonest collusion by the respondents said to have been on the grounds of his race. The most egregious of these is the allegation that the respondent's managers did not interview the Comparator for the ATM (Nights) position at all, but rather they lied to the effect that he had been interviewed, and then dishonestly created fabricated interview notes which marked him higher than the claimant, thus depriving the claimant the opportunity to be appointed. The second allegation is that the respondent's managers colluded in the investigation and disciplinary process against the claimant in a dishonest manner so as to be in a position to issue an unwarranted warning. The third allegation is that Mr Tilley fabricated his record of difficult interactions with the claimant, and that this was not a contemporaneous document, but rather was a series of deliberate lies made up after the event.
 50. These are extremely serious allegations against a range of senior managers which, if correct, would be acts of gross misconduct for which they would stand to be dismissed. However, the claimant has not adduced a shred of evidence to support any of these allegations, which, for the record, we have no hesitation in rejecting out of hand.
 51. The claimant faces other difficulties with regard to his credibility. For instance, he was only prepared to accept the respondent's version of events when it suited his case. An example is that he accepted Mr Tilley's account of the meeting on 7 November 2020 only to the extent that it supported his version of events, but he denied other matters which were in Mr Tilley's contemporaneous notes. In addition, he had a tendency to complain to the respondent only after the event if he subsequently became dissatisfied. For example, the claimant only raised concerns about the interview process after he found out that he had not been appointed to the role. His repeated refusal to accept the advice of his managers, including reasonable management instructions, was a clear strand throughout the factual matrix of this case, which clearly led to the impression that the claimant always thought that he knew best in circumstances where his view was not supported by the respondent's policies, the contemporaneous documents, and not least, by common sense.
 52. Finally, there were a number of occasions when the claimant's assertions were not supported by, or even were contrary to, the contemporaneous documents in the agreed trial bundle.

53. For all these reasons we had serious concerns about the claimant's credibility and where there was a conflict between the evidence of the claimant and the respondents, or between the claimant and the contemporaneous documents, we preferred the evidence of the respondents and the contemporaneous documents.
54. The Law:
55. Having established the above facts, we now apply the law.
56. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, harassment; and victimisation.
57. The protected characteristic relied upon is race, as set out in sections 4 and 9 Race of the EqA.
58. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
59. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
60. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. The following are all examples of a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
61. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
62. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
63. We have considered the claimant's detailed closing submissions which is a document running to 56 pages and which refers to principles and extracts from the following cases, which we have considered: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Charles v Tesco Stores Ltd [2012] CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; Miller v MoJ [2016] EAT; DPP v Marshall [1997]; Olasehinde v Panther Securities plc; R v JFS Governing Body [2009] HL; R v Birmingham City Council ex parte E Equal Opportunities Commission; Rihal v London Borough of Ealing [2004] CA; Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT; Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and Anor [2019]; London School of economics and Political Sciences v Lindsay [2012] EAT; and Gayle v Sandwell and West Birmingham Hospitals NHS Trust [2010] EAT.
64. We have also considered the cases of; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC; London Borough of Islington v Ladele [2009] IRLR 154; Ayodele v Citylink Ltd and Anor CA [2017]; Chief Constable of West Yorkshire v Khan [2001] IRLR 830 HL; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell

and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; Robertson v Bexley Community Service [2003] IRLR 434 CA; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.

65. Decision

66. Our decision against this background is as follows. The claimant has raised seven separate allegations of discrimination, and the separate statutory claims of direct discrimination, harassment, and victimisation sometimes overlap. Our findings with regard to each of the allegations is now set out in order, before we subsequently set out our decision with regard to each statutory claim.

67. Allegation 1:

68. The first allegation is that the first respondent Mr Tilley failed to approve the claimant's attempt to participate in the Retail Level 4 Pathways to Retail Management Scheme.

69. In fact, the decision to reject the claimant's application for the Level 4 apprenticeship was taken by Mr Lyall, albeit after discussions with Mr Tilley who was the claimant's line manager at the time. We have accepted Mr Lyall's evidence that his decision to reject the claimant's application for level 4 was because of a fair assessment of the claimant's abilities and lack of management experience at that time, and it was not in any way a decision which was made or tainted by the claimant's race or nationality.

70. Allegation 2:

71. The second allegation is that the first respondent Mr Tilley told the claimant that he needed to be "high calibre" to apply for the position of Assistant Team Manager.

72. We have found that Mr Tilley accepted that he had a detailed discussion with the claimant about the ATM position and made it clear that it required management experience and that only those candidates which met the necessary criteria would be appointed. He made it clear to the claimant that in his opinion the claimant did not yet meet these higher criteria. He does not recollect using the phrase "high calibre", and in any event denies making any derogatory or offensive remark to the claimant in the context that he the claimant was of insufficient calibre or from a lower species. We have accepted Mr Tilley's evidence to this effect.

73. Allegation 3:

74. The third allegation is that the first respondent Mr Tilley and the second respondent Mr Lyall failed to select the claimant for the position of Assistant Team Manager. This is a correct assertion. The claimant was not appointed to the position of ATM (Nights) for which he applied.

75. Allegation 4:

76. The fourth allegation is that the third respondent Mr Sharp was aggressive and confrontational to the claimant in their meeting on 30 October 2020.

77. Mr Sharp denies that he was in any way aggressive or confrontational. Given the context of the meeting and the claimant's previous behaviour we find Mr Sharp's explanation to be much more credible, and entirely consistent with the Partnership's approach to constructive resolution of employment issues. We have already rejected the claimant's assertion that Mr Sharp was in any way aggressive or confrontational during this meeting.

78. Allegation 5:

79. The fifth allegation relates to the investigation which led to the disciplinary case against the claimant. The claimant asserts that the first respondent Mr Tilley colluded with the third respondent Mr Sharp in manufacturing an unfair investigation which led to a disciplinary investigation and disciplinary hearing. This is closely linked to:

80. Allegation 6:

81. The sixth allegation is that during the investigation process the third respondent Mr Sharp made a false statement which supported the statement presented by the first respondent Mr Tilley.

82. The claimant asserts that the statements prepared by Mr Tilley and Mr Sharp were untrue and deliberate lies, and now also asserts that Mr Tilley and Mr Sharp colluded with Ms Bowen to manufacture a dishonest and unfair disciplinary investigation and process. For

the reasons confirmed in our findings of fact above, we have no hesitation in rejecting these serious allegations which are not supported by any evidence. The evidence of Mr Tilley Mr Sharp and Ms Bowen before us was measured and credible, and entirely consistent with the contemporaneous documents which provide a clear record and explanation for the context of the claimant's behaviour, and the wholly reasonable conclusion that it merited a disciplinary investigation.

83. Allegation 7:

84. The seventh and final allegation relates to the commencement of the disciplinary process. This allegation was factually correct to the extent that the claimant was subjected to a disciplinary process.

85. Direct Discrimination s13 EqA:

86. The allegations pursued as allegations of direct discrimination because of the claimant's race are Allegations 1, 2, 3, 4, 5, 6 and 7.

87. With regard to Allegation 1, the claimant was not appointed to the Level 4 apprenticeship because of his lack of management experience. It had nothing to do with his race. With regard to Allegation 2 we reject the allegation that Mr Tilley told the claimant that he was not of high calibre. With regard to Allegation 3, it is correct that the claimant was not appointed to the position of ATM (Nights) and that this was less favourable treatment compared with the Comparator, who was offered that position. However, the Comparator cannot be said to be an actual comparator in the same position as the claimant who did not have any management experience and who failed to meet the minimum requirements for the post. The decision not to appoint the claimant instead of the Comparator had nothing to do with his race.

88. With regard to Allegation 4 we have rejected the assertion that Mr Sharp was aggressive and confrontational to the claimant on 30 October 2020. With regard to Allegations 5 and 6 we have rejected the allegations that any of the Partnership's managers involved colluded in creating dishonest statements or an unfair disciplinary process. Allegation 7 is correct in that a disciplinary process was commenced, but this was an entirely reasonable decision based on the information before Ms Bowen and others, and the decision to commence the process was not taken because of the claimant's race.

89. With regard to a claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.

90. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

91. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

92. Harassment - s26 EqA:

93. Turning next to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct

- at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
94. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
 95. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "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 ..."
 96. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: "one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."
 97. The allegations pursued as race-related harassment are Allegations 2, 4, 5, 6 and 7.
 98. Allegation 2 is that the first respondent Mr Tilley told the claimant that he needed to be "high calibre" to apply for the position of Assistant Team Manager. Mr Tilley does not recollect using the phrase "high calibre", and in any event denies making any derogatory or offensive remark to the claimant in the context that he the claimant was of insufficient calibre or from a lower species. We have accepted Mr Tilley's evidence to this effect. The context of the meeting was that Mr Tilley was trying to give the claimant advice on applying for managerial roles. We reject the assertion that any of Mr Tilley's comments had the purpose or effect of violating the claimant's dignity or creating the requisite environment for the claimant, and we reject the assertion that it was reasonable of the claimant to perceive that this was the case.
 99. As for Allegation 4 we have already rejected the claimant's assertion that Mr Sharp was in any way aggressive or confrontational during this meeting. Given the context of the meeting we do not accept that it was reasonable of the claimant to perceive that this was the case.
 100. As for Allegations 5 and 6, for the reasons confirmed in our findings of fact above, we have no hesitation in rejecting these serious allegations of collusion and dishonesty which are not supported by any evidence. The evidence of Mr Tilley Mr Sharp and Ms

- Bowen before us was measured and credible, and entirely consistent with the contemporaneous documents which provide a clear record and explanation for the context of the claimant's behaviour, and the wholly reasonable conclusion that it merited a disciplinary investigation. The investigation process did not have the purpose or effect of violating the claimant's dignity or creating the requisite environment for the claimant, and we do not accept that it was reasonable for the claimant to perceive that this was the case.
101. Similarly, with regard to Allegation 7, the commencement of the disciplinary process by Ms Bowen and the decision reached by Ms McConnachie were based on the evidence before them and wholly unrelated to the claimant's race. This process did not have the purpose or effect of violating the claimant's dignity or creating the requisite environment, and given the clear factual matrix which gave rise to that decision, we do not consider that it was reasonable for the claimant to perceive that this was the case.
102. In conclusion therefore we do not accept that any of the respondents committed any unwanted conduct which related to the claimant's race, and which was conduct which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for the claimant. We do not accept that it was reasonable for the claimant to perceive that this was the case. We therefore dismiss the claimant's claim of harassment related to his race.
103. Victimisation s27 EqA:
104. The allegations relied upon as acts of victimisation are Allegations 5 and 7 only, which are respectively the alleged collusion between Mr Tilley and Mr Sharp, and the commencement of the disciplinary process.
105. The protected act relied upon by the claimant was his suggestion that he that he would commence tribunal proceedings. This occurred at the meeting with Mr Tilley on 7 November 2020. We accept that the claimant raised an allegation of less favourable treatment because of his race and suggested that he would take the respondents to a tribunal. In our judgment that is sufficient to amount to a protected act under s 27 EqA because the claimant effectively alleged that the respondents had contravened the discrimination provisions of the EqA and that intended to issue tribunal proceedings.
106. The claimant had also raised other allegations of race discrimination occasionally during his employment, but it is not his case that he was victimised because he raised any of these other allegations of race discrimination.
107. However, in our judgment there was no evidence before us that any of the parties to these proceedings was ever motivated by the claimant's apparent threat that he might issue tribunal proceedings, and there was no causative link between the detriments alleged to have been suffered and the protected act relied upon.
108. With regard to Allegation 5, we have rejected this allegation that there was any collusion or dishonesty between Mr Tilley and Mr Sharp, and it cannot therefore be said to have been any less favourable treatment suffered by the claimant in this respect.
109. With regard to Allegation 7 and the commencement of the disciplinary proceedings, there was detrimental treatment in this respect because the claimant had to face these proceedings. However, for the reasons explained above in our judgment this was an entirely reasonable decision based on the information before Ms Bowen and others, and the decision to commence the process was not taken because of the claimant's indication or threat that he might issue tribunal proceedings. The correct legal test as to the causation or "reason why" detriment has been suffered question is whether the protected act had a significant influence on the outcome - see Warburton v Chief Constable of Northamptonshire Police [2022] EAT, applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL; Nagarajan v London Regional Transport [2000] 1 AC 501; Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 and Page v Lord Chancellor [2021] ICR 912 CA.
110. In conclusion therefore the protected act relied upon had no significant influence on the one remaining allegation of detrimental treatment (Allegation 7) being the commencement of disciplinary proceedings. This was a decision taken for clear and supportable reasons, and it had nothing to do with the claimant's threat to issue tribunal proceedings.

111. We therefore also dismiss the claimant's claims of victimisation.
112. Claims Out of Time:
113. In any event we would have dismissed the first six Allegations of the claimant's claims as having been presented out of time.
114. The claimant first commenced the Early Conciliation process with ACAS against the first three respondents on 2 December 2020 (Day A). ACAS issued the Early Conciliation Certificate in respect of the first three respondents on the same day, namely 2 December 2020 (Day B). The claimant presented these proceedings on 26 April 2021. The claimant relies on a continuing course of discriminatory conduct, but given that he issued these proceedings more than one month after Day B (and therefore does not enjoy any extension of time under the Early Conciliation provisions), in the absence of any continuing course of discriminatory conduct, any claim in respect of an act occurring before the normal time limit of three months before the issue of proceedings (that is to say before 27 January 2021), has on the face of it been presented out of time.
115. Of the claimant's seven allegations, only the last, namely Allegation 7, occurred after 27 January 2021. This is the commencement of the disciplinary process by letter dated 10 February 2021.
116. The relevant case management order made it clear that limitation was a potential issue to be determined at this hearing. The claimant did not present any evidence to explain why proceedings in respect of Allegations 1 to 6 inclusive were not issued within the relevant time limit, and he did not present any evidence as to why it would be just and equitable to extend that time limit.
117. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
118. We have rejected the claimant's various claims of discrimination for the reasons set out above, and there cannot be said to be a continuing course of unlawful discriminatory conduct. For these reasons we would also have dismissed Allegations 1 to 6 inclusive as having been presented out of time.
119. In conclusion therefore the claimant's claims are all dismissed.
120. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 6 to 53; a concise identification of the relevant law is at paragraphs 54 to 64; how that law has been applied to those findings in order to decide the issues is at paragraphs 65 to 119.

Employment Judge N J Roper

Date: 26 October 2022

Judgment sent to Parties: 31 October 2022

FOR THE TRIBUNAL OFFICE