



EMPLOYMENT TRIBUNALS

Claimant: Mr Faisal Abdi

Respondent: TC Facilities Management Ltd

Heard at: Cardiff (Hybrid) **On:** 25-28 July 2022,
Chambers 16 August 2022

Before: Employment Judge R Brace
Members: Mr R Mead and Ms R Hartwell

Representation

Claimant: In person
Respondent: Mr Underwood (HR Consultant)

RESERVED JUDGMENT

1. The claim of unfair dismissal (s.98 ERA 1996) is well founded. The Claimant was unfairly dismissed on 20 January 2021.
2. The complaints of harassment related to race in relation to being referred to as a 'Golliwog' and 'cheeky monkey' (s.26 EqA 2010) are well founded and succeed.
3. The remaining complaints of harassment related to race are not well founded and are dismissed .
4. The complaints of direct race discrimination (s.13 EqA 2010) in relation to suspension, rejecting the Claimant's evidence in relation to comments made to him and claim that 'cheeky monkey' was a racial slur, are well founded and succeed.
5. The remaining complaints of direct race discrimination are not well-founded and are dismissed.
6. The complaint that the Respondent failed to comply with the duty to make reasonable adjustments (s.20/21 EqA 2010) is not well founded and is dismissed.
7. Remedy hearing will be listed for one day on **2 November 2022** (to be confirmed in Notice of Hearing).

WRITTEN REASONS

Preliminary Issues

8. This has been listed as a partly remote hearing, which had been consented to by the parties. The form of remote hearing was video by CVP.
9. The Claimant participated in person on the first day and was accompanied by his cousin as support. The Respondent's representative, the Employment Judge and Mr Mead, one of the non legal members, and the clerk also participated in person on the first day. The Respondent's witnesses participated remotely by CVP, as did Mrs Hartwell, the second non-legal member.
10. On the second and third day of the hearing, only the clerk and the Respondent's representative participated in person. The fourth and final day was a wholly remote hearing (CVP).

The Claims and List of Issues

11. The parties agree that the Claimant's employment ended on 19 October 2020. The Respondent concedes termination of employment on 19 October 2020 for the Claimant's misconduct was unfair on the basis that the sanction of dismissal was outside the band of reasonable responses but say that this was rectified on appeal on 7 December 2020, when the Claimant was reinstated. On that basis, they contend that the dismissal fell away and assert that there had been no dismissal. The Respondent says it reinstated the Claimant and that he was paid from 19 October 2020 to 7 December 2020. It is agreed that during this period, the Claimant did not return to work.
12. Early conciliation started on 26 October 2020 and ended on 26 November 2020. The ET1 was presented on 17 February 2021 [16]. The Claimant brings claims of unfair dismissal, race and disability discrimination and failure to make reasonable adjustments.
13. The Claimant is a black Somalian man and relies on both his colour and his Somalian nationality for the purposes of his race discrimination claim. He relies on chronic post traumatic stress disorder, anxiety and depression for his disability discrimination claims. Disability at the relevant times is conceded, as is knowledge of disability.
14. The list of issues had been discussed at case management on 7 October 2021 and the parties agreed at the outset of this hearing that these remained the list of issues for determination [1-15].
15. In addition, the morning of the first day of the final merits hearing was spent seeking to understand from the Claimant why he had not returned to work after the appeal. This was to understand what acts of the Respondent the Claimant relied on to support an alternative claim, that if the dismissal of 19 October 2020 'fell away' as a result of the reinstatement, that he was in any event, constructively unfairly dismissed. He confirmed that this was a series of events as follows:
 - a. Ashley Creel denying knowledge that the Claimant suffered with PTSD.

- b. When suspending the Claimant:
 - i. the suspension had been taken without investigating/speaking to the Claimant to get his version of events of 14 July 2020 and accepting the evidence of Susan Standing only.
 - ii. the suspension decision had been taken on the basis that the Claimant had been aggressive to Susan Standing and the allegation of fraudulent hours had only been added after the Claimant had complained to Ashley Creel that he had taken Susan Standing's version of the incident of 14 July 2020 without speaking to the Claimant as well.
- c. Within the Grievance outcome:
 - i. there was no apology or explanation to the Claimant for his suspension without preliminary investigation.
 - ii. there was a failure to deal with the Claimant's complaints of race discrimination, either in terms of how the Respondent dealt with race discrimination, indication of process to follow when making a discrimination complaint or any communication/statement that discrimination was not tolerated/unacceptable.
- d. Within the Grievance Appeal
 - i. The Appeal officer dismissed the comment made to the Claimant of being a 'lazy cheeky monkey', as being an 'old school' comment and acceptable and that the Claimant was overly sensitive.
- e. Neither the Claimant's race concerns nor PSTD was supported.
- f. Within the disciplinary process:
 - i. there was insufficient evidence to support the allegation that the Claimant had fraudulently claimed hours.
- g. Within the dismissal appeal –
 - i. The appeal letter did not explain why Susan Standing had not been suspended.
 - ii. the appeal notes said the Claimant was aggressive and rude and were not written impartially but were one-sided.
 - iii. there was no evidence to support the conclusion that the Claimant had fraudulently claimed 26 minutes; and
- h. The Respondent failed to deal with the Claimant's concerns regarding race and disability discrimination.

Bundle

16. The Tribunal was referred selectively to the hearing bundle of relevant documentary evidence ("Bundle"). References to the hearing Bundle (pages 1-262) appear in

square brackets [] below. These are references to the hard copy bundle and not electronic PDF automated numbering.

Witness evidence

17. The Tribunal heard evidence from the Claimant, and for the Respondent:
 - a. Eric Dawson, grievance manager - Operations Manager responsible for the contract for cleaning Nationwide Building Societies premises nationwide ("Nationwide Contract"); and
 - b. Mark Wilson, grievance appeal manager - Operations Manager for a facilities management contract.
18. Whilst a statement from Agnes Becsei, appeal manager on the dismissal decision (Operations Manager for Distribution Contracts), was included in the witness statements before the Tribunal, the Respondent confirmed that she was not attending to give live evidence, having left the Respondent's employment. Her new employer was not willing to allow her time to attend. The Respondent confirmed that they were not seeking a witness order for her attendance and/or asking for a postponement of the hearing. Whilst the Claimant was keen for her to attend, so that he could cross-examine her, he understood that this opportunity was very limited if he had made an application for a witness order for her attendance.
19. Whilst no formal application was made for a witness order for Agnes Becsei to attend, it was suggested by the Respondent's representative that an HR manager could 'adopt' Agnes Becsei's witness evidence and be asked additional questions in chief and then be subject to cross-examination. This suggestion was not acceptable to the Tribunal.
20. No evidence was given by the dismissing manager, Mr Paul Brookes, even though he was still in the Respondent's employment. Mr Underwood indicated that he had not been called as the unfair dismissal was conceded on the basis that the sanction had been too harsh.
21. No evidence was given by Ashley Creel, the Claimant's line manager, who had made the decision to suspend the Claimant, or Susan Standing, the Claimant's co-worker who, the Claimant asserts, had harassed him. Both were still in the employment of the Respondent and the Respondent had chosen not to call either. The Respondent's representative had indicated that Susan Standing had not wished to give evidence and the Respondent had not wanted to compel her to do so.
22. All witnesses relied upon witness statements, which were taken as read, and they were all subject to cross-examination, the Tribunal's questions and re-examination.

Facts

Employment: Commencement and Time Recording

23. The Respondent is a large nationwide organisation which operates as a facilities management contractor. Its predominant services are cleaning and security for third party clients. At the time of the acts complained of, the Respondent employed around 6,000 employees and had a turnover of approximately £80million.
24. One such cleaning contract was for the cleaning of approximately 340 branches of the Nationwide Building Society (the "Nationwide Contract").
25. The Claimant was born in September 1984 in Somalia where he lived until 2001 when he escaped civil war there and came to the UK. He was, at that point, diagnosed with chronic post-traumatic stress disorder ("PTSD") along with depression and anxiety and has since then received treatment for his mental health conditions. That the Claimant is a disabled person at all relevant times is conceded by the Respondent, as is knowledge.
26. Prior to his employment with the Respondent, the Claimant had been employed as a cleaning operative from December 2013 by an organisation known as NBS but, on 22 December 2019, his employment and continuity of employment, transferred to the Respondent by reason of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the "TUPE Regulations"). The Claimant gave evidence that his employment commenced on 9 December 2013, which we accepted as the commencement date, the Respondent having provided no evidence to challenge that as an alternative commencement date of employment with NBS.
27. He was assigned, as one of two cleaning operatives to clean one of the Nationwide's larger branches in Cardiff, under the Respondent's Nationwide contract where on 22 December 2018, the date of transfer under the TUPE Regulations, he worked in the Respondent's employment. He was contracted to work 15 hours per week, Monday to Saturday. There was no evidence that either the Claimant or the Claimant's employer had any issues or concerns regarding his employment prior to working for the Respondent and, save for an issue regarding overtime in April 2019, the Claimant had no issues regarding his employment with the Respondent.
28. From the transfer of the contract in December 2018, the Claimant reported to Ashley Creel, Team Leader, who had responsibility for the Cardiff Nationwide Branch. Ashley Creel, in turn, reported to Paul Brookes. Paul Brookes in turn reported to Eric Dawson, Operations Manager for the Nationwide Contract.
29. From around July 2019, the Claimant worked alongside Susan Standing, when she started working as the second cleaning operative at that branch.
30. No contract of employment for the Claimant was provided in the Bundle. A copy of the Disciplinary Policy only was provided and no Grievance Policy or procedure, no Equal Opportunities policies or evidence of what, if any training, any of the Respondent's employees had received on equal opportunities or equal opportunities monitoring were provided to us.
31. In response to a question from the Tribunal, the Claimant gave evidence that he was not aware of any policies of the Respondent and had never been provided with a copy of any policy (save for being provided with a copy of the disciplinary procedure when

he was subject to disciplinary which resulted in dismissal). He also gave evidence, which we accepted, that he had never been trained on the Respondent's policies and procedures. A text in the Bundle [154] indicated that the Claimant had asked for such policies in 2019 but there was no evidence that these had been sent to him. We found that they had not.

32. We did find however that:

- a. the Claimant had wished to bring a grievance regarding some overtime he felt he had worked and not been paid for in April 2019;
- b. that he had been advised to contact HR;
- c. that he had contacted HR; and
- d. was told that if he had a concern that he should put such concerns in writing.

33. Whilst we accepted that the Claimant had been unable to undertake such a step at the time, due to his health circumstances, we did find that he was aware of how to complain if he had an issue in the workplace despite not having received a copy of the grievance procedure.

34. We also found on the evidence before us that neither Eric Dawson nor Mark Wilson had any experience in dealing with complaints of race discrimination, neither having conducted any grievance investigations prior to the Claimant's complaint. The Respondent had no equal opportunities policies for staff, no discrete policy for dealing with complaints of discrimination including harassment, and neither were we persuaded that either Eric Dawson or Mark Wilson had received any training on equal opportunities as:

- a. Eric Dawson could not recall having such training and could only say that he presumed such policies existed, not that he knew that they did; and
- b. Mark Wilson gave evasive evidence that he '*would have had*' training on equal opportunities which he believed he had received in the last 12 months or so, and when asked where the policies could be located, responded '*I believe it is in the company handbook, I would think.*'

35. Whilst we had not heard evidence from either Agnes Becsei or Susan Standing, we also found, on balance of probabilities and based on the evidence we had heard from Eric Dawson and Mark Wilson, that it was more likely than not, that neither had they.

Time and attendance system

36. The Respondent operated a time and attendance recording system known as "Timegate", which allowed the employees to check in and off work. It is a system that links directly to the Respondent's payroll. The Respondent's 'Control Room' was responsible for shift scheduling and the Timegate clocking system,

37. As most employees, including the Claimant, worked on remote customer sites, Timegate was accessed via an application or 'app' on the employee's mobile phone, through which the employee would record their clocking in and out times. The app only allowed employees to log on, and only worked when the employee was physically located in the relevant customer site. If app did not function, an alternative method of

clocking in was also provided where the employee would need to use the Nationwide branch telephone landline to telephone into the Control Room to confirm their start time. Timegate was programmed to only allow a telephone booking from that telephone number and no other.

38. The employee's normal working shift was pre-logged onto Timegate and employees had a short window of opportunity when they could arrive at the branch, to log in using the app. Failure to clock in the relevant window (before or after commencement of shift,) would prevent the employee clocking in using the app when the employee would need to contact the Control Room, or their line manager, to make a manual adjustment for the employee's start time.

July 2020 clocking concerns

39. From April 2020, the Claimant was absent from work stated to be because of stress at work [212]. He returned to work in June 2020.
40. On 8 July 2020, the Control Room contacted Ashley Creel by email to advise him that the Claimant had contacted them at 17.54 that day and had asked them to manually clock him in at 17.30 [79]. There is a dispute between the parties as to what was said by the Claimant to the Control Room that day. At the subsequent disciplinary hearing the Claimant disputed that he had asked the Control Room to be clocked in at 17.30.
41. Eric Dawson gave evidence that the Control Room email was 'self-explanatory' (§14 Dawson WS), and that Ashley Creel was to follow up and investigate for 'obvious reasons' (§15 Dawson WS). The document provided at [79] appears to be part of the message only however. The only information which we found 'self-explanatory', was that the Control Room recorded that the Claimant had called them on 8 July at around 17.54 to amend his start time to 17.30.
42. Eric Dawson also gave evidence, which we did accept, that there had been discrepancies in the start and finish times of cleaning staff in the Nationwide branch and that this was being monitored by Ashley Creel hence the Control Room had highlighted the call.
43. We therefore found that the Respondent had information that the Claimant had reported as starting work at a time later than the time he had reported and that there were reasonable concerns to be investigated regarding the Claimant's time-keeping that day. Whilst it was suggested in evidence that the concerns held were wider than that one instance, no evidence was before us that this was the case, nor indeed presented at the disciplinary hearing for the Claimant, and we made no finding in relation to that.
44. Ashley Creel appears to have visited the Cardiff Nationwide Branch after the contact from the Control Room, speaking to the branch manager there and viewing the CCTV held there. What the CCTV demonstrated and what else happened in the period from 8 July 2020 to 23 July 2020, when the Claimant was subsequently suspended, if anything, is less than clear and we have no evidence as to what, if any, investigation did take place in relation to the fraudulent claim allegation, not having had any evidence from Ashley Creel, and Eric Dawson being unable to assist.

45. Either way, at some point it appears that a hand-written statement from the Claimant's co-worker at the Cardiff Nationwide Branch, Susan Standing, was created. This was a short-handwritten statement and contained in the Bundle [80]. It stated as follows:

"I Susan Standing heard Faisal call Control Room on the 8th of July and tell them he came in at 17.30 when he actually got to sight [sic] at 17.50.

On the 14/7/20 Faisal told me not to walk thro his Area he told me to go to my own even though I have to walk that way to get my Personal Belongings And cleaning stuff i feel like I was threatened [sic] not to go there And I don't want to Be on my own with him anymore.'

46. We have been provided with no evidence from any of the Respondent's witnesses why such a statement contained information relating to 14 July 2020 in addition to matters relating to the Claimant's contact with the Control Room on 8 July 2020, or when it was prepared but, as the statement referenced an incident on 14 July 2020, it was clearly written at a point on or later than 14 July 2020, some 8 days after the alleged clocking offence on 8 July 2020.

Suspension

47. As indicated, what Ashley Creel was doing by way of investigation in the period up to 23 July 2020 is not within the evidence but, it is not in dispute that on that date, Ashley Creel telephoned the Claimant to advise him that he was being suspended on full pay.
48. The Claimant asserts that he was told by Ashley Creel that this was because of his conduct towards Susan Standing, and that only when the Claimant told Ashley Creel that Susan Standing had been rude to him, that Ashley Creel had then added that the Claimant had also been suspended for fraudulent claims on time.
49. The Claimant's oral evidence of that conversation was reflected in the Claimant's written grievance submitted on 24 July 2020, the following day [52]. We accepted the Claimant's evidence on this point, particularly as it was supported by that contemporaneous document and found it likely that his version of events was how the conversation had unfolded.
50. The Claimant's suspension was confirmed in a letter of the same date [50]. The letter stated that the Claimant was suspended pending investigation into allegations of fraudulently claiming hours when he had called the Control Room to book on when he was not on site, and unacceptable behaviour towards an employee resulting in them feeling threatened.
51. We have no evidence on what investigation if any, was undertaken as a precursor to suspending the Claimant into the allegation of unacceptable behaviour towards Susan Standing. We found it more likely than not that there had been no investigation for a number of reasons:
- a. In §63 of his witness statement, Eric Dawson gave evidence of a conversation he says he had with Ashley Creel regarding Ashley Creel's reason for

suspending the Claimant in which he stated that Ashley Creel told him that the principal reason was the potential fraudulent claim but that Susan Standing's statement also '*contained this argument in which he also felt very aggrieved he threw that in also*';

- b. When asked to clarify what he meant by this statement, Eric Dawson was unable to do so and his responses were unclear and confused. We found that he did not recognise his own statement and could not explain clearly what he had written down in that paragraph.
52. We also found that no steps were taken by Ashley Creel to speak to the Claimant to obtain from the Claimant his comments on Susan Standing's allegations prior to his suspension or indeed any explanation as to why Ashley Creel would be 'aggrieved'.
53. We also found that there was no credible evidence to support Eric Dawson's statement that the predominant reason for suspension was the fraudulent hours claim on the hours claim.
54. Eric Dawson had confirmed in live evidence that:
- a. it would be 'very rare' to suspend an employee on the basis of another employee's report of an altercation with them;
 - b. that if an investigation into a clocking offence indicated some fraud, the Respondent could suspend; but
 - c. that he did not consider the one instance of clocking that was alleged against the Claimant, had been sufficient to suspend.
55. We did not accept Eric Dawson's evidence, given in cross-examination, that the only reason that the Claimant had been suspended was because of the hours claim allegation. This was contrary to his own evidence and the written documentation in the Bundle that we were referred to, including the suspension letter which confirmed that the Claimant had been suspended pending investigation into fraudulently claiming hours *and* unacceptable behaviour towards colleagues [50].
56. We found that the Claimant had been told that he was suspended for both the fraudulent claim and the allegation brought by Susan Standing, but that suspension for neither allegation was a routine step that this Respondent would take; that it would be very rare for this Respondent to suspend on the basis of a report by an employee of an altercation with another employee, and that one instance of clocking as alleged was insufficient grounds for this Respondent to suspend. We found that the suspension of the Claimant not a reasonable step in the circumstances for Ashley Creel to have taken and that why Ashley Creel had been motivated to suspend for these allegations or be 'aggrieved', was not in the evidence before us.

Invite to disciplinary

57. The letter confirming the suspension also included an invite to the Claimant to attend a disciplinary hearing on 28 July 2020, stating that the purpose was for the Respondent to consider both allegations. The letter informed the Claimant that if true, the allegations could result in his employment being terminated. He was advised of the

right to be accompanied and asked to contact human resources if he required an interpreter.

58. The letter enclosed a copy of:
- a. the Respondent's disciplinary procedure [148].
 - b. the email from the Control Room [79]; and
 - c. a copy of Susan Standing's statement [80].

Grievance

59. On 24 July 2020, the Claimant submitted a grievance headed '*Unfair Suspension*', prepared with the assistance of his cousin [52]. In that letter, he confirmed that he wished to make a formal complaint against Susan Standing and Ashley Creel. He stated that he believed he had been racially discriminated by Ashley Creel and Susan Standing.
60. In relation to Susan Standing, he complained that she had:
- a. On 14 July 2020, been hostile towards him, calling him 'lazy', telling him '*you are being watched*' '*they want to get rid of you*', '*they want to kick you out*;', '*they are after you*', '*the company is targeting you*';
 - b. been following him, giving him dirty looks and had called him a '*lazy, cheeky monkey*';
 - c. He asserted that he had told her to stop following him or speak to him like that and that she had responded '*you are a fucking asshole, nasty*' and that she had continued to swear at him.
61. He stated that he had left work after the heated exchange and had felt traumatised. He confirmed that he had not spoken to her after the incident. He alleged that she been bullying him for some time, telling him that the Respondent wanted to get rid of him. He stated that this was racial and verbal abuse that left him traumatised. He did not give any other or further examples of racial abuse.
62. In relation to Ashley Creel, he stated that he believed that Ashley Creel had added on the allegation of the fraudulent hours, when suspending him, to cover himself and the Respondent from racial discrimination. He confirmed that he suffered from PTSD.
63. We found that in that letter the Claimant clearly indicated that he wished to make a formal complaint against both Susan Standing and Ashley Creel asserting that he had been racially discriminated by both.
64. As a result of the grievance, the disciplinary was placed on hold so that the Claimant's grievance could be investigated.
65. On 26 July 2020, the Claimant's father passed away in Somalia. The Claimant's evidence, which was not challenged by the Respondent's representative and which we

accepted, was that this was a particularly difficult and stressful time for him and that he felt suicidal during this period.

Grievance meeting

66. By way of letter dated 28 July 2020, the Claimant was invited to attend a grievance meeting on 31 July 2021. This was held by Eric Dawson as grievance investigator and manager [54]. Again, the Claimant was advised of the right to be accompanied and asked to contact the Respondent's HR if he required the services of an interpreter.
67. The meeting was re-arranged because of the death of the Claimant's father and was held by conference call on 5 August 2020.
68. Within the Bundle is a copy of the note prepared [60]. It is not a verbatim note, and it was challenged by the Claimant at that time. We considered these notes in conjunction with the Claimant's own summary of that meeting as set out in his subsequent email of 7 August 2020 [62]. The meeting lasted approximately 40 minutes.
69. We found that at the meeting:
 - a. the Claimant again raised concerns regarding the conduct of Susan Standing asserting that they were racist comments and passive aggressive action against him, again repeating that she had called him a 'cheeky monkey';
 - b. The Claimant explained why he had not raised concerns earlier. He said he had been frightened and grieving and that he had tried to ignore her. He said that he was not comfortable speaking to his line manager, Ashley Creel, as he had suspended him without hearing his side of what had happened with Susan Standing;
 - c. The Claimant asserted that he felt bullied and victimised and that he had no one to ask for assistance. He had felt a victim of racial abuse and that Ashley Creel did not support him;
 - d. He also confirmed that he had not told Ashley Creel he needed support; and
 - e. He informed Eric Dawson that he had PTSD and that HR had given him information on mental health and who he could turn to for support.
70. The notes reflect at the meeting Eric Dawson noted the following action points and confirmed that he would investigate:
 - a. the Claimant's allegations against Susan Standing;
 - b. Why the Claimant had not been given a chance to explain his version of events before being suspended; and
 - c. That he would ensure that the Respondent made information on mental health be made more accessible and that line managers would know how to support staff.

71. We heard in live evidence from the Claimant that he had been asked by Eric Dawson if he needed support and he confirmed that he did not. He also confirmed that HR had provided him with information regarding organisations that could provide mental health support and he was encouraged to look at that information. The Claimant had not however read that information. He now asserts in this hearing for the first time that HR and/or an impartial manager should have contacted him and should have been checking up on him on a weekly basis to see how he was and that the Respondent should have made contact with his next of kin to check on him. He did not tell the Respondent that he expected or believed he needed this support at the relevant time and this action did not take place.

Grievance investigation

Susan Standing incident

72. We found that the 'investigation' into the Claimant's allegations against Susan Standing, consisted of a brief telephone conversation with Sandra Sandford. He accepted in cross-examination that he had not undertaken a formal investigation and had only, what he referred to in live evidence as, a 'long conversation of 10 minutes'. Following that conversation, he concluded that there had been a disagreement between the two employees.

73. The Tribunal had no notes of that discussion included in the Bundle and no notes had been disclosed to the Claimant. Eric Dawson confirmed, in response to a question asked by the Tribunal, that there had been no note-taker but that he had taken some hand written notes; that he had not disclosed them as he had not been asked if he had kept any notes. He confirmed that he did not now have easy access to those notes as they were in a locked cupboard in his office 30 miles away and was not sure if they had been shredded. The Respondent's representative also confirmed that he had not asked Eric Dawson if he had prepared any notes of the meeting.

74. We therefore only have the witness evidence from Eric Dawson as to the extent of that discussion. He gave evidence, which we accepted that Susan Standing:

- a. Accepted that she told the Claimant that the manager of the Nationwide branch had spoken to her direct regarding issues he had about the cleaning of the branch at the time and that told him that they would both be under scrutiny over cleaning standards and as a result their jobs could have been part of that conversation;
- b. Denied calling the Claimant a 'cheeky monkey'.

75. Eric Dawson concluded, from his personal knowledge of the Nationwide manager, that he was confident that Susan Standing had taken his concerns regarding cleaning standards seriously and that this was why she had passed those comments on to the Claimant; that a disagreement had arisen between the two and there had been a breakdown in the relationship between the two cleaners.

76. He gave conflicting evidence however on his assessment of whether Susan Standing had in fact called the Claimant a 'cheeky monkey'.

77. In his written evidence¹, Eric Dawson had stated that it was a 'classic "*he said, she said*". In contradiction to this statement, had however been very clear later in his written evidence², and had repeated in live evidence, that rather than be unable to form a view as to whether such a comment had been made, that in fact he did not believe Susan Standing had made such a comment. He explained that he believed her as she had '*absolutely denied*' making that statement and was '*absolutely mortified*'
78. He also was of the belief that if she had made such a comment it did not '*have any racial undertone or indeed was racist in any way*'.
79. He provided no explanation why he did not believe the Claimant or why he had come to the conclusion that such a comment was not a racial slur. We also had no explanation why he did not tell the Claimant that, having investigated, he believed that the words had not been said to him by Susan Standing.
80. In his evidence, Eric Dawson also accepted that he had suggested to Susan Standing that 'cheeky monkey' was the sort of comment that someone of her generation may make in the context of a discussion about work and perhaps not made with the intention to offend. No explanation was provided why Eric Dawson would have made such a suggestion to Susan Standing.
81. When asked by the Claimant whether he had considered the term 'cheeky monkey' could have had negative racial tones, Eric Dawson accepted that potentially it could, and that would be a serious allegation of race discrimination, but that equally it could have just been a turn of phrase or a term of endearment and that it depended on the context in which it was made. He was insistent that it depended on context. He provided no explanation why however, he had not considered the context that the comment had in fact been made i.e. a white employee to a black employee during a disagreement in work which, in his words, '*probably....got a bit personal*'.
82. We found that despite the actual context, Eric Dawson had not taken that context into account or, had considered context and ignored that context, choosing instead to accept Susan Standing's denial and suggest an explanation that had not been proffered by her.

Suspension

83. Eric Dawson also telephoned Ashley Creel but he did not consider that his investigation was to explore why Ashley Creel suspended or to investigate concerns that the act of suspension was a form of cover for allegations of race discrimination. He considered that he was investigating the process of suspension only.
84. He did not investigate the Claimant's complaint that Ashley Creel had added on the allegation of the fraudulent hours when suspending him to cover himself and the Respondent from racial discrimination.

¹ Eric Dawson WS §54

² Eric Dawson WS §57

85. In cross-examination, when asked to explain why the Claimant had been suspended following Susan Standing's complaints against him, but that in contrast, Susan Standing had not been suspended when the Claimant had put in his complaint about her, Eric Dawson gave evidence that this was because the Claimant's complaint into the conduct of Susan Standing had been dealt with as a 'grievance', but that Susan Standing's complaint against the Claimant was not treated as a grievance, but as a complaint. He did not accept that her written complaint amounted to a grievance on the basis that she had not asked to raise it a grievance.
86. The Tribunal found that this was not a logical or reasonable explanation for the difference in treatment of the two complaints.

Health programme

87. Eric Dawson also contacted HR to understand what programme of health support the Respondent provided to employees with mental health issues and was informed that an employee assistance programme in place 'Heath Assured' had yet to be launched but would include support from qualified counsellors and that contact would be confidential with the employee and that body. He was informed that this information had been already provided to the Claimant by HR and that the Claimant had been given access to that assistance programme already.
88. We accepted that this had been the case and that the Claimant had access to a confidential advice and support service provided by the Respondent that was conducted on a confidential basis. We also found that the Claimant did not contact such a body and did not seek such assistance.

Grievance Outcome

89. On 10 August 2020, the grievance meeting was reconvened, and again brief notes of that meeting are contained in the bundle [66]. We found that Eric Dawson told the Claimant that workshops for managers would be held so that they were aware of the help and support offered to employees struggling with mental health and the Claimant was encouraged to look at the information sent to him on the employee assistance programme.
90. Eric Dawson also told the Claimant that:
- a. he had been suspended for fraudulently claiming hours. He did not say that he had only been suspended for that allegation;
 - b. Susan Standing had confirmed to him that:
 - i. she had told the Claimant that the branch felt that there were poor cleaning standards rather than tell her manager.
 - ii. the Claimant had been aggressive towards her and that he had called her a 'fat ugly bitch'.
 - iii. she denied '*saying some things to Faisal but not denied all of them*'.

- c. once the disciplinary had concluded there would be a meeting to go through the issues and reconcile the cleaners.
91. The outcome was confirmed by letter dated 12 August 2020 [67]. The letter needs to be read in its entirety and is incorporated by reference.
92. In relation to the approach taken by Eric Dawson to the Claimant's grievance, we made the following additional findings:
 - a. We found that there was no reasonable investigation into the allegations of race discrimination. We did not find that a 10-minute informal conversation regarding allegations which, by Eric Dawson's own evidence, were serious allegations of race discrimination against another employee, was a reasonable investigation in the circumstances.
 - b. Further, we did not consider it a reasonable approach for Eric Dawson to make the suggestion, to the individual accused of making a racist comment, that was the sort of comment that someone of her generation may make in the context of a discussion about work and perhaps not made with the intention to offend. Rather, it indicated to the Tribunal that he was closed off to the possibility that, in the context that such a comment was alleged to have been made, such a comment could have been made with the purpose of discriminating.
 - c. Eric Dawson failed to inform the Claimant that he had concluded that the comment 'cheeky monkey' had not been made and failed to make any reference, either in the meeting of 10 August 2020 or letter of 12 August 2020, on whether or not he considered the conduct of Susan Standing to amount to race discrimination.
 - d. Eric Dawson failed to deal with the allegation of race discrimination made against Ashley Creel in suspending the Claimant. Whilst Eric Dawson stated that the suspension was in relation to the allegation relating to the claims of hours only, he did not indicate his view on whether the Claimant should ever have been suspended and/or what his conclusions were on the complaint made in the grievance from Claimant that Ashley Creel had suspended him as an act of discrimination.
 - e. There was no reason why Eric Dawson should have come to the view on what he had been told, that the only reason for suspension was the fraudulent hours. This was not a reasonable conclusion.
93. Eric Dawson reiterated that he understood that HR had shared the Respondent's health and wellbeing support programme with the Claimant, and he was encouraged to use this. The Claimant was advised of the right of appeal.

Grievance Appeal

94. On 16 August 2020, by way of email the Claimant appealed the outcome of the grievance [68] in which the Claimant raised the following:
- a. That his suspension had still not been justified and that he considered it a lie that his suspension related just to fraudulent hours;
 - b. He had been given no proof or basis to show that he had committed fraud and requested evidence of that; and
 - c. He complained that nowhere in the letter was there anything being done by HR to rectify racial abuse he had experienced from Susan Standing or in the manager suspending him whilst allowing Susan Standing to go unchallenged.
95. He stated that he considered that the grievance outcome had done nothing to address his grievance but had brushed over racial bullying and that he had been suspended wrongfully and accused of a sackable offence.

Grievance Appeal

96. On 21 August 2021, Mark Wilson, Contract Manager wrote to the Claimant confirming that he had been appointed to consider the appeal and invited the Claimant to an appeal hearing by conference call [69]. This was subsequently re-arranged and held on 3 September 2020. Again, we were provided with notes of the meeting [72] which we did not consider to be full or detailed as they were prepared by Mark Wilson and by his own admission, he struggled to take detailed notes.
97. Again the notes need to be read in their entirety, but in brief:
- a. The Claimant confirmed when asked, that he considered 'cheeky lazy monkey' a pejorative term; and
 - b. He repeated that he considered Ashley Creel in suspending him, had racially discriminated him.
98. As Eric Dawson had at the original grievance meeting, Mark Wilson also appears to have suggested to the Claimant that Susan Standing as an older woman, may have used such a comment as a '*common term of endearment*' and that he was to '*appreciate there are cultural differences in language*' which the Claimant might find offensive or racially motivated, but '*could just have been lack of sensitivity*' to the Claimant's ethnicity.
99. The Claimant was asked if he believed she had used the term 'monkey' as the Claimant was '*coloured*'. The Claimant confirmed that having worked with her for over a year, he believed that she had used such a term as a result of his colour. He expressed concerns that his claims were being dismissed and he was accused of being aggressive and that his work was not good.
100. The Claimant was informed that Susan Standing had denied calling him a cheeky monkey and that she had alleged he had started the disagreement by calling

her a 'fat ugly bitch'. The Claimant repeated that she was racist towards him and that Ashley Creel despite being aware, had done nothing.

101. Mark Wilson informed the Claimant that he felt it would be hard to label either Susan Standing or Ashley Creel as racist based solely on the interactions relied on by the Claimant. In his witness statement Mark Wilson had given evidence that he had concluded that there had been no accusations of racial abuse or racial bullying or a '*sequence of events that may have been related to racial issues*'³. He also concluded the appeal extended the original grievance by suggesting that the decision to suspend was also racially motivated.

102. We found that both were unreasonable conclusions to have reached taking into account the Claimant had repeatedly and expressly stated that he considered both Susan Standing's conduct and Ashley Creel's decision to suspend to be racially motivated and the potential of 'cheeky monkey' to be said as a racial slur when said to a black worker by a white worker in the context of a disagreement between the two.

103. Mark Wilson did subsequently speak to Eric Dawson who informed him that the Claimant had accused Susan Standing of calling him a '*cheeky monkey*'. Again, Mark Wilson concluded that this was not a racist remark⁴. However no further investigation was undertaken by him and we found that this conclusion had been made without reference to the circumstances in which the comment was said to have been made i.e. by a white employee to a black co-worker during a disagreement in work and without any further investigation.

104. The Claimant confirmed that he was opposed to mediation as he considered that trust had gone.

105. By way of letter dated 9 September 2020, the Claimant received the outcome of his appeal [80]. His appeal was not upheld on the following basis:

- a. As Susan Standing had denied the allegations and there were no witnesses, he could not conclude that such a matter had been said;
- b. Susan had admitted that there was a dispute and the Claimant was urged to attend mediation so that an agreement could be reached on how to move forward.

106. The Claimant was informed that this was the final stage of the grievance appeal.

Disciplinary hearing

107. On 7 October 2020, the Claimant attended a disciplinary meeting having been sent a letter of invite dated 5 October 2020 [78].

³ Mark Wilson WS §10

⁴ Mark Wilson WS §16

108. The letter again confirmed that the hearing was to consider both allegations that he had:
- a. fraudulently claimed hours when he had contacted the Control Room to clock him in/book him on when he was not at site; *and*
 - b. unacceptable behaviour towards a colleague resulting in them feeling threatened
109. The Claimant was warned that if considered gross misconduct, this could result in his summary dismissal. He was advised that he could attend with a companion and also if he felt he would need an interpreter.
110. The meeting took place before Paul Brookes, Ashley Creel's line manager [83]. No evidence was given by Paul Brookes albeit he is still employed by the Respondent, the Respondent taking the view that his evidence was not relevant as the Respondent conceded that the decision he took to dismiss was unfair on the basis that the sanction of dismissal for the allegation of claim of hours was not within the bands of reasonable responses.
111. We had in the Bundle a copy of the notes taken by a note-taker [81]. The notes reflect that the allegations were for *'fraudulently claiming hours and unacceptable behaviour towards a colleague'*.
112. Despite the letter of invite and this documentation referring to both allegations, the meeting appears to have discussed exclusively, the allegation in relation to the claim of hours. The notes reflect that Paul Brookes asked the Claimant no questions about the allegations from Susan Standing of unacceptable behaviour, despite the Claimant raising that he considered she was lying and that she had been racially abusing him, and that both she and Ashley Creel had targeted him.
113. The Claimant also confirmed on cross-examination that only the hours issues was discussed but despite this he had believed that the disciplinary hearing was related to *both* the hours and the alleged behaviour towards Susan Standing. We considered this to be a reasonable belief taking into account the documentation (both in terms of suspension and invite to the hearing) referred to both, and the notes reflect that he was told that the hearing related to both.
114. We did not accept that it was clear that the disciplinary was only to deal with the fraudulent claim of hours and were not persuaded that either Eric Dawson or Mark Wilson had made this clear to the Claimant, either during their meetings with him or in the documented notes of the meetings or follow up letters from them.
115. In relation to the hours, the Claimant disputed the content of his call to the Control Room, asserting that he had come in to work at 5.56pm and had asked them to change his start time to that time i.e. 5.56pm, as his shift was set for a 5.00pm start. He denied that he had asked the Control Room to change it to 5.30pm; that the Control Room were lying.

116. Susan Standing's statement does appear to have been raised with the Claimant, but only in the context that she had given a statement confirming that she had heard the Claimant asking the Control Team to record his start time as 5.30pm.
117. The meeting notes do not reflect that the Claimant was told that the allegations raised by Susan Standing were no longer being pursued as a disciplinary matter against the Claimant.
118. The Claimant attended a reconvened meeting on 19 October 2020 when he was told he was dismissed with immediate effect following further evidence of claiming hours fraudulently [85].
119. The notes of the meeting of 19 October 2020 reflect that the decision had been made to dismiss the Claimant following evidence of claiming hours. No reference is made to the allegation of conduct towards Susan Standing. Likewise, the letter of 20 October 2020, makes no reference to the allegation of conduct towards Susan Standing.
120. Despite our finding that the disciplinary hearing was held to consider both allegations, as a result of the content of the discussion at the disciplinary meeting before Paul Brookes and the letter dismissing the Claimant, we did find that the Claimant was dismissed for reasons related to his conduct in relation to fraudulently claiming hours only.
121. We were not persuaded that he was dismissed for both the fraudulently *and* his conduct towards his Susan Standing.

Appeal against dismissal

122. On 25 October 2020, the Claimant submitted his letter of appeal [88] in which he complained of the following:
- a. That he had been dismissed for both the allegations of aggression and claim of hours;
 - b. He had been treated less favourably than Susan Standing who had not been suspended;
 - c. He had not been given a proper opportunity to defend himself before the decision to dismiss had been made;
 - d. No regard had been given to the fact that his parents had recently died, and he suffered from PTSD; and
 - e. He had been racially abused and referred to by Susan Standing as a 'monkey', which he had found to be offensive and hurtful.
123. 26 October 2020, the Claimant contacted ACAS and commenced early conciliation.

124. On 16 November 2020, the Claimant attended his appeal against dismissal before Agnes Becsei. Whilst the Tribunal had been provided with an unsigned, undated witness statement from Agnes Becsei, she did not attend to give evidence. From our review of the contemporaneous notes of the disciplinary appeal hearing [93], we made the following findings on balance of probabilities:
- a. The Claimant was asked to speak slowly and calmly on a number of occasions but there was no evidence of aggression and rudeness within the notes;
 - b. The Claimant repeated that he felt that had been subject to discrimination by Ashley Creel and Susan Standing and that his allegations of discrimination had not been dealt with;
 - c. The Claimant complained that Susan Standing should have been suspended as she had called him a lazy cheeky monkey. In that context, the notes reflect, and we found that in response Agnes Becsei stated that she had read the grievance and disciplinary notes and that she wanted to '*say that it is a term that some people can and do use at times and it is something people can use in conversation....*';
 - d. When asked for examples of micro-aggression that the Claimant had been subjected to by Susan Standing, he described how she had told him that he looked like a 'golliwog', a doll-like character in the form of a caricature of a black minstrel. He asked her not to call him that as it was offensive and that in response she had looked up and shown the Claimant a picture of a golliwog;
 - e. The Claimant also asserts that he felt that she was being critical of his work but gave no evidence as to what Susan Standing said or did to make him feel as though she was being critical;
 - f. He explained he had not raised earlier as he had been scared of being called a liar and that he felt intimidated by Ashley Creel and Susan Standing;
 - g. He alleged that Ashley Creel had taken advantage of his poor mental health.
125. Agnes Becsei told Claimant that there were two possible outcomes: she could uphold the decision or overturn but that if she decided to reinstate the Claimant then how he could work with Susan Standing would need to be considered.
126. We found that the first time that the Claimant had alleged that Susan Standing had called him a golliwog was during that appeal hearing. In cross-examination, the Claimant was asked why he had not raised in his earlier grievance that Susan Standing had compared him to a golliwog. His response was that he had not been asked for other examples, that he was extremely unwell due to his PTSD, had been feeling suicidal and had not been thinking straight. He felt that the grievance meeting had been very brief, and that if he had been given the opportunity to elaborate, he would have recalled the comments, but he had been unwell with no support. He also explained that he had been concerned that his complaint would not have been dealt with, as his previous complaint to HR regarding his overtime had not been dealt with.

We accepted that as a reasonable explanation of why the Claimant had not complained about this comment earlier.

127. On 7 December 2020, the Claimant attended a further meeting when he was informed of the outcome of the appeal. Notes of the appeal hearing were contained in the Bundle as was a transcript of a tape recording of the meeting [131] which we accepted as an accurate record of the proceedings.
128. The Claimant was informed that she had found:
- a. no evidence of racial abuse;
 - b. that the Claimant had been offered support, as soon as the Operations Manager became aware of the Claimant's PTSD, but had not accepted that support; and
 - c. evidence that the Claimant had contacted Control Room to change the commencement of his start time on 8 July 2020 to 5.30pm.
129. She confirmed she was reinstating the Claimant, as only one incident of a clocking offence did not support a decision to dismiss. However, we found that the reinstatement was conditional as, for the Claimant to be reinstated, he had to agree to undergo mandatory mediation with Susan Standing. The Claimant indicated that he was not prepared to engage with mediation.
130. On 9 December 2020, Agnes Becsei wrote to the Claimant confirming her outcome [139]. The letter indicated that if an investigation had been undertaken into Susan Standing, the contents and outcome would not be shared with the Claimant, but it was confirmed that a meeting had been held with her after the Claimant had raised the allegation that she had been racially abusive. We make no positive findings as to what that meeting dealt with.
131. With regard to the term 'cheeky monkey', it was repeated that Susan Standing had denied using such a term and indicated that in any event such a term was '*quite often used without having any intention of discriminating anyone racially*'.
132. No reference was made to the allegation made in the meeting that the Claimant had been compared to a golliwog. Whilst Agnes Becsei has not given live evidence, neither does her statement contain any reference to that allegation. Indeed, we have had no evidence from the Respondent in relation to this allegation and claim.
133. We found that the conclusion by her, that there was no evidence of racial abuse, was not supported by any independent investigation by her of the 'golliwog' comment or indeed any other comment. It also appears that she adopted the same approach of Eric Dawson and Mark Wilson after him, of suggesting to the Claimant that such a comment i.e. 'cheeky monkey', was normal turn of phrase that had been misinterpreted if it had been said.
134. The Respondent informed the Claimant that he was being reinstated, but that he must engage in mediation with Susan Standing. Mediation was arranged for 21

December 2020 and, by way of email dated 16 December 2020, the Respondent wrote to the Claimant confirming that the mediation was to be chaired by Eric Dawson [142]. The email stated that the purpose of the mediation was not to discuss any previous meetings or issues, as these matters were now closed, it was to find ways of working moving forward following reinstatement [142].

135. On 21 December 2020 the Claimant emailed the Respondent and confirmed that he was refusing mediation with Susan Standing. No reference was made to refusing reinstatement and we did not find that the Claimant refused reinstatement [144].
136. On 20 January 2021, the Respondent wrote to the Claimant confirming that as he had turned down the offer of reinstatement and mediation, the original dismissal remained effective as at the original date of 19 October 2020 [147].
137. We found that the Claimant was dismissed not on 19 October 2020, but on 20 January 2021 on receipt of that letter and that the reason for the dismissal at that point was not the Claimant's conduct but that the Claimant refused to engage in mediation with Susan Standing.

Harassment Allegations

138. In relation to the specific conduct of Susan Standing relied on by the Claimant for his s.26 EqA 2010 harassment claims, we made the following findings on the balance of probabilities and on the evidence before this Tribunal, evidence which did not include the witness evidence of Susan Standing:
- a. That on or around October/November 2019, Susan Standing had told the Claimant that he looked like a 'Golliwog', had shown the Claimant a photograph of a golliwog on her telephone and that the Claimant had asked her not to call him this as he had found this offensive. The Claimant was not challenged on his evidence in cross-examination, there was no evidence from the Respondent that such a comment had not been made and the Respondent had not investigated this allegation at any time. We accepted the Claimant's evidence which, despite not having been raised until after his dismissal, we found credible and on the basis that we accepted the Claimant's explanation for the delay in raising this as a concern;
 - b. That there had been a disagreement between the Claimant and Susan Standing on or around 14 July 2020 after Susan Standing had been notified by the Nationwide branch manager that there were concerns regarding the cleaning of that branch. We did not find on balance of probabilities that she had criticised his work or given him dirty looks although we did conclude that it was more likely than not that she did tell the Claimant that they were being monitored and could lose their jobs. We also accepted that following the Claimant whilst he worked may have made him feel uncomfortable and that the Claimant may have felt that she was giving him dirty looks;
 - c. We also found that it was more likely than not that she had called the Claimant a 'cheeky monkey' during that conversation. Whilst Eric Dawson had concluded

that she had not, we accepted the live evidence of the Claimant, evidence which the Claimant had repeatedly relied on since July 2020. The Respondent had not been able to challenge this evidence as Susan Standing did not attend to give evidence that she did not make such a statement. We drew an adverse inference from the refusal of Susan Standing to attend to give evidence and at the lack of disclosure of notes that Eric Dawson had stated he had made of his discussion with her. We were not satisfied that Eric Dawson had undertaken a reasonable investigation into the allegation, made contemporaneously by the Claimant that she had made such a comment, to persuade us otherwise.

Submissions

139. With regard to unfair dismissal, the Respondent's representative submitted that:
- a. the original decision to dismiss was unfair but that had been corrected on appeal when the Claimant had been 'potentially' reinstated;
 - b. there was evidence to suspend and potential grounds to dismiss in October 2019; and
 - c. the suspension was not because of the Claimant's race and that Susan Standing was not a comparator as she did not have a live allegation relating to fraudulent claims against her. At that point in time, the Respondent only had knowledge of the Claimant's complaints of 'cheeky monkey' and in relation to the act of suspension; and
 - d. Eric Dawson tried to separate out the disciplinary claim for hours and the complaint brought by Susan Standing, and that Eric Dawson used his best efforts to do that and enable the Claimant to work with Susan Standing.
140. He submitted that if 'cheeky monkey' comment had been made, it was a general comment and was not made because of race even if it had been said: that if it was considered to be a racist comment had not been meant in such a way. The Respondent submitted that the 'golliwog' comment had only been raised in the appeal against dismissal and must have taken place no later than October/November 2019 and was significantly out of time and that neither the allegation in relation to the fraudulent claim of hours or suspension held a 'racial undertone'.
141. He also submitted that Mark Wilson had made an effort to get a constructive outcome and more forward and that Agnes Becsei also asked the Claimant to attend mediation.
142. The Respondent's representative accepted that the reinstatement was qualified by the need to enter mediation and was asked what the Respondent's position was on the letter dated 20 January 2021. He accepted that there would be a dismissal of the Claimant on that date because of that letter but that the failure by the Claimant to mediate went towards the reasonableness of the Respondent's actions.
143. With regard to the allegations of harassment, it was not disputed that there was an argument but the Respondent contends that the Claimant and Susan Standing had been discussing work and that the Nationwide manager had been discussing with Susan Standing the improvements to the cleaning, had not been challenged. Susan

Standing had not been called to give evidence as the Respondent did not want to compel an employee to give evidence where they did not want to.

144. The Claimant repeated that he did not wish to engage in mediation as trust had gone on the basis that they had accepted Susan Standing's evidence not his and that working for the Respondent was not good for his mental health. He considered that he had been unfairly suspended for both allegations and that the Respondent had wanted to get rid of him.

Relevant Law

Ordinary unfair dismissal – s98 ERA 1996

145. With unfair dismissal, we first have to consider the reason for the dismissal and whether it was a potentially fair reason for the dismissal.

146. In this regard, the Respondent bears the burden of proving on balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in section 98(2) ERA 1996. The Respondent states that the Claimant was dismissed for some other substantial reason which was a potentially fair reason for dismissal and was capable of justifying the dismissal of an employee holding the position which the employee held.

147. After considering the reason for dismissal, on the presumption that we identified a potentially fair reason for dismissal, we then have to consider whether the application of that reason in the dismissal for the Claimant in the circumstances was fair and reasonable in the circumstances (including the respondent's size and administrative resources). This should be determined in accordance with equity and the substantial merits of the case and the burden of proof in this regard is neutral.

s.13 EqA 2010 Direct Race Discrimination

148. In the Equality Act 2010, race is a protected characteristic and direct discrimination is defined in Section 13(1) as:

'A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'

149. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case.*"

150. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the tribunal should consider how the Claimant would have been treated if they had not had the protected

characteristic. This is often referred to as the hypothetical comparator. Exact comparators within s.23 EqA 2010 are rare, and it may be appropriate to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator (see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196. The courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and the importance of drawing inferences: **King v The Great Britain-China Centre** [1992] ICR 516.

151. It is well established that where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl v Law Society 2004 IRLR 799**.

s.26 EqA 2010 - Harassment

152. Section 26 of the Equality Act defines harassment under the Act as follows:
- (1) A person (A) harasses another (B) if –
 - (a) A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of race], and
 - (b) the conduct has the purpose or effect of –
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
 - (2) A also harasses B if –
 - (c) A engages in unwanted conduct of a sexual nature, and
 - (d) the conduct has the purpose or effect referred to in subsection (1)(b).
 - (3) A also harasses B if –
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
 - (4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

- (a) the perception of B;
- (b) the circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

153. In **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three-step test for establishing whether harassment has occurred:

- i. was there unwanted conduct.
- ii. did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
- iii. was it related to a protected characteristic?

154. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. 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 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 her, then it should be found to have done so.

155. In **Grant v HM Land Registry** 2011 IRLR 748 the Court of Appeal again reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

Failure to make reasonable adjustments –s20 and s21 EqA 2010

156. Section 20 EqA states that: ...

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

157. Section 21 EqA states that:

- (1) A failure to comply with the first ... requirement is a failure to comply with a duty to make reasonable adjustments
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

158. The Equality and Human Rights Commission's Code of Practice on Employment contains guidance on the Equality Act, on what is a reasonable step for an employer to take will depend on the circumstances of each individual case (para

- 6.29). The examples previously given in section 18B (2) DDA remain relevant in practice, as those examples are now listed in para 6.33 of the Code of Practice.
159. In **Environment Agency v Rowan** [2008] ICR 218, the EAT set out how an employment tribunal should consider a reasonable adjustments claim (p24 AB, para 27). The tribunal must identify:
- a. the provision, criterion or practice applied by or on behalf of an employer, or (b) the physical feature of premises occupied by the employer.
 - b. (c) the identity of non-disabled comparators (where appropriate); and
 - c. (d) the nature and extent of the substantial disadvantage suffered by the claimant'.
160. PCP is not defined within the EA 2010. EHRC Code of Practice (6.10) states that the phrase should be construed widely and could include informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions.
161. Finally, the duty to make adjustment arises by operation of law. It is not essential for the claimant himself to identify what should have been done (**Cosgrove v Ceasar and Howie** [2001] IRLR 653, EAT). Indeed, the EAT held in **Southampton City College v Randall** [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.
162. **Ishola v Transport for London** [2020] IRLR 368 the Court of Appeal confirmed that a one-off act could amount to a practice, but it must be capable of being applied in future to similarly situated employees.
163. S.212 (1) EqA 2010 defines 'substantial disadvantage' as one which is more than minor or trivial and whether such a disadvantage exists in a particular case is a question of fact and it is to be assessed on an objective basis (EHRC CoP, 6.15). It is necessary for a Tribunal to identify the nature and extent of any alleged disadvantage suffered and to determine whether that disadvantage is because of disability.
164. To do so, the Tribunal should consider whether the employee was substantially disadvantaged in comparison with a non-disabled comparator. If a non-disabled person would be affected by the PCP in the same way as a disabled person, then there is no comparative substantial disadvantage (**Newcastle Upon Tyne Hospitals NHS Trust v Bagley** (2012) UKEAT/0417/11/RN, para 72).
165. The required knowledge is of the facts of the disability, not that they meet the legal definition. Whether an employer knows that the employee was liable to be at a substantial disadvantage may vary from one alleged PCP to another.

Time

166. Section 123 EqA 2010 sets the time limit for bringing any complaint in contravention of Part 5 of the EqA 2010 and provides that proceedings may not be brought after the end of
- a. The period of three 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.
167. For the purposes of s.123 EqA 2010, conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it (s.123 EqA 2010).
168. Further s.124(4) EqA 2010 provides that in the absence of evidence to the contrary, a person is to be taken to decide on failure to do something:
- a. When a person does an act inconsistent with doing it, or
 - b. If a person does no inconsistent act, on the expiry of the period in which a person might reasonably have been expected to do it

Conclusions

Harassment related to race (s.26 Equality Act 2010)

169. The Tribunal dealt first with the harassment related to race allegations and the Tribunal had made findings of fact, on balance of probabilities on the evidence before us, that Susan Standing had:
- a. in or around October/November 2019, told the Claimant that he looked like a ‘Golliwog’; and again
 - b. in July 2020, had called the Claimant a ‘cheeky monkey’.
170. We considered whether such comments could or did amount to ‘unwanted conduct’ and also took into account the Equality and Human Rights Commission’s Code of Practice on Employment (“EHRC Code”) which notes that unwanted conduct can include a wide range of unwelcome behaviour including spoken or written words or abuse, including imagery (para 7.7 and para 7.8 EHRC Code).
171. The Tribunal concluded that both comments were inherently related to race. That the first comment was inherently related to race was self-evident to us, the golliwog doll being universally considered as a racist caricature and such a comment widely accepted as a racial slur towards black people.
172. With regard to the comment ‘cheeky monkey’, whilst we accepted that in some domestic circumstances such a comment would not necessarily be inherently related to race, e.g. where a young child might affectionately be referred to as such by an older relative, we considered that in this work context, where there was a disagreement between two workers and the recipient of a comment made by a white employee is black, that such a comment is potentially inherently related to the recipients race, widely being regarded as a racial slur.
173. We accepted the Claimant’s evidence that he found the comments offensive and found that the Claimant had complained to Susan Standing at the time she had made the ‘golliwog’ comment⁵. He had also complained to Ashley Creel, following the

⁵ Claimant WS §10

'cheeky monkey' comment, albeit only after he had been suspended. We did not consider that the timing of his complaint about the latter undermined our conclusions that the comment had been made and that the Claimant had found it offensive at the time.

174. We also inferred and concluded that it was more likely than not, that the purpose of such comments was to either violate the Claimant's dignity or create the proscribed environment for him, taking into account:

- a. the inherently racist nature of the first comment, of comparing the Claimant to a golliwog, and the potentially inherently racist nature of the second comment in certain contexts,
- b. the actual circumstances surrounding the second comment i.e. a disagreement between two co-workers where the recipient is black; and
- c. the failure by Susan Standing to attend this hearing to give evidence to rebut the allegations.

175. Even if we were wrong, in terms of the purpose of the comments made, we concluded that such comments did, in any event, have the effect on the Claimant of violating his dignity or creating the proscribed environment and the Tribunal accepted the evidence of the Claimant that he found both comments offensive.

176. In those circumstances, we concluded that the claims of harassment related to race, in relation to the two comments of telling the Claimant that he looked like a 'Golliwog' and calling the Claimant a 'monkey' or 'cheeky monkey', were well founded.

177. In contrast however, we were not persuaded that the remaining complaints of harassment regarding the conduct of Susan Standing of 8 July 2020 were related to race and those do not succeed.

178. Whilst we concluded that there were facts from which we could decide that the remaining conduct was related to race, as a result of our findings that the comments had been made by Susan Standing and were inherently related to race, such that the burden shifted to the Respondent to prove a non-discriminatory explanation, we were persuaded that the Respondent had demonstrated that such conduct was not in fact related to race.

179. This was based on the evidence from the Respondent, which we accepted, that there had been concerns, raised by the Nationwide manager regarding the cleaning of the Cardiff branch to Susan Standing, and that this was the reason for the remaining treatment of the Claimant alleged, a reason which was unrelated to the colour or nationality of the Claimant. Whilst no doubt the Claimant would have considered any discussion of cleaning and potential threat of loss of his job to be unwanted, we were not persuaded that this remaining conduct was related to race.

180. The remaining complaints of harassment related to race therefore do not succeed and are dismissed.

Direct Race Discrimination (s13 Equality Act 2010)

181. In considering the Claimant's direct discrimination claim, we took into account that it is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent has committed an act of discrimination and that if the Claimant did not prove such facts, his claim would fail.
182. We also took into account that it is unusual to find direct evidence of discrimination and that the outcome at this stage was likely to depend on what inferences it is proper to draw from the primary facts we had found as a Tribunal.
183. We also took into account that the treatment, relied on for the direct discrimination claims, was not necessarily and obviously inherently discriminatory because of race, unlike the comments that had been made. In those circumstances, we considered it appropriate to consider the mental processes, conscious or subconscious, of the individuals responsible for each decision, being conscious that the Claimant's protected characteristic of race must have had at least a material influence on the decision in question and that unfair treatment by itself was not discriminatory.

Suspending the Claimant

184. The first treatment relied upon was that of the suspension, an act which the Tribunal found had been carried out by Ashley Creel. The Tribunal had also made findings that the Claimant had been suspended in circumstances in which this Respondent:
- a. would only rarely, if ever, suspend i.e. for alleged conduct towards a co-worker, and/or
 - b. would not normally be suspended for i.e. a one off clocking offence.
185. Not having heard from Ashley Creel, and for the reasons set out below, the Tribunal could not make positive findings as to Ashley Creel's motivation in suspending the Claimant. The Tribunal had found that suspension was an unreasonable step for Ashley Creel to have taken. Whilst the Tribunal acknowledged that unreasonable conduct of the Respondent alone is insufficient, the Tribunal also attached weight and drew inferences from the following however:
- a. The Respondent had chosen not to call Ashley Creel to give evidence to explain to the Tribunal why he had suspended the Claimant and no explanation had been provided by the Respondent on why that was the case despite him still being in the Respondent's employment and being the decision-maker in relation to the suspension;
 - b. Ashley Creel informed the Claimant that he was being suspended for his conduct towards Susan Standing but had undertaken no preliminary investigation into the allegations made by Susan Standing, before determining to add such allegations to the disciplinary investigation against the Claimant;

- c. The explanation for the suspension, provided by Eric Dawson and based on a conversation he had with Ashley Creel, set out at §63 of his witness statement was confused. He did not clarify and assist the Tribunal in his answers on questions when asked what had been meant by the wording of his evidence, particularly that Ashley Creel had been 'aggrieved'. Indeed, he altered his evidence as the questioning progressed, from the principal reason for suspension being the hours claim, to the Claimant not being suspended for his interaction with Susan Standing at all. We had made a positive finding that this had not been the case and that the Claimant had been suspended because of both allegations.
186. On that basis, we concluded that we could properly and fairly infer discrimination such that the Claimant had made out a prima facie case of discrimination in relation to his suspension and for the burden of proof to revert to the Respondent to provide an explanation for the Claimant's suspension.
187. We concluded that there was no clear explanation for the suspension of the Claimant for the conduct alleged, no evidence having been received from Ashley Creel and Eric Dawson's evidence being contradictory save that in his view neither allegation would have been sufficient to suspend, within this organisation. We did not consider that his suggestion, given in the live evidence, that there was a concern that the amount of clocking offences of concern amounted to more than the 8 July 2020 matter, was supported by any evidence. We made no positive findings in relation to that issue and were not satisfied that this amounted to an explanation for the suspension.
188. We also considered how the Claimant would have been treated if he not had the protected characteristic of his race. Whilst we did not consider that Susan Standing was an appropriate comparator, as she had not been accused of making claims on her hours worked, Eric Dawson had been unable to explain why the Claimant had been treated differently to Susan Standing at the point of suspension, and his explanation, that one was treated as a complaint and the other a grievance, was not a reasonable explanation or one which the Tribunal could understand.
189. We were therefore not satisfied that the Respondent had proven a non-discriminatory explanation for the Claimant's suspension and we concluded that the Claimant had been less favourably treated in being suspended than that given to a hypothetical white comparator. The complaint of direct race discrimination in relation to his suspension is well-founded.

Accepting Susan Standing's evidence and rejecting the Claimant's evidence during the disciplinary and grievance process including the appeal stages and rejecting the Claimant's claim that 'cheeky monkey' was a racial slur

190. We have dealt with these two complaints together.
191. The Tribunal would repeat its findings in relation to Eric Dawson's investigation, in relation to the conclusions that he reached as to whether the comments had been made by Susan Standing and in relation to his own investigation into the comments (§72-82 and §92 of these written reasons) and in relation to Mark Wilson's investigation (§96-103 of these written reasons).

192. We did not consider that the decision to accept the evidence of Susan Standing above that of the Claimant to be inherently discriminatory, but we did again draw adverse inferences from and attached weight to the following:

- a. Eric Dawson provided no explanation of why he preferred the evidence of Susan Standing and gave no explanation of why, in turn, he did not believe the Claimant;
- b. The Claimant had not been informed that Eric Dawson did not believe that such a comment had been made;
- c. Eric Dawson had undertaken no real investigation into allegations of race discrimination made by the Claimant and had failed to address the allegation of discrimination at all within his grievance. He had also failed to provide his own notes of the investigation;
- d. Rather than undertake a balanced investigation, Eric Dawson had himself suggested to Susan Standing a context in which the comment 'cheeky monkey' might have been made and that the comment arose because of a potential cultural difference in language or a common term of endearment. This had been repeated by both Mark Wilson and Agnes Becsei at the dismissal appeal;
- e. the failure by all three to consider the context in which the Claimant had been asserted that such a comment had been made;
- f. We also concluded that both Eric Dawson and Mark Wilson had closed their minds, or at best, failed to put their minds to the context in which such a comment had been made i.e. in a disagreement between two workers where the recipient of the comment is black;
- g. Our finding that Mark Wilson had closed his mind to the possibility that the comment from Susan Standing would be racially motivated, concluding that calling a black worker a 'cheeky monkey' would not amount to racial bullying;
- h. The failure by the Agnes Becsei to investigate the allegation from the Claimant that Susan Standing had called him and compared him to a golliwog; and
- i. Our findings in relation to lack of training on equal opportunities, lack of policies and equal opportunities within the Respondent organisation and lack of experience in dealing with discrimination complaints.

193. Again, we considered that it was proper to draw inferences of discrimination in the absence of any explanation from the Respondent, such that the burden shifted to the Respondent to prove that there was no discrimination.

194. Whilst we did not conclude that either Eric Dawson or Mark Wilson had necessarily been consciously influenced by the Claimant's race, we took into account the repeated suggestion put to the Claimant by both, that the comment arose because of a potential cultural difference in language or a common term of endearment. In the

circumstances that the comment was asserted to have been made, we conclude that this was an unreasonable suggestion to have repeatedly made and concluded that the Claimant's race had, subconsciously, a material influence on the decision to believe Susan Standing and not the Claimant.

195. We had also found that the comment of calling or comparing the Claimant to a 'golliwog' had not been raised by the Claimant until the dismissal appeal. It had not formed part of the grievance hearing or disciplinary hearing and we concluded that this had not been dealt with at all by Agnes Becsei. Despite this, we found that she had still conclude that she had found no evidence of racial abuse (see §128 of these written reasons). We concluded that she had rejected the Claimant's evidence on this comment.
196. In that regard, the Tribunal was not satisfied the Respondent had provided a non-discriminatory explanation of why Eric Dawson had rejected the Claimant's evidence that Susan Standing had called him a 'cheeky monkey', why all three had failed to consider that 'cheeky monkey' as a racial slur and why Agnes Becsei had rejected the Claimant's evidence that 'golliwog' was a racial slur. We would repeat our findings and conclusions at §191 above.
197. In the absence of an explanation from the Eric Dawson as to why he had rejected the Claimant's evidence that Susan Standing had called him a cheeky monkey, why Eric Dawson, Mark Wilson and Agnes Becsei had failed to consider such a comment as a racial slur, and why Agnes Becsei had failed to consider the 'golliwog' comment as a racial slur, we concluded that the Claimant had been treated less favourably than a white comparator would have been treated had a racial slur, in relation to the protected characteristic of their colour been made to them, and the complaint of less favourable treatment in rejecting the Claimant's evidence in relation to that comment and in rejecting that such comments were or were capable of being a racial slur, to be well founded.
198. We concluded that all other complaints, in relation to not accepting the Claimant's evidence to be not well-founded and these complaints are dismissed for the following reasons:
- a. Neither Mark Wilson nor Agnes Becsei investigated whether or not Susan Standing had made the 'cheeky monkey' comment and had simply approached the matter on the basis that Susan Standing had denied making such a comment. It did not form part of the disciplinary hearing. We concluded that neither Mark Wilson nor Agnes Becsei had rejected the Claimant's evidence regarding this comment as such, but rather they had approached the grievance appeal and disciplinary appeal on the basis that Susan Standing had denied making the comment, not that they had rejected the Claimant's evidence. The claim that the Claimant's evidence in relation to the comment 'cheeky monkey' had been *rejected* at the grievance appeal and disciplinary appeal, was therefore not well-founded and is dismissed.
 - b. We accepted the evidence of Eric Dawson that the disciplinary issues relating to the hours claim did not fall within the remit of the Claimant's grievance and any complaint in relation to the Claimant's evidence in relation to the hours

issue dealt with as part of the grievance or grievance appeal is not well founded and is dismissed.

- c. Whilst the Tribunal did attach some weight to the lack of clarity to the Claimant as to what he was being disciplined for, we were satisfied that the Respondent had provided an explanation of why they had rejected the Claimant's evidence in relation to the clocking offence of 8 July 2020 and had determined that the Claimant was responsible for a clocking offence. The evidence before the Respondent was that the Control Room had been told by the Claimant to clock him in at 5.30, in addition to the evidence from Susan Standing. We did not consider that Susan Standing's evidence had been preferred during the disciplinary hearing or appeal and this complaint too, was dismissed.

Dismissal

199. We did not consider the complaint, that the Claimant had been dismissed because of his race, to be well-founded. The Tribunal did not conclude that the Claimant had been treated less favourably than a white comparator would have been treated in not materially different circumstances as:

- a. We were not satisfied that the Claimant had proven facts from which we could infer or find that the Claimant had been treated less favourably in being dismissed than a white comparator facing such an allegation of fraudulent claims would have been treated;
- b. In any event, we were satisfied that the Respondent provided an explanation for the treatment of the Claimant in relation to the decision to dismiss in October 2019 i.e. that there was evidence before the dismissing manager, in the form of the information from the Control Room, that the Claimant had sought to claim additional time not worked. We had also found that the reason for dismissal related to that clocking offence only and that Paul Brookes had not taken into account the allegations, brought by Susan Standing against the Claimant, when reaching the decision to dismiss the Claimant; and
- c. We were also satisfied that there was an explanation for the treatment of the Claimant in relation to the decision to dismiss in January 2021, that was a non-discriminatory reason, namely the refusal of the Claimant to engage in mediation with Susan Standing as a condition of reinstatement.

200. The complaint that the dismissal (whether the original decision on 19 October 2020, or indeed the later decision in January 2021) was an act of less favourable treatment because of the Claimant's race is therefore not well-founded and is dismissed.

Failure to comply with the duty to make reasonable adjustment in relation to the Respondent's disciplinary and/or grievance procedures (s.20/21 Equality Act 2010)

201. Whilst this had been listed in the List of Issues as a lack of an auxiliary aid (s.20(5) and s20(11) EqA 2010) namely providing Employee Well Being Support, the

parties dealt with this issue as a complaint also brought under s.20(3) EqA 2010 with the 'provision, criterion or practice' being the application of the disciplinary and grievance procedures.

202. The Tribunal concluded that the Claimant had been provided with information regarding the Respondent's employee well being support scheme but that the Claimant had not availed himself of that auxiliary aid or adjustment. In that regard the complaint under s.20/21 EqA 2010 is not well founded.

203. The Claimant had suggested for the first time during the hearing however, that it would have been a reasonable adjustment to have contacted his relative or next of kin to explain to them the fact that the Claimant was undergoing such procedures and/or for HR or an independent manager to contact him weekly. The Respondent had the opportunity and did question the Claimant on these claims during cross-examination.

204. The Respondent had conceded that it had knowledge of the Claimant's disability and the relevant time. What was not conceded was that the Respondent knew or could reasonably be expected to know that the Claimant was likely to be placed at a disadvantage.

205. Whilst the Tribunal accepted that this Claimant with post traumatic stress disorder would likely have been placed at a disadvantage in relation to such internal processes in that it was likely that as a disabled person with PTSD, he would be less able to cope with them, the Tribunal concluded that the Respondent did not know or could not reasonably be expected to know that the Claimant was or had been substantially disadvantaged by his disability. This was on the basis of our findings that the Claimant had been repeatedly asked during the procedures if he had needed support, had failed to utilise the support that had been offered and had not indicated that he needed such support. On that basis, these claims too would fail.

206. However, even if we were wrong on that conclusion, we further did not consider that the steps suggested, of contacting the Claimant's relatives and/or contacting the Claimant weekly, were reasonable steps for this Respondent to take in any event as:

- a. The procedures were internal grievance and disciplinary process that were confidential to the Claimant and any disclosure to third parties would have been a breach of the Claimant's right to confidentiality and/or likely a breach of the Claimant's rights under the General Data Protection Regulations;
- b. We were not persuaded that the proposed steps would have ameliorated any disadvantage to the Claimant in relation to the processes, arising from his PTSD.

Time: Jurisdiction (s.123 Equality Act 2010)

207. Given the date of the claim form (17 February 2021) and the dates of early conciliation (26 October 2020 until 26 November 2020), any complaint about something that happened before 18 October 2020 may not have been brought in time, the general rule being that a claim related to work-related discrimination under the

Equality Act 2010 must be presented to the employment tribunal within the period of three months beginning with the date of the act complained of together with the early conciliation period (s.123 EqA 2010).

208. We were satisfied that the comments from Susan Standing, from October 2019 and 8 July 2020, was a continuing act of discrimination. We also concluded that the involvement of Susan Standing in the disciplinary allegations against the Claimant in July 2020 and, in turn, the management of the Claimant's grievance and disciplinary appeal, which was not resolved until 9 December 2020, also formed conduct extending over this period in that the individuals involved were responsible for a continuing state of affairs in which the Claimant was treated less favourably in relation to the comments alleged to have been made to him by Susan Standing. It was relevant that the same individual was involved and we were satisfied that that it was appropriate to consider that there was a continuing act and that the complaints had been presented in time.

Unfair Dismissal

209. The Respondent had asserted that they had dismissed for reason related to the Claimant's conduct, but that dismissal had 'disappeared' on the basis that the Claimant had been reinstated. The Respondent further asserted that the Claimant's employment terminated on 19 October 2020.
210. Whilst the Tribunal had concluded that the Claimant had been reinstated by Agnes Becsei, as communicated to the Claimant in the meeting of 7 December 2020, and that the original dismissal on 19 October 2020 then 'disappeared', we did not conclude that when the Claimant refused to engage in reinstatement, his dismissal reverted back to 19 October 2020.
211. We also did not find that the Claimant had refused re-engagement but that he had refused to engage in mediation. We also concluded that the Claimant had not resigned at the end of the grievance process such that we were dealing with a potential constructive dismissal claim despite the discussions at the outset of the hearing.
212. Rather, the Tribunal concluded that whilst the reinstatement did make the original dismissal of 19 October 2020 'disappear', the Claimant continued in employment following 19 October 2020, the Claimant did not 'resign' or treat himself as dismissed and his employment terminated by the Respondent giving notice to terminate by way of its letter of 20 January 2021.
213. The Claimant's effective date of termination was therefore on 20 January 2021.
214. We also concluded that the reason for dismissal was not the Claimant's conduct in relation to the fraudulent claim of hours, as had been asserted by the Respondent. The Respondent had therefore not proven its reason for dismissal and in such circumstances, we concluded that the dismissal was unfair.
215. The complaint of unfair dismissal succeeds. The Claimant was unfairly dismissed on 20 January 2021.

216. Whilst we did not consider that we were obliged to ascertain the real reason for dismissal, we did conclude that the real reason for the dismissal in January 2021 was in fact that the Claimant refused to engage with mediation after reinstatement. This was not a reason related to the Claimant's conduct in fraudulently claiming hours, which had been asserted by the Respondent.
217. Further, we did not consider that this was a potentially fair reason for dismissal in the circumstances where the mediation was obligatory and a condition of the reinstatement. We did not consider that the Claimant acted unreasonably in refusing to engage in mediation with Susan Standing, particularly in circumstances where there had been no reasonable investigation into the Claimant's grievance into her comments made and/or whether they amounted to race discrimination.
218. In those circumstances we were not satisfied that dismissal of the Claimant fell within the band of reasonable responses and the complaint of unfair dismissal would still succeed.
219. A remedy hearing of one day will be listed and directions for preparation of that remedy hearing will be sent to the parties separately.

Employment Judge R Brace
Dated: 25 August 2022

JUDGMENT SENT TO THE PARTIES
ON 26 August 2022

FOR THE SECRETARY OF
EMPLOYMENT TRIBUNALS Mr N
Roche