EMPLOYMENT TRIBUNALS

Claimant: **Mr S Collins**

Respondents: **Devo Technology UK Ltd**

Heard at: London Central (remotely by CVP)
On: 8 - 11 February 2022

Before: Employment Judge Brown
Members: Ms O Stennett
Mr F Benson

Appearances
For the claimant: Ms Millin
For the respondent: Mr C Milsom

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The Respondent did not discriminate against the Claimant because of race.
2. The Respondent did not victimise the Claimant.
3. The Respondent did not subject the Claimant to race harassment.
4. The Respondent unfairly dismissed the Claimant.
5. It is 80% likely that the Respondent, acting fairly, would have dismissed the Claimant for matters known before and after dismissal. Compensation should be reduced by 80%.
6. It is not just and equitable to reduce the amount of the basic or compensatory awards further for contributory fault.
7. No uplift is appropriate for breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures.
8. A Telephone Preliminary Hearing shall take place for 30 minutes before EJ Brown at 9.30am on 14 March 2022 to give directions for a remedy hearing.

REASONS

1. By a claim form presented on 3 April 2021, the Claimant brought complaints of unfair dismissal, direct race discrimination, race-related harassment and victimisation against the Respondent, his former employer. The Respondent resists these complaints.

2. The issues in the claim had been established at a Telephone Preliminary Hearing on 4 August 2021. The Claimant had subsequently provided details of his comparators. The agreed List of Issues was as follows:

Unfair Dismissal

1 Was there a potentially fair reason for the dismissal? The Respondent claims that it
was capability/some other substantial of such a kind as to justify dismissal ("SOSR").

2 The Respondent concedes that the dismissal was unfair because no process was
followed.

3 Whether any compensation awarded to the Claimant should be increased because of the failure to follow the ACAS Code of Conduct

4 Whether any compensation awarded to the Claimant should be reduced having regard to what it would be just and equitable to award, and because of Polkey, contributory conduct, failure to mitigate and conduct that came to light after the dismissal.

Direct race discrimination

5 The Claimant describes himself as Caribbean-Black-White-Mixed. Whether the Respondent directly discriminated against the Claimant by:

(a) Dismissing him and/or

(b) Refusing to provide him the reasons for his dismissal.

The named comparators for unfair dismissal are Dean Robertson and Nikolas Eklov White Caucasian. Their employment was not terminated.

The comparator /s for the failure to provide reasons are hypothetical White Caucasian employees whose employment has been terminated within 12 months of the Claimant's dismissal, and their treatment by the Respondent.

Victimisation

6 Whether the Claimant's solicitor's letter of 11 January 2021 amounts to a protected act. It is not in dispute that there was an allegation of race discrimination in that letter, but the Respondent contends that it was not made in good faith.

7 Whether the Respondent subjected the Claimant to a detriment by sending him the letter of 25 February 2021 informing him that they were starting an investigation into allegations that he had breached his obligations of confidentiality to the Respondent.

8 If the answer to the above two questions is in the affirmative, whether the Respondent subjected the Claimant to the detriment because he had done the protected act.

Harassment related to race

9 Whether the letter of 25 February 2021 amounted to harassment related to race.

Remedy

10. Whether any compensation awarded to the Claimant should be increased because of the failure to follow the ACAS Code of Conduct (to the extent that it is applicable).

11. Whether any compensation awarded to the Claimant should be reduced having regard to what it would be just and equitable to award and because of Polkey/Chagger, contributory conduct, failure to mitigate and conduct that came to light after the dismissal. Mitigation is not a matter for the ET to consider at the liability stage.

3. The Final Hearing was conducted by CVP remote videolink. There were occasional connectivity issues but these were resolved.

4. There was a Bundle of documents.

5. The Tribunal heard evidence from the Claimant. It heard evidence for the Respondent from: Dean Robertson, the Respondent's Head of Solutions Engineering for EMEA and the Claimant's line manager; Steve Heckert, the Respondent's Senior Vice President for "People" (HR) and Matthew Thomas, the Respondent's Chief Revenue Officer .

6. All witness statements were exchanged, late, on the day before the hearing started. The Tribunal gave the Claimant the first day of the hearing as additional time with his Counsel to consider Dean Robertson's witness statement, because it had been disclosed after close of business the day before the hearing. Some documents had also been disclosed late by the Respondent and

the Claimant was able to consider these, too, in the extra time. The Claimant agreed to this course of action. The Claimant then served a supplemental statement in reply, to which the Respondent did not object.

7. The Respondent provided a chronology which was not agreed. Mr Milsom, Counsel for the Respondent, invited the Tribunal to treat it as an opening note from the Respondent.

8. The Tribunal timetabled the hearing and the parties complied with the timetable. Evidence and submissions were concluded during the listed hearing time. The Tribunal reserved its judgment.

9. There was a disagreement between the parties about whether the Tribunal should name an employee who had made a private complaint about the way in which the Claimant had spoken to her and had attempted to hug her. The Respondent contended that the Tribunal judgment should anonymise the employee, to preserve her Article 8 right to a private life.

10. Mr Milsom drew the Tribunal's attention to the case of *TYU v ILA Spa Ltd* [2022] ICR 287 where the High Court ruled that, where a judgment was published containing adverse imputations about a named third party, capable of adversely affecting their enjoyment of their private life, the engagement of article 8 of the Human Rights Convention would depend on the extent to which the judgment was potentially damaging to the third party's reputation. The HC said that a Tribunal carry out a fact-sensitive assessment, and determine the proportionality of, either the interference with the applicant's article 8 rights if her application for anonymity was rejected, or the interference with article 10 rights and open justice if the application was granted.

11. The Tribunal decided to grant the female employee anonymity, by referring to her only as X in its judgment. X had made a private complaint during her employment about the Claimant's conduct towards her person. That was clearly an intensely private matter, even if her allegation about the Claimant's conduct had not amounted to an allegation of a sexual assault, pursuant to which X would have had the right to lifelong anonymity. X's article 8 right to privacy was strongly engaged. On the other hand, granting X anonymity would result in little interference with the principle of open justice, or article 10 rights to freedom of expression, or the Claimant's article 6 rights. The Claimant knew who X was, and had been given all documents relating to her complaint. He did not contend that anonymising her would interfere with his ability to conduct his case in court. Further, publication X's name was not necessary for the public to understand the issues in the case, or the judgment. X's allegation was not a central issue in the case, in any event. X's right to a private life outweighed competing Article 6 and Article 10 and open justice rights and considerations.

Primary Findings of Fact

12. The Claimant describes his race as Caribbean-Black-White-Mixed. He was employed by the Respondent from 9 September 2018 to 4 January 2021.

13. The Respondent offers tailored solutions for the management and security of data to its business customers. It was not in dispute that industry confidentiality and close client management are very important to it.

14. On 9 September 2018 the Claimant commenced his employment with the Respondent as a Presales Solution Engineer, pp 58-72.

15. His contract of employment included the following clauses:

    i. "At all times during the Employment…the Employee shall…perform the Duties faithfully and diligently" [4.2(b)] p.60;
    ii. "At all times during the Employment…the Employee shall…obey all lawful and reasonable directions of the Company, observe such restrictions or limitations as may from time to time be imposed by the Company upon the Employee's performance of the Duties and implement and abide by any relevant Company policy in operation from time to time:" [4.2(c)] p.60;
    iii. "At all times during the Employment…the Employee shall…use best endeavours to promote the interests of the Company and shall not do or willingly permit to be done anything which is harmful to those interests:" [4.2(d)] pp.60-61;
    iv. "The Company may terminate the Employment at any time in writing, without notice or payment in lieu of notice…if the Employee commits any act of gross misconduct, including but not limited to…Acts of dishonesty where the Employee's conduct affects his or her ability or suitability for continued employment…Any breaches of confidentiality (other than minor breaches)…Harassment, unlawful discrimination or bullying" [13.1] p.63;
    v. "During the Employment, the Employee shall not…directly or indirectly disclose to any person or use other than for any legitimate purpose of any Group Company any Confidential Information; at any time (whether during or outside normal working hours) take any preparatory steps to become engaged or interested in any capacity whatsoever in any business or venture which is in or is intended to enter into competition with any of the Business" [15.4] p.65.

16. The Respondent also had the following policies, which the Claimant agreed in evidence were relevant to his employment:

    i. The Acceptable Use Policy pp.186-195 which addresses all information "created, received, stored or communicated in connection with the conduct of Devo's business" p.188. In particular, it requires staff to "take all necessary steps to protect confidential or proprietary information such as trade secrets" p.189. Breach of the policy may give rise to disciplinary action up to and including termination of employment pp.193-4;
    ii. The Information Security Standard policy pp.205-225;
    iii. The Code of Business pp.236-249 addresses matters of use of confidential information and fair dealing pp.242-3.

17. The Respondent is the UK company within the "Devo Group". It is a small company and had 2 employees on 1 January 2020, increasing to 9 by the date of the Claimant's dismissal. It does not have a UK HR presence. At the material

time there were no policies addressing either disciplinary or capability procedures.

18. The Respondent's "Pre-Sales Engineering" team, of which the Claimant was part, is the technical side of the Respondent's sales team. It helps identify potential clients and works on pitches with the core sales team by handling technical questions and leading demonstrations of the Respondent's products.

19. Mr Robertson told the Tribunal, and the Tribunal accepted, that there are three elements to the skillset required to be a successful Solutions Engineer and that each part is important The first is technical ability, to understand the Respondent's products and processes. The second is interpersonal skills, to connect with clients, thereby securing customer retention, and to build relationships with the Respondent's sales team. The third is presentational capabilities, to handle the technical aspects of pitches and tailor presentations for each customer.

20. It was not in dispute that the Claimant was technically excellent in his role and that, during his employment, he had received "points" – or praise - from other employees on many occasions, including for being a "team player", p167, 168, 226, 252 and for exceeding customer expectations, p167, 252.

21. On 11 November 2019 the Claimant emailed Matthew Thomas, the Respondent's Chief Revenue Officer, saying that the Claimant had wanted to maintain a reporting line "to a native English speaker" because he would not have to elaborate all the time if things were misunderstood. He also criticised the "lack of customer focussed understanding of our Spanish colleagues". He complained about having multiple reporting lines, p.102.

22. On 12 November 2019 Mr Thomas replied, saying that there was a need to come together as a team and that many people would need to "change our communication styles and become more empathetic..". However, he also said, "From what I can tell you are an extremely valuable employee and have a tremendous amount of passion. I think what you do from a technical management of the opportunities is far beyond what others are doing (pushing back, commanding the knowledge of why we are being asked to do something, etc.)."p101.

23. On 8 January 2020 Mr Thomas and Stephen Heckert, the Respondent's Senior Vice President for "People" (HR), discussed the Claimant's refusal to work for his proposed line manager, Guillermo (Head, Solution Engineering) p.135. The Company had proposed an alternative security role for the Claimant, but Mr Thomas said that he did not want to show, "that we are acquiescing to Sev [the Claimant] because he doesn't want to work for someone. He has to put company first and know that we want team players" p.134.

24. The Claimant did not allege that he was subjected to race discrimination at any point before his dismissal. In his witness statement to the Tribunal he said, "I generally had good relationships with my managers and due to my work ethics, professionalism and experience I was more or less allowed to work

autonomously. I did, however, receive the required support when I raised it:" [14]; "I worked at Devo a decent amount of time. I mostly enjoyed my work:" [76].

25. Mr Heckert told the Tribunal that, on 26 February 2020 an employee called Andrew Riggs telephoned him and told him that, during a conversation about a potential deal in India, the Claimant said, "There's enough of them in my fucking country I don't need to deal with them Packi's." . p153.

26. It was not clear that this matter was ever raised with the Claimant during his employment. In evidence to the Tribunal, the Claimant denied having made this comment and said that he is close friends with people from India and Pakistan and that he challenges anyone who makes racist comments about Pakistani people.

27. The Claimant agreed, in evidence at the Tribunal, that he has said that he is not attracted to "women of colour". The Tribunal found that, in this regard, he holds unashamedly discriminatory views based on race.

28. The Tribunal found that Mr Riggs did report to Mr Heckert that the Claimant had made a derogatory comment about people from the Indian subcontinent and that Mr Heckert believed Mr Riggs. Mr Heckert made a note of what Mr Riggs had reported but did not investigate this comment further, or ask for the Claimant's comments on it.

29. Mr Herkert also told the Tribunal that, in the same telephone call, Mr Riggs reported that, on 25 February 2020, Mr Riggs, the Claimant and a female employee called X, were at a party and, on the way back to their hotel in a taxi, all 3 had been talking about how many female employees were still in the Respondent's Marketing Division. X mentioned a couple of names including Andy Pool. Regarding Ms Pool, Mr Riggs reported, "Sev said, "Andy doesn't count, she's old" ….. "Sev then said that there are only four (4) attractive females in the company. Sev mentioned Nuria (in Sales) in Spain. Sev added Natalia (is) too skinny for me – even if I could do her I wouldn't."

30. Mr Riggs also reported that, when the 3 arrived in the hotel, the Claimant tried to give X a hug and when X avoided the hug, the Claimant tried to hug her again. Mr Riggs reported that X pushed the Claimant away and asked him where his room was, and the Claimant responded by saying words to the effect of, "Are you trying to go back to my room? Aren't you married?"

31. Mr Heckert subsequently spoke to X, who said that the Claimant had made comments about female employees' appearance during the taxi ride, had tried to hug X twice, which she had resisted, and that the Claimant had suggested that X wanted to come to his room, p154.

32. On 27 February 2020 Mr Heckert telephoned the Claimant while the Claimant was at an airport, queuing for a flight. The Claimant remembered making a comment about a colleague called Natalia. He also recalled making a comment about his colleague Andy. He said that he had been drinking and that some of

his comments may have been misinterpreted. He offered to apologise, pp.155-6.

33. In evidence to the Tribunal, the Claimant agreed that on 25 February 2020, when X asked the Claimant where his room was in the hotel, he had, "responded in my comical way - why do you want to go to my room, aren't you married?" He also agreed that the had then attempted to hug X in a friendly manner and that, when she pulled away, rejecting the hug, he had attempted to hug her again.

34. On 2 March 2020 Mr Heckert discussed the matter with a senior officer at the Respondent, Charles Amick, who told Mr Heckert that the Claimant had commented to him about this issue, "Don't they know I won't sleep with women of colour?" p.156. The Claimant agreed in evidence that he had said this and that he does not find "women of colour" attractive.

35. The Tribunal found that the Respondent did not carry out a full investigation into the allegations. The Claimant was not asked to provide a statement. He was not invited to a disciplinary hearing at which the allegations were put to him. However, he did admit to Mr Heckert that he said, "Natalia (is) too skinny for me – even if I could do her I wouldn't" and that he had made a comment about another female colleague's age.

36. On 12 March 2020 Mr Heckert sent the Claimant a final written warning, pp.149 – 150. It said,

> "We have found that you:
> 1. made a number of inappropriate comments about women in our company; and
> 2. made suggestive and unwanted remarks to and (twice) attempted to hug a female colleague
> …
>
> ….. We will not tolerate harassment relating to any protected characteristic including sex or race.
>
> As you have breached out anti-harassment policy we are entitled to dismiss you without notice. However we have chosen on this occasion to impose a less serious penalty. You will instead receive a final written warning and will be required to attend a mandatory diversity and inclusion awareness course.
>
> The warning will remain active for a period of one year. This means that if there are any concerns about your conduct or performance over the next 12 months you are likely to be dismissed.
>
> This warning will also remain on your personnel file for the duration of your employment……"

37. The Claimant did not appeal against this final written warning, or otherwise contest it.

38. The Respondent drew the Tribunal's attention to a number of documents. In an email of 20 April 2020, Matthew Thomas had noted to Mr Charles Amick: "no surprise there at all outside that (the Claimant) and Simon aren't talking. That's alarming" p.161. Mr Amick's July 2021 performance appraisal of the Claimant reminded the Claimant of the need to be "collaborative, positive and a good team player" p.170. On 30 September 2020 a Mr Adamson, the Respondent's Vice President in EMEA, noted that Mr Thomas wanted Mr Adamson and Mr Amick to " protect Ryan from Sev's negativity. Let me know if you wanna chat. Usual challenge", p174.

39. The Claimant was cross examined about these documents. He explained that he was realistic, not negative, about the Respondent's plans. He also said that he enjoyed a continuing, very friendly relationship with Simon Attfield, the employee with whom he was allegedly not speaking in April 2020.

40. The Tribunal found that the Respondent took no action in relation to these further matters, apart from noting them in emails and in the relevant appraisal. They were clearly not matters which the Respondent considered significant .The Respondent did not view them as worthy of any sanction, even in the light of the final written warning.

41. On the other hand, there was evidence of the Claimant's continued good performance in his role. On 9 April 2020, Simon Attfield, Regional Sales Manager, sent an email praising the Claimant and others for their for work on a "POC workshop". He said, p.159, "Sev in particular drove the process to create a POC environment, populated with 'canned' data, and a whole series of Activeboards to meet the Use Case information and Success Criteria defined in the POC. He even produced the attached documentation for the CTE Evaluation team to be able to validate the use cases after the Workshop. Two weeks ago we were heavily exposed on this project because we did not have a ready-made environment to give to CTE for them to validate in the POC. If CTE hac been forced to ingest their own data sources, and create their own visualisations, we would have failed miserably in the timescales involved."

42. On 16 September 2020 at a meeting "lasting about 10 minutes", the Respondent terminated Simon Attfield's employment, p.171. The note of the meeting recorded that Mr Attfield's employment had been terminated with immediate effect for business reasons. It recorded, "…Simon is very unhappy and appears surprised."

43. Mr Attfield's termination letter was in the Tribunal Bundle, pp.172-3. It said, "It is with regret that I have to advise you that Devo Technology UK Ltd is terminating your employment for business reasons, with immediate effect."

44. The Tribunal found that Mr Attfield's letter of dismissal was in materially the same terms as the Claimant's subsequent letter of dismissal. Mr Attfield is white.

45. On 1 October 2020 Dean Robertson, Head of Solution Engineering, became the Claimant's line manager.

46. Mr Robertson told the Tribunal that a number of matters arose during his line management of the Claimant between October and November 2020.

47. Mr Robertson told the Tribunal that he was informed that the Claimant had called a prospective client "an idiot" on a telephone call with them. However, the Tribunal noted that there had been no complaint from the customer and neither Mr Robertson nor anyone else appeared to have raised the matter with the Claimant. The Tribunal concluded that this was not viewed as anything more than a trivial matter at the time.

48. Mr Robertson also told the Tribunal that the Claimant was rude towards Mr Robertson when he was assisting Mr Robertson to install company infrastructure on Mr Robertson's home equipment. Mr Robertson said that the Claimant was dismissive of the Mr Robertson's home equipment, saying that Mr Robertson could not be much of a solution engineer given the equipment he had and queried how Mr Robertson could work on out-of-hours projects.

49. Mr Robertson told the Tribunal that he considered this to be an unprofessional way to speak to any employee, let alone a new direct line manager.

50. Mr Robertson also told the Tribunal that, when Mr Robertson needed help with an installation document, the Claimant challenged him as to whether he had read the guidance documentation on installation, saying, " .. well clearly you haven't otherwise it would be working:" Mr Robertson also told the Tribunal that, in late October or early November 2020, when the Claimant disagreed with Mr Robertson about the Resondent's sales pitch strategy, the Claimant said to him, "I've been selling for (xx) years, how many have you been selling for?"

51. The Claimant told the Tribunal that his comments were banter and that banter was common at the Respondent. Both Messrs Robertson and Heckert were questioned on whether they considered that the Claimant had not been sufficiently subservient to Mr Robertson. It was put to them that the Claimant was a senior employee with many years of experience. Both Messrs Robertson and Heckert told the Tribunal that they would not have spoken to their own managers in that manner.

52. The Tribunal found that Mr Roberston did genuinely feel that the Claimant had addressed him in an inappropriately disrespectful, or rude way, on these occasions. The Tribunal considered that the Claimant's comments were a tactless way of dealing with a manager with whom he had no established working relationship.

53. Mr Robertson told the Tribunal that, on about 18 November 2020, he tried to talk to the Claimant about the Claimant's presentational skills; Mr Robertson felt that the Claimant spoke too quickly and was confusing. Mr Robertson's said that the Claimant had retorted that he had been trained by a very experienced trainer, who had told him that speaking quickly was an advantage. Mr

Robertson told the Tribunal that he considered that the Claimant had made it clear that he was not going to change his presentational style and was resistant to coaching.

54. The Claimant agreed, in evidence, that he did have a discussion about his presentational style with Mr Robertson in November 2020 and that they had expressed different views about the Claimant's style.

55. The Tribunal found that Mr Robertson believed that the Claimant had been resistant to informal coaching about his presentation style. It noted, however, that Mr Robertson did not warn the Claimant that his employment might be at risk if he did not change his style. Mr Robertson did not make any offer of training; or require that the Claimant adopt a Company-standard presentational style. Mr Robertson did not document his exchange with the Claimant.

56. There was therefore nothing to indicate to the Claimant that his employment at risk arising out of this conversation. It would not have been clear to the Claimant how serious the conversation was. The Tribunal concluded that the Claimant was not given a proper opportunity to change his approach to presentations. The Tribunal also noted that there appeared to have been no negative feedback from customers about the Claimant's presentational style.

57. Mr Robertson told the Tribunal, " … the other Solutions Engineers in my team were easy to work with and certainly did not come with any of the attitude that I experienced with Severin. My main concern was the impact Severin's style would have on external facing activity and I was hugely concerned about the risk (of) losing a key sale as a result of Severin upsetting a client prospect.… In November 2020, I started to think about the pre-sales team I wanted to put together to achieve Devo's fiscal targets for 2021 and, based on the issues I had identified with his interpersonal and presentational skills, I did not think that Severin should be part of this team." The Tribunal will return to this later in its Judgment.

58. On 19 November 2020 Mr Robertson emailed Mr Heckert regarding the Claimant. He said, "Having given it a LOT of thought I've reached the conclusion that we are going to need to start a search for an SE for the UK to replace Sev. I've had more opportunity to observe him working and whilst technically brilliant, he is really lacking in the core pre-sales skills that we need. I don't think any of this is news to anyone who has worked with Sev and it's not something that is coachable when he is so far away from what is needed. I wouldn't propose doing anything with Sev until Jan 1 but I need to start looking for a replacement", p182.

59. Mr Heckert replied, "Hi Dean, reach out to Mike Smart, Director of TA, to raise the req. I'm sure he'll ask me about the Sev situation. You and I will need to talk about this more – how to manage, next steps…". P181.

60. There was an issue about who made the decision to dismiss the Claimant. In evidence, Mr Heckert confirmed that he had approved it the decision, but would not have dismissed the Claimant, in the absence of Mr Robertson. From the

wording of their email exchange, the Tribunal considered that it was clear that Mr Robertson had made the decision to dismiss.

61. Mr Thomas told the Tribunal that, on 3 December 2020 at 4:13pm Central US time, a contact at Securonix, one of the Respondent's competitors, contacted Mr Thomas and told him that the Claimant was providing information about the Respondent Company to an employee of Securonix, via a messaging platform. The messages were being displayed on a Securonix employee's screen, which was being shared in a video conference, so that other Securonix employees could see the messages being sent and received in real time. Mr Thomas told the Tribunal that this contact took photographs of these messages on the computer screen with his phone camera and that he sent Mr Thomas 10 images of these conversations, which Mr Thomas then saved to his personal phone.

62. Mr Thomas told the Tribunal that he believed that there was some highly sensitive, confidential information in these messages. For example, the messages had referred to the details of a potential acquisition of the Company by IBM, p 292, which Mr Thomas considered to be highly confidential and not public knowledge. Mr Thomas also said that he believed that the Claimant had helped the competitor, as the competitor had thanked him and then offered him a job in the messages.

63. The Claimant was adamant in evidence that he did not send these messages. He pointed out that the Respondent did not appear to have searched their own systems for these messages – when the messages would have been recorded on the Respondent's systems if they had genuinely been sent by him from the Respondent Company.

64. The Claimant gave a detailed statement explaining how he could not have sent the messages. He explained that he did not use the Google messaging platform said to have been utilised for sending the messages – and he produced a screenshot showing that, just before this Tribunal hearing, he had attempted to use that Google messaging platform for the first time.

65. The Claimant agreed, however, that the messages themselves would have been a breach of contract, if he had sent them. He also said, nevertheless, that the information in the messages was in the public domain; he pointed to public documents which contained much of the information discussed in the messages, but not the details of the IBM bid.

66. The Tribunal noted that there was no electronic data accompanying the messages, to show from whom they had originated.

67. The Claimant agreed that the profile photograph accompanying the messages was the profile photograph he used when at the Respondent, but only on the Respondent's Slack messaging system. The messages in question were not sent using Slack. He produced other profile pictures which he used on his own personal messaging platforms, showing that the messages could not have been sent by him from his personal systems.

68. The Claimant suggested that someone else may have impersonated the Claimant when sending the messages. He pointed out that Fred Wilmot, the Respondent's Chief Information Security Officer (CISO) and Head of Security Products & Engineering, one of the 2 employees at the Company who had the technical expertise to investigate or interrogate the messages, had confirmed that he had not been asked to do so. The Claimant pointed out that Mr Thomas had not named his source at Securonix.

69. Mr Thomas told the Tribunal that he simply retained the messages and did not take any further action on them in December 2020. He did not tell anyone else at the Respondent, at that point, about the messages.

70. It was put to Mr Thomas during the Tribunal hearing that simply retaining the messages was inconsistent with his assertion that the messages constituted a serious breach of the Claimant's duties of confidentiality. Mr Thomas told the Tribunal that he had understood that the Claimant would soon be dismissed. He also said that he did not want to compromise the source of this information and that Mr Thomas had more immediate priorities at a very time of year, when the Company was going through its year-end processes. Mr Thomas said that he had limited technical expertise.

71. It was not put to Mr Thomas that he, himself, had fabricated the messages.

72. Mr Heckert was also asked whether any measures were taken to mitigate the risks associated with the confidential information breach. Despite the Respondent's witnesses telling the Tribunal that the messages constituted a breach of the Respondent's confidential information, it appeared that no one else at the Respondent ever investigated the extent of the alleged breach, beyond the receiving the screenshots of some messages.

73. On the same day, 3 December 2020, at 4:26pm Central (10:26 pm GMT) the Claimant messaged Mr Thomas on Slack saying, "Hey Matt, just a quick note seems like you have gotten on the radar of Securonix in the US – the director of product marketing reached out to me assuming I had moved on wanting competitive intel (edited)."

74. There were therefore very substantial disputes of fact between the parties concerning these messages: whether the Claimant sent them; whether Mr Thomas received them in the way that he described; whether Mr Thomas considered, at the time he received them, that they represented very serious breaches of the Claimant's contract of employment.

75. The Tribunal noted that the Claimant had not, before the Tribunal hearing, acknowledged that he had sent Mr Thomas an email on 3 December 2020, saying that the Claimant had been in contact with the director of product marketing at Securonix. The Tribunal considered that the Claimant had not been candid in his witness statements in this regard. The Tribunal also considered that it would have been a remarkable coincidence if the Claimant had been in contact with Securonix on 3 December 2020 and, on the same day,

someone else had impersonated him and sent messages to Securonix about the Respondent's business. This seemed very unlikely.

76. Furthermore, the Tribunal accepted Mr Thomas' evidence that he did receive these photographs of a computer screen, showing the messages, on 3 December. The images did appear to be photographs of a computer screen, as the images were hazed, with a slightly pixelated pattern all over them, like photographs of a computer screen. It appeared that it might have been difficult to edit those pictures and not disturb the pattern on them. It was not put to Mr Thomas that he had fabricated the images or messages. The Tribunal found Mr Thomas' account of how he came by the messages to be credible – he was able to describe this is detail and his evidence on this was not undermined by cross examination.

77. On the other hand, the Tribunal considered that the Respondent would have to have engaged in an extremely elaborate subterfuge if the Respondent, or any of its employees, had invented or manipulated the messages to undermine the Claimant.

78. On the balance of probabilities, the Tribunal concluded that it was more likely than not that the Claimant did send the messages to Securonix, the Respondent's competitor, on 3 December 2020 and that an employee of Securonix did take photographs of them and send them to Mr Thomas that day.

79. However, the Tribunal found, on the balance of probabilities, that Mr Thomas did not consider these messages to be a very serious breach of the Claimant's contractual obligations. The Tribunal noted that Mr Thomas took no action at all regarding the messages, at the time. He did not mention them to anyone else at the Respondent; he did not ask for any investigation into the confidentiality breach; he took no measures – at any time - to protect the Respondent from the allegedly serious breach of confidentiality; and he did not suggest that the Claimant be dismissed forthwith. If the messages had constituted a very serious breach of the Claimant's contractual obligations, the Tribunal considered that he would have taken some, or all, of those steps. The fact that Mr Thomas was busy and/or believed the Claimant would be dismissed in another month, or that he wanted to protect his source, were not convincing reasons for his complete failure to act on an allegedly very serious information breach.

80. On 4 January 2021 the Claimant was invited to a Zoom meeting with Mr Robertson. The Claimant expected the meeting to be a "welcome back / start of the new year" meeting. Mr Robertson almost immediately told the Claimant that the meeting would not be as he expected. Mr Heckert joined the call.

81. The Claimant was then told he was being dismissed. He was shocked. He had not been informed of the true purpose of meeting before he attended.

82. The Claimant told the Tribunal that he was given no reason for his dismissal and that, when he asked for a reason, he was informed that he would be sent a letter.

83. Shortly after the meeting, the Claimant received a letter signed by Marc van Zadelhoff, the Respondent's CEO. The letter simply said,

> "It is with regret that I have to advise you that Devo Technology UK Ltd is terminating your employment for business reasons, with immediate effect.
>
> You will be paid out your notice period (1 month) in accordance with clause 14.2 of your contract of employment."

84. On the facts, it was plain that the Claimant was given no warning of his dismissal, no chance to discuss the dismissal decision and no opportunity to appeal.

85. On 5 December 2020 the Respondent had decided that Mr Tobias Jakobza should be dismissed p.229. He was dismissed by a telephone call on 8 December 2020, p.228. There was no evidence that Mr Jakobza was given notice of the nature of the call. On 8 December Mr Jakobza received a letter saying "It is with regret that I have to advise you that Devo Technology UK Ltd is terminating your employment for business reasons, with immediate effect. You will be paid out your notice period (1 month) in accordance with clause 14.2 of your contract of employment." pp.233-4. Mr Jakobza is white.

86. The letter was identical, in material terms, to the Claimant's dismissal letter.

87. On 1 March 2021 Mr Jon Andrews also received a letter identical to that of the Claimant dismissing him from the Respondent with immediate effect pp.289-90. Mr Andrews is white.

88. The Claimant highlighted, in evidence, that Mr Roberston was not dismissed, despite having recently joined the Respondent. The Claimant also compared himself with a Mr Eklov, who was not dismissed. Both employees are white.

89. The Tribunal was not told any reasons why those 2 employees might have been dismissed, save that Mr Robertson was a recent appointee. The Claimant did not tell the Tribunal that those employees had interpersonal difficulties with their managers. Neither had received a final written warning.

90. The Claimant consulted a solicitor shortly after his dismissal.

91. On 11 January 2021, his solicitor contacted Marc van Zadelhoff by letter, delivered by email pp265 – 266. Mr Heckert was cc'd into the email. The letter said, amongst other things,

> "Your letter dated 4 January, and the decision to terminate Severin's employment, is unlawful treatment. Employers are required by the Acas Code on dismissals, which sets the minimum standard of fairness that workplaces should follow, to adhere to a fair and reasonable procedure to decide whether to dismiss someone, and this was not the case here.

Severin had worked at Devo Technology UK since 9 September 2018. With 2 years continuous employment he has the statutory right to not be unfairly dismissed. …..

….

Furthermore, my instruction includes examples of questionable treatment during Severin's employment at Devo Technology UK, which raises the issue that the dismissal is also less favourable treatment based on colour and racial origin, which in turn places a spotlight on the 'reason' for the dismissal.

As a UK employer I understand you have a HR function and will be aware of the basic right to a 'fair' procedure and a 'fair' reason to dismiss. In Severin's case this has been entirely ignored, which begs the question why. It is necessary therefore to flag the concern that Severin's treatment and the dismissal amounts to unlawful race discrimination."

92. The Claimant's solicitor chased a response on 14 January 2021 and 16 January 2021, cc'd to Mr Heckert, p 267. On 21 January 2021, in the absence of a response, the Claimant's solicitor emailed the Respondent's Corporate Counsel, Ingo Bednarz, cc'ing Marc van Zadelhoff, Steve Heckert and Sara Madame (Head People), p269. The solicitor wrote, "I attach my letter to Marc van Zadelhoff dated 11 January. …. Can you please acknowledge my letter and respond."

93. Mr Heckert, VP, People, replied by email on 22 January 2021, p271, saying simply, "I understand you have been trying to contact me".

94. By a further email on 27 January 2021, Mr Heckert wrote, "There are some new details with respect to this matter that have come to my attention. I need a few days to review. I plan on getting back to you by the end of next week". P276.

95. The Claimant's solicitor responded that day, pp 275-6 referring to the Claimant's right not to be unfairly dismissed and the hope that ET proceedings could be avoided.

96. On 29 January 2021 Ingo Bendarz, the Respondent's General Counsel, wrote to the Claimant's solicitors, asking them to confirm that that the Claimant had complied with his confidentiality obligations "at all times…including specifically (without limitation" that he has never disclosed any technical, acquisition-related or pricing information regarding Devo that would be considered Devo Confidential Information as defined in the employment contract to any of Devo's competitors, particularly in the security business?" p.279.

97. On 2 February 2021 the Claimant's solicitor responded, querying the request and asking for an explanation, p.279.

98. On 6 February 2021 the Claimant entered ACAS Early Conciliation, p.1. and on 7 February 2021 his solicitors wrote again to the Respondent, saying his dismissal had been unfair and stating the Claimant's intention to bring Tribunal proceedings, p.286.

99. On 9 February 2021, the Respondent's solicitors GQ Littler (GQ) sought a response Ingo Bendarz's email of 29 January p.297, saying. "Our client is alarmed at your evasive response to the email from Ingo Bendarz dated 29 January 2021 in which you were asked to confirm that your client has compiled at all times with his confidentiality obligations to Devo. This should be a simple confirmation to give. Please urgently take instructions and provide a full substantive response. Please also confirm the date on which you advised your client of his duty to preserve documentation in advance of proceedings."

100. On 22 February 2021 an EC Certificate was issued, p.1.

101. On 25 February 2021 GQ Littler the Respondent's solicitors wrote again to the Claimant's solicitors, pp298-304. They said, "We have been instructed to carry out an investigation into allegations that your client has breached his obligations of confidentiality to the Company…… Our client is gravely concerned that Mr Collins has refused to provide a simple assurance that he has complied with his obligations to the Company. We can only assume that the reason that he has failed to provide these assurances is that he knows that he is in flagrant breach of them. We are instructed that in or around December 2020 Mr Collins had over 40 conversations with an IP address of one of the Company's competitors on a messaging app. During these discussions he disclosed confidential information regarding the Company's M&A activities, go to market strategies, technological information and pricing data. This information is not in the public domain, it is commercially sensitive and disclosing it to any third party let alone a competitor is in breach of the duty of confidence and the duty to promote the interests of the Company. During one of these exchanges we are instructed that the competitor in question stated: "If it doesn't work out at Devo, you should come work for us."" The Respondent's solicitors asked the Claimant to sign undertakings not to disclose confidential information, not to compete with the Respondent and to provide information to the Respondent, including access to his electronic devices.

102. On 4 March 2021 the Claimant's solicitor responded saying, "My response is based on Severin's instruction Severin has not disclosed any confidential information as alleged and has no intention of doing so. Severin does not know what the content of your letter is about and categorically denies the breach as alleged. Severin has no knowledge of the 40 conversations and does not have access to any of the screenshots as alleged …If your client requires an undertaking that Severin will abide by his obligations as to confidentiality, I am instructed to communicate that my client will, subject to advice on the wording, agree to provide this, to reassure Devo Inc. My client is most concerned the allegation raised for the first time in your letter is an attempt at muddying the waters to detach focus from the fact of his unfair dismissal. I am instructed to make clear the allegation is outrageous and there is no risk of damage to your client's commercial interests".

103. The Claimant did not, in the event, sign any undertakings. In evidence to the Tribunal, he said that he would have been willing to sign undertakings but that

the undertakings sought by the Respondent, including searches of his electronic devices, were far too onerous.

104. The Claimant presented his claim to the Tribunal on 3 April 2021, pp.2-18

105. The Claimant was asked in cross examination why he alleged that his dismissal was because of race, when he did not allege that he had been subjected to race discrimination in any other way during his employment. The Claimant responded that, despite asking, both by himself and through his solicitor, he was never given a reason for his dismissal. He said that he had felt, almost immediately after Mr Robertson became his manager, that Mr Robertson disliked him. He also said that the Claimant had alleged race discrimination, in his solicitor's letter, as "leverage" and a "protective step."

106. Mr Thomas told the Tribunal that, on learning in late January 2021 that the Claimant was alleging that he had been unfairly dismissed, he then told other people in the Respondent, including Mr Heckert, about the messages to Securonix and said that the Claimant should not be paid.

107. Mr Thomas was questioned about his knowledge of the Claimant's legal claim. Mr Heckert was also questioned about Mr Thomas's knowledge. It was put to both of them that they must have known that the Claimant would claim compensation for unfair dismissal, given that he was dismissed in breach of UK employment law. It was put to them that the Respondent would normally expect to negotiate with an ex employee when they had been dismissed without any fair procedure. Mr Heckert agreed that this was correct. It was put to both men that the Claimant's race discrimination allegation might, however, have been unexpected and that this unusual aspect of the Claimant's solicitor's letter would therefore have been discussed with Mr Thomas in January 2021.

108. Mr Heckert, who knew of the Claimant's race discrimination allegations, because he had been cc'd into the Claimant's solicitor's correspondence, did not recall discussing the Claimant's race discrimination allegation with Mr Thomas.

109. Mr Thomas was vague about what he was told - and when he was told it - about the Claimant's dismissal. However, Mr Thomas was adamant that he was not aware that he Claimant had alleged race discrimination against the Company until the week before the ET Final Hearing.

110. Mr Thomas was asked why he had revealed the messages in late January 2021, given that he must have known that Claimant would seek compensation for unfair dismissal. Mr Thomas said that, when he discovered that the Claimant wanted money for unfair dismissal, he said, "Are you kidding me?" He said that he had then disclosed the message about the IBM bid to others in the Company, because that was the message which, in his view, contained truly confidential information. He said that he considered that the Claimant should not receive any money from the Company, because the Claimant had been in breach of his obligations and his claim for unfair dismissal was "real cheek". He said that Mr Heckert often held confidential information about employees which

he did not share with Mr Thomas and that Mr Thomas had not dealt with the Respondent's legal representatives - and did not know who they were - until the week before the ET Final Hearing. The Tribunal considered this further, below.

111. Mr Heckert told the Tribunal that he referred the Claimant's alleged messages to Securonix to the Respondent's lawyers, for them to investigate. In the meantime, he had sent a "holding response" to the Claimant's solicitors on 27 January 2021, "There are some new details with respect to this matter that have come to my attention. I need a few days to review. I plan on getting back to you by the end of next week". P276.

112. In evidence, the Claimant accepted that Mr Heckert genuinely believed that the Securonix allegations against the Claimant were true.

113. The Claimant told the Tribunal that he was very distressed to have been dismissed, particularly in the middle of a pandemic when it would be difficult to obtain alternative work.

Relevant Law

Direct Race Discrimination

114. By s39(2) Equality Act 2010, an employer must not discriminate against an employee by dismissing him.

115. Direct discrimination is defined in s13(1) EqA 2010:
"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

116. Race is a protected characteristic, s4 EqA 2010.

117. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 Eq A 2010.

Victimisation

118. By 27 Eq A 2010,
" (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—(a) bringing proceedings under this Act;(b) giving evidence or information in connection with proceedings under this A (c) doing any other thing for the purposes of or in connection with this Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act."

119. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

120. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

121. If the Tribunal is satisfied that the protected characteristic/act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

122. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Unreasonableness

123. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof—see *Bahl v Law Society* [2003] IRLR 640, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

124. The *Court of Appeal in Khan v Home Office* [2008] EWCA Civ 578 stated: "It does not follow that, because the respondent was guilty of unlawful discrimination in its woeful inattention to and handling of the appellants' historic grievances, it was also guilty in relation to … other matters [complained of]. It may well be that, especially when acting in disregard of its own redundancy policy and procedure, the respondent acted unreasonably or unfairly but an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He has only to establish that the true reason was not discriminatory: Griffiths-Henry v Network Rail Infrastructure Limited [2006] IRLR 865, at paragraph 22, per Elias J."

Harassment

125. s26 Eq A provides, "(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account— (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

126. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of s.3A RRA 1976: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

127. This guidance is instructive in respect of harassment claims under *s26 EqA*, albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race. There is no requirement that harassment be "on the grounds of" the protected characteristic – *R(EOC) v Secretary of State for Trade and Industry* [2007] ICR 1234.

Burden of Proof

128. The shifting burden of proof applies to claims under *the Equality Act 2010, s136 EqA 2010*.

129. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

130. In *Madarassy v Nomura International plc*. Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift where M proves a difference in race and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para [56 – 58] Mummery LJ.

131. The EHRC Code of Practice of Employment 2011 provides, "1.13 The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings."

132. At **Chapter 19 Termination of Employment. How can discrimination be avoided in capability and conduct dismissals?** The Code provides,

> "Terminating employment "
> 19.3 Those responsible for deciding whether or not a worker should be dismissed should understand their legal obligations under the Act. They should also be made aware of how the Act might apply to situations where dismissal is a possibility. Employers can help avoid discrimination if they have procedures in place for dealing with dismissals and apply these procedures consistently and fairly. In particular, employers should take steps to ensure the criteria they use for dismissal – especially in a redundancy situation – are not indirectly discriminatory (see paragraph 19.11 below).
>
> 19.4 It is also important that employers ensure they do not dismiss a worker with a protected characteristic for performance or behaviour which would be overlooked or condoned in others who do not share the characteristic.
>
> 19.10 To avoid discrimination when terminating employment, an employer should, in particular: • apply their procedures for managing capability or conduct fairly and consistently (or use Acas's Guide on Disciplinary and Grievance at Work, if the employer does not have their own procedure); • ensure that any decision to dismiss is made by more than one individual, and on the advice of the human resources department (if the employer has one); • keep written records of decisions and reasons to dismiss; • monitor all dismissals by reference to protected characteristics (see paragraph 18.28 and Appendix 2); and • encourage leavers to give feedback about their employment; this information could contribute to the monitoring process.

Polkey

133. By *s123(1) ERA 1996*,
> " …the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

134. If a dismissal is unfair, the Tribunal may go on to consider the percentage chance that the employer would have fairly dismissed the employee, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

135. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason (procedural unfairness). Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred, or at some later date. In making an assessment Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Contributory Fault

136. By *s122(2) ERA*, where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the Tribunal shall make such a reduction. By *s123(6) ERA,* where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. *Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

137. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the Tribunal is to find contributory conduct:
- The relevant action must be culpable and blameworthy;
- It must actually have caused or contributed to the dismissal;
- It must be just and equitable to reduce the award by the proportion specified.

138. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault. The proper approach of Tribunals in these circumstances is first to assess the loss sustained by the employee in accordance with *s123(1) ERA 1996*, which will include any percentage deduction to reflect the chance that he would have been dismissed in any event. The Tribunal should then make the deduction for contributory fault, *Rao v Civil Aviation Authority* [1994] ICR 495. However, in deciding the extent of the employee's contributory conduct and the amount by which it would be just and equitable to reduce the award for that reason under *s123(6)*, the Tribunal should bear in mind that it has already made a deduction under *s123(1) ERA 1996.*

Contributory Conduct and Polkey - Discrimination

139. A reduction in compensation can be made in an award of compensation for unlawful discrimination on the basis of contributory negligence: *Way v Crouch* [2005] IRLR 603, [2005] ICR 1362*, EAT* and on a *Polkey* basis, *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202).

ACAS Code

140. The ACAS Code on Disciplinary and Grievance procedures has no application to either capability or SOSR dismissals: *Holmes v Qinetiq Ltd* [2016] ICR 1016; *Phoenix House Ltd v Stockman* [2017] ICR 84.

Decision

141. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

Race Discrimination

142. The Claimant contends that the Respondent subjected him to race discrimination by

(a) Dismissing him and/or

(b) Refusing to provide him the reasons for his dismissal.

143. The named comparators for unfair dismissal are Dean Robertson and Nikolas Eklov White Caucasian. Their employment was not terminated.

144. The comparator /s for the failure to provide reasons are hypothetical White Caucasian employees whose employment has been terminated within 12 months of the Claimant's dismissal, and their treatment by the Respondent.

145. **(a) The Tribunal considered whether the Claimant had shown facts from which it could conclude that the Claimant had been dismissed because of race.**

146. The Tribunal decided that the Claimant's actual comparators were not in materially similar circumstances to the Claimant. They were not subject to final written warnings and there was no evidence of any concerns about rude behaviour towards their managers or their presentational skills.

147. The Tribunal accepted that Mr Robertson considered that the Claimant had been rude to him and that he considered that the Claimant had rejected Mr Robertson's attempts to change his presentational style.

148. There were no other facts from which the Tribunal could infer that race was a reason for dismissal.

149. The Claimant did not complain that he had been subjected to any other race discrimination during his employment. While the Respondent did not give the Claimant a reason, or a true reason, for his dismissal, the Respondent treated all other employees it dismissed within 12 months of the Claimant in the same way - they were all told that they had been dismissed for "business reasons". All others who were dismissed were white. On the evidence, those employees were also dismissed summarily, with no chance to appeal. Mr Attfield, for example, was dismissed in a meeting which lasted 10 minutes and was "shocked" by his dismissal.

150. The fact that the Respondent acted unreasonably in dismissing the Claimant without any fair procedure does not shift the burden of proof, *Bahl v Law Society [2003] IRLR 640*, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

151. On the facts, the burden of proof did not shift to the Respondent to show that race was no part of the reason for dismissal. Even if it had, and taking into

account the EHRC Code of Practice of Employment 2011 and the Respondent's failure to follow any fair process in dismissal, the Tribunal would have decided that the Respondent had shown that race was not a reason for the dismissal.

152. The Tribunal accepted Mr Robertson's evidence that he decided to dismiss the Claimant because of the Claimant's interpersonal skills and the likelihood he would jeopardise client relationships. It accepted Mr Robertson's evidence that, " … the other Solutions Engineers in my team were easy to work with and certainly did not come with any of the attitude that I experienced with Severin. My main concern was the impact Severin's style would have on external facing activity and I was hugely concerned about the risk (of) losing a key sale as a result of Severin upsetting a client prospect."

153. The Tribunal has found that these reasons were insubstantial, see further below. The Respondent has admitted that the Claimant's dismissal was unfair. Nevertheless, these were non-discriminatory reasons for the dismissal. The Tribunal accepted Mr Robertson and Mr Heckert's evidence that neither of them would have spoken to their managers in the way the Claimant spoke to Mr Robertson.

154. Although the Respondent did not follow any fair process in respect of the Claimant's dismissal, the Respondent treated all employees it dismissed in the same summary way as it treated the Claimant. There was no evidence that the Respondent had substantial reasons for dismissing any of the other employees. The Tribunal was satisfied that the Respondent's standard practice was to dismiss employees without giving any real reason for doing so, so that race was not a reason for the summary nature of the Claimant's dismissal.

155. In this regard, the Tribunal noted that the Claimant himself said in evidence that he had alleged race discrimination in his solicitor's letter of 1 January 2021 as "leverage". It appeared that the Claimant did not himself believe that his race was a reason for his dismissal.

(b) Refusing to provide him the reasons for his dismissal

156. As the Tribunal has indicated, the Respondent treated all other employees it dismissed within 12 months of the Claimant in the same way - they were all told that they had been dismissed for "business reasons". All others who were dismissed were white. Those employees were also dismissed summarily, with no chance to appeal. Mr Attfield was dismissed in a meeting which lasted 10 minutes and was "shocked" by his dismissal.

157. The Claimant was not treated less favourably than the 3 white comparators who were dismissed within 12 months of the Claimant. There was nothing to suggest that a further hypothetical white comparator would have been given reasons for his dismissal. The burden of proof did not shift to the Respondent to show a non-discriminatory reason for the failure to given reasons.

158. The race discrimination claims failed.

Victimisation

159. The Tribunal decided that the Claimant's solicitor's letter of 11 January 2021 was a protected act.

160. It is not in dispute that there was an allegation of race discrimination in that letter, but the Respondent contends that it was not made in good faith.

161. The Claimant told that the race discrimination allegation had been included, at least partly, for "leverage".

162. However, at the time the letter was written, the Claimant had been dismissed summarily in a meeting, with no reason given. The Respondent's dismissal letter referred to vague "business reasons". The Claimant also told the Tribunal that he was alleging race discrimination because he had never been given a reason for his dismissal.

163. The Tribunal accepted that the allegation of race discrimination was made in good faith. It accepted that the Claimant was genuinely confused about the reason for his dismissal and considered that race was a possible reason.

164. The Tribunal also considered that the Respondent deciding not to offer the Claimant any compensation and, instead, sending him the letter dated 25 February 2021, informing him that they were starting an investigation into allegations that he had breached his obligations of confidentiality to the Respondent, amounted to a detriment. The Claimant would reasonably have expected the Respondent to engage in discussions about compensation for unfair dismissal – given that the dismissal was in breach of the ACAS Code of Practice 1. A reasonable employee would consider that the Respondent's failure to do so, but instead to say it was commencing an investigation against him, put them at a disadvantage in their post-employment relationship.

165. The Tribunal considered that the burden of proof shifted to the Respondent to show that the protected act was not the reason for this change in attitude to the Claimant.

166. Mr Thomas agreed that he had disclosed the Securonix messages after he had learned that the Claimant was seeking compensation. Given that Mr Heckert, at least, thought that it would be normal for the Claimant to seek compensation for unfair dismissal, an inference might be drawn that it was the race discrimination allegation which led to Mr Thomas revealing the Securonix messages and the Respondent's attitude to negotiations changing.

167. Mr Thomas was questioned closely about this.

168. The Tribunal considered that Mr Thomas was a truthful witness. He was convincing in his evidence that he considered that the Claimant had breached confidentiality and that the Respondent should not engage in compensation discussions with him. The Tribunal accepted that he did not know that the

Claimant had alleged race discrimination against the Respondent at the time he revealed the Securonix messages to Mr Heckert and others. It accepted that he had only discovered about the race discrimination allegations the week before the Final ET Hearing. It accepted that Mr Thomas considered that, in light of the Claimant's messages to Securonix, the Claimant should not be offered any compensation for unfair dismissal. That being the case, the protected act was not in Mr Thomas' mind at all and was not part of the reason that he disclosed the messages.

169. It was clear from the chronology that, once the Securonix messages had been disclosed by Mr Thomas in late January 2021, the Respondent started to question the Claimant about breaches of confidential obligations. The Claimant accepted that Mr Heckert genuinely believed that the Claimant was responsible for confidentiality breaches. The Tribunal found that it was the Respondent's genuine belief that the Claimant had acted in breach of his confidentiality obligations which was the only reason for the solicitor's letter of 25 February 2021. That letter, on its face, was directed precisely to the alleged confidentiality breaches.

170. The Claimant's victimisation claim failed.

Harassment related to race

171. The Claimant contended that the letter of 25 February 2021 amounted to harassment related to race.

172. The Tribunal accepted that the letter was unwanted by the Claimant. However, on the evidence, the letter was not related to the Claimant's race in any way. The letter was written solely because the Respondent believed that the Claimant had breached his confidentiality obligations.

173. The Claimant's race harassment claim failed.

Unfair Dismissal – Polkey and Contributory Fault

174. The Respondent conceded that it had dismissed the Claimant unfairly. The Tribunal was asked to consider whether any compensation awarded to the Claimant should be reduced on a just and equitable basis and because of Polkey/Chagger, contributory conduct and conduct which came to light after the dismissal.

175. The Tribunal considered the likelihood that this employer, the Respondent, would have dismissed the Claimant, following a fair procedure. There were 2 elements to the Tribunal's consideration: Mr Robertson's pre-dismissal concerns and the confidentiality breach which was fully revealed after dismissal.

Mr Robertson's Concerns

176. The Tribunal found that the reasons, in Mr Robertson's mind , for dismissing the Claimant were that the Claimant had been rude and was unwilling to be guided,

so that Mr Robertson considered that there were risks to future client relationships if the Claimant continued to be employed. The Tribunal decided that these were capability-type reasons for dismissal. Mr Robertson considered that the Claimant could not cooperate, or otherwise perform, to do his job well.

177. It was not in dispute that the Respondent followed no process to examine these matters. Mr Robertson never told the Claimant that he considered the Claimant was underperforming. He gave him no guidance on his interpersonal skills, or how the Claimant might otherwise improve his performance. Mr Robertson had only once raised the Claimant's presentational skills with the Claimant. In Mr Robertson's view, the Claimant had failed to respond appropriately to an informal conversation. Even the Respondent did not characterise this as a refusal to follow a management instruction.

178. Insofar as Mr Robertson held a negative view about the Claimant's ability to perform well in important interpersonal aspects of his role, therefore, Mr Robertson's judgment on this was entirely superficial.

179. A fair procedure would, at least, have involved inviting the Claimant to a meeting to consider whether he should be dismissed for his unsatisfactory performance. It might also have involved giving him an opportunity to improve.

180. The Tribunal considered that, given that the UK was in lockdown at the time, the Claimant would have been likely to have wanted to stay in employment and would have attempted to respond to any concerns raised with him. It noted that Mr Robertson's concerns were not in the nature of the sex harassment/discrimination complaints in the March 2020 final written warning. When the March 2020 allegations were raised with the Claimant, he was reasonably contrite and offered to apologise. He was not resistant to feedback on that occasion.

181. The Claimant was highly skilled and was viewed as valuable to the Company in other respects.

182. On the other hand, the Claimant was also on a final written warning and worked in a small company.

183. The Tribunal needed to consider whether this small company would fairly have dismissed this Claimant, for Mr Robertson's concerns, when the Claimant was already subject to a final written warning.

184. Given the minor and superficial nature of Mr Robertson's concerns against the Claimant, the Tribunal decided that it was more likely than not that the Respondent would not have dismissed the Claimant for Mr Robertson's concerns, if it had adopted any sort of fair procedure. It would only have been 40% likely that the Claimant would have been dismissed following Mr Robertson's concerns. Mr Robertson's concerns amounted to the Claimant having been rude on a few occasions and declining to be advised on his presentation style. The Tribunal decided that these were truly minor matters which a reasonable employer might deal with, in the first instance, in an informal

way. The new matters which were not similar to the sex harassment in the final written warning.

Confidentiality Breach

185. The Tribunal has already found, as a fact, that Mr Thomas did not consider the Securonix messages to be a very serious breach of the Claimant's contractual obligations. It has set out its reasons above.

186. If the breaches were very serious, Mr Thomas would have been likely to seek the Claimant's immediate dismissal.

187. A least part of the information was in the public domain. Mr Thomas' evidence was to the effect that he considered that only the Claimant's comments on the IBM bid were not in the public domain.

188. Nevertheless, the Claimant agreed that sending the messages would have been in breach of his contract.

Polkey Conclusion – Matters Known Before and After Dismissal

189. Given Mr Thomas' complete lack of action in relation to the Securonix messages when he received them, the Tribunal rejected the Respondent's contention that it was 100% likely that the Claimant would have been dismissed fairly for sending the messages. The Claimant was not even suspended and no action at all was taken by the Respondent to investigate the extent of the breach, even when the Respondent's other officers were informed of them. That indicated that, in fact, the Respondent did not view these confidentiality breaches to be serious.

190. However, taking Mr Robertson's concerns, the confidentiality breaches and the final written warning together, the Tribunal considered that it was very likely that the Respondent would have dismissed the Claimant following a fair procedure.

191. Taking into account all the relevant matters, the Tribunal considered that this Claimant was 80% likely to have been dismissed fairly by this Respondent on the same date, 4 January 2021.

Contributory Fault

192. The Claimant did not repeat the conduct which was the subject of the final written warning. That conduct had been culpable and blameworthy.

193. The Tribunal considered that Mr Robertson's concerns about the Claimant did not relate to culpable and blameworthy matters. They were reasonably trivial performance concerns.

194. The Claimant agreed that the Securonix messages were in breach of contract. That was culpable and blameworthy, but the Tribunal has made clear that the

Respondent's own actions indicated that these breaches of confidentiality were not serious.

195. The Tribunal has already taken full account of the final written warning and the confidentiality breaches when making its *Polkey* assessment in this case. It is not just and equitable to reduce the compensatory or basic awards further for the same reasons.

No ACAS Uplift

196. The Tribunal decided that compensation awarded to the Claimant should not be increased because of the failure to follow the ACAS Code of Conduct. The Claimant was not dismissed for misconduct so the ACAS code did not apply.

197. A Telephone Preliminary Hearing shall take place for 30 minutes before EJ Brown at 9.30am on 14 March 2022 to give directions for a remedy hearing.

Employment Judge Brown

28 February 2022

Sent to the parties on:

28/02/2022.

For the Tribunal: