



EMPLOYMENT TRIBUNALS

Claimant: Mr Charles Iseki

Respondents: 1) McColl's Retail Group Limited
2) Christopher Richardson
3) James Coomber

Heard at: East London Hearing Centre

On: 24, 25, 26, 29, 30 November and 1 December 2021

Before: Employment Judge John Crosfill
Members: Ms G Forrest
Ms S Jeary

Representation

Claimant: Mr Brown of Brown & Co Solicitors

Respondent: Mr Paman Singh of Workwise Law

JUDGMENT

1. The Claimant's claim for harassment contrary to section 26 and 40 of the Equality Act 2010 succeeds as against the Second and Third Respondent in respect of a remark made by the Second Respondent in the last 2 weeks of March 2019.
2. The Claimant's other claims brought under section 26 and 40 of the Equality Act 2010 do not succeed and are dismissed.
3. The Claimant's claims for direct discrimination contrary to Sections 13 and 39 of the Equality Act 2010 do not succeed and are dismissed.
4. The Claimant's claims for direct discrimination contrary to Sections 27 and 39 of the Equality Act 2010 do not succeed and are dismissed.

REASONS

1. The First Respondent ('McColl's') owns and operates convenience stores across the UK. The Claimant was employed by McColl's as a Store Manager of its' Blackheath store. The Claimant self identifies as a Black Nigerian.
2. The Claimant says that he experienced harassment related to race from the Second Respondent, Christopher Richardson who was a junior member of staff who reported to the Claimant. The Claimant says that when he reported this treatment to his manager James Coomber, the Third Respondent, no action was taken. The Claimant alleges that James Coomber subjected him to harassment and direct discrimination culminating in what the Claimant says was a false account of the Claimant threatening him during a telephone call that took place on 2 April 2019. The Claimant then complains about the manner in which his grievances and the Respondent's disciplinary process was conducted. He says that certain of his grievances amounted to protected acts and alleges that he was subjected to various detriments because he did these acts.
3. The Respondent dismissed the Claimant at the conclusion of a disciplinary process ostensibly for threatening James Coomber on 2 April 2019. The Claimant has not brought any claim directly arising from that dismissal but has claimed that James Coomber made a false allegation because of the Claimant's race.
4. After a period of early conciliation the Claimant obtained an Early Conciliation certificate naming 'McColl's' as a prospective Respondent. On 3 August 2012 the Claimant presented his ET1 to the Employment Tribunal in which he identified all three Respondents.

Relevant procedural history and the hearing

5. A preliminary hearing took place on 16 September 2019 before EJ Lewis. EJ Lewis recorded that she considered that the Claimant's ET1 set out the legal and factual basis of the Claimant's claims more accurately than a list of issues proposed by the parties. She directed that a revised list of issues be produced that more closely followed the ET1. She directed that the Respondents provide some further information setting out their factual response to the allegations of harassment.
6. The parties did then agree a further list of issues. That list was included in the bundle prepared for the hearing. We have to say that that revised list is still not quite as clear as it could be and not as precise as the ET1. Where we deal with the issues below we shall refer to both the list of issues and the numbered paragraphs of the Particulars of Claim.
7. The case was first listed in the summer of 2020. Because of the Covid Pandemic that hearing was postponed. The matter was listed for a hearing commencing on 7 September 2021. That hearing was due to take place via CVP. Due to difficulties with witnesses accessing the hearing EJ Russell

decided to postpone the hearing. She dealt with an application to amend the ET1 to bring additional claims of direct discrimination in respect of each matter identified as a claim of harassment. That application was refused.

8. The matter was relisted to commence on 24 November 2021. The first day was set aside as a reading day for the Tribunal.
9. On 25 November 2021 the Claimant and his Solicitor did not attend the Tribunal at 10:00am. It appeared that there had been some uncertainty about whether the hearing was in person or via CVP. Whilst the notice of hearing was in our view quite clear we made no criticism of the Claimant because of this accepting that there had been a genuine misunderstanding.. The Claimant arrived at 11:30.
10. At the outset of the hearing we discussed the fact that the Claimant's ET1 did not include ACAS early conciliation certificate numbers for the second and third Respondents. This was not a point identified at an early stage in the proceedings and, initially, the matter had been conducted on the basis that these respondents had been properly joined as parties. The point was first taken before EJ Russell at the hearing on 7 September 2021. It appeared that the Claimant had engaged in early conciliation naming the two individual respondents. However as stated above the ET1 included only the certificate number for the First Respondent. We concluded that, whilst the claims against these respondents should have been rejected, it was open to the Tribunal to use its powers under rule 34 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 to join the Respondents to the claim against McColl's – see **Mist v Derby Community Health Services NHS Trust UKEAT/0170/15**. For reasons we gave orally at the time we decided that as the parties had proceeded on the basis that the Respondents were properly joined for a considerable period it would be in the interests of justice to join those parties.
11. We were told by the Respondents that one of their witnesses, Jackie Allen, was only available on 30 November 2019. She was on holiday in Spain. We pointed out that she may need permission from the Spanish authorities to give evidence from Spain. Later in the hearing Mr Singh indicated that he was unable to ascertain whether Jackie Allen could give evidence lawfully. He indicated that he would be unable to call her to give live evidence but asked us to have regard for her witness statement in circumstances where she was willing to give evidence.
12. The Respondent had served witness statements from Sarah Tottman (who had conducted the investigation into the disciplinary charges arising from a telephone call of 2 April 2019 and the claimant's later grievances) and from Martin Sherriff who was asked to hear an appeal by the Claimant against the decision to dismiss him and the outcome of his grievances. The Claimant had made it clear that his case included no allegations arising from the decision to dismiss him per-se or in relation to anything done by these two witnesses. In the light of that Mr Singh decided that it was unnecessary for the tribunal to consider their evidence.

13. We heard from the following witnesses:
 - 13.1. The Claimant, who gave evidence from mid-day on 25 November 2019 to 11 am on 27 November 2019 (with interruptions set out below); and
 - 13.2. Christopher Richardson, who was at all material times a sales assistant reporting to the Claimant who gave evidence between 11:27 and 13:05 on 27 November 2019; and
 - 13.3. Franky Howard, who was at the material times a sales assistant working alongside Christopher Richardson and who commented specifically on a meeting between the Claimant and Christopher Richardson on 2 March 2019; and
 - 13.4. James Coomber who was appointed as the Area Manager responsible for the Blackheath Store on 4 February 2019 and who was the Claimant's line manager. He gave evidence from 14:37 and his evidence concluded at the end of the day on 27 November 2019.
 - 13.5. On 30 November 2019 we heard from Carole Harris who at the material time was an Area Manager and who was the person who dealt with grievances raised by the Claimant in March 2019; and then
 - 13.6. From Stuart Frost, a Regional Operations Director who specifically dealt with a suggestion made by the Claimant that he had, during a telephone conversation on 29 March 2019, raised allegations of race discrimination.
14. It can be seen from the timings set out above that the Claimant's evidence went on for some time. One reason for this was that the Claimant would tend to give long expansive answers at some speed. On numerous occasions we had to remind the Claimant to speak at a speed where his answers could be recorded.
15. During the Claimant's evidence Mr Singh asked him a number of questions about the timing of events. The Claimant suggested that he had made reference to his/a diary when compiling his witness statement. The Claimant had not disclosed a diary and we directed that he produce any diary he was referring to the following day.
16. We record that on 26 November 2019 the Claimant did not arrive at the Tribunal until 11:00. No adequate explanation was given although an apology was offered. It seems that the Claimant had attended his solicitors office with the documents he was to produce. Mr Brown had sent the Tribunal an amended Chronology of allegations presumably on instructions from the Claimant. We made it clear that it was unacceptable to be late to the hearing without some good explanation. We have been prepared to assume that the chronology prepared by Mr

Brown before travelling to the Tribunal did not involve any discussion with the Claimant about his evidence.

17. At the outset of the hearing on 26 November 2019 the Claimant made an application to adduce and rely upon three categories of documents these were:
 - 17.1. A workplace diary; and
 - 17.2. Holiday request forms completed by Christopher Richardson and other staff members; and
 - 17.3. A staff review form that related to Franky Howard.
18. The introduction of these new documents was opposed by Mr Singh. We heard submissions from both parties . We decided to admit the diary into evidence but refused the application to adduce the other documents. We gave our oral reasons at the time and will not repeat them in full here. In short it appeared to us that the existence of a diary said to have been completed at the time was a key document in relation to the question of whether there had been contemporaneous records of complaints made by other staff members about racist remarks by Christopher Richardson. We declined to admit the other documents as they appeared to be of peripheral relevance and having regard to the timing and manner in which they were produced it was not in the interests of justice to admit them.
19. At lunchtime Mr Singh applied to admit additional documents from the Respondents. These were CCTV stills apparently showing a masked man who had entered the Blackheath store using the alarm code after the Claimant's dismissal. There was an e-mail where James Coomber speculates that the most probable culprit was the Claimant as no items of value were stolen. Those documents were admitted without objection.
20. After the evidence concluded we invited the parties to make their submissions. Mr Singh had provided comprehensive written submissions and stated that he was content to rely upon those. In those submissions he referred to some additional authorities. Mr Brown made oral submissions on behalf of the Claimant. Having heard Mr Brown's submissions Mr Singh did address us orally in response to some of the points made by Mr Brown. There was no dispute about the law that we needed to apply. We shall not set out the submissions in this decision but refer below to the arguments presented to us that we consider had a material bearing on our decisions.
21. Unfortunately it was clear that we did not have sufficient time to deliberate and to deliver a judgment on the final day of the hearing. We therefore reserved our decision. The decision has been delayed for a number of reasons unconnected with the case. An apology for this is set out below.

Findings of Fact and the evidence about the key events.

22. In this section we set out our findings of fact about the background events giving rise to the claims we were invited to decide and the evidence relating to the events giving rise to the claims. We set out our findings of fact as to those key events in our discussions and conclusions.
23. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of **Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560**. In that case, the court noted that that human memories are fallible they are are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. It is a fallacy to suppose that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

The management structure and roles within the store.

24. The Blackheath store is a typical medium sized convenience store. Regrettably the staff within the store had to deal with shoplifters and other abusive customers.
25. At the time of his appointment the Claimant was the manager of the store. He reported to an area manager. Initially the Claimant's area manager was Paul Collins. The Claimant received some training on appointment as manager including training from Jackie Allen. When the Claimant first raised a grievance by an e-mail dated 9 January 2019 he referred to Phil Collins, Jackie Allen and 'Rebecca', an HR Partner, as wonderful people. He referred to Jackie Allen as a 'great caring lovable supportive woman'.
26. There were around 11 staff who reported to the Claimant. These were a mixture of sales assistants and supervisors. We find that there was little difference between these roles. In the course of the hearing we learnt that a supervisor would have some minor additional duties. They might be asked to open and close the store including cashing up. The tills within the store would only permit a till operator to reverse or override a transaction when a code was entered. As a general rule only a manager or supervisor would be given such a code. Such a code was necessary for cashing up at the end of the day. We were told during the hearing that a supervisor received a very slightly higher rate of hourly pay. The sales assistants and supervisors worked to a roster and were allocated shifts depending on the needs of the business.

27. It was the Claimant's evidence that he had no power to discipline any employee. He said that he could speak to the staff that reported to him about disciplinary matters but if any action was to be taken it needed to be taken by his area manager. James Coomber disagreed. It was his position, shared by other managers, that the Claimant did have the authority to instigate disciplinary proceedings. Their position is supported by the disciplinary policy which at section 15 sets out who might conduct a disciplinary hearing. The policy provides that an appropriate manager can conduct a hearing at any stage of the disciplinary process including up to a dismissal. An appropriate manager is defined as a manager at the next work level. We accept the Claimant's evidence that he did not know that he had the power to discipline staff who reported to him. That conclusion is supported by the fact that the Claimant did not actually issue any written disciplinary warnings to any member of staff despite his numerous complaints about their conduct. We find that if he knew he had the power to discipline his staff he would have used it. We would conclude that the Claimant ought to have known what the disciplinary policy was and that his managers could reasonably have expected him to have utilised that policy were it necessary to do so.

Christopher Richardson expressing racist views between August – December 2018

28. The Claimant says in his witness statement that he found out that Christopher Richardson was racist from the outset of his engagement as a Manager. He says that he would tell other members of staff that 'he hates black people'. In his witness statement he names two of those staff members as Rebecca and Claudine and says that both of these individuals were black.
29. The matter is dealt with in the Claimant's witness statement. He says that Christopher Richardson would tell other members of staff that he hates black people on a regular basis.
30. In his witness statement the Claimant refers to another black employee, Kieran, complaining about Christopher Richardson. He says that Kieran told him that the Claimant had said that black people were lazy and were in gangs. The diary produced by the Claimant has a handwritten entry on 30 August that reads '*Kieran complained/Chris*'. On 3 September there is a further entry that reads '*Kieran called (complaint about Chris attitude)*'.
31. There is no document or record of the Claimant taking any action formal or informal in response to a complaint by Kieran.
32. The Claimant suggests in his statement that in October 2018 Claudine came to see him and relayed that she felt uncomfortable working with Christopher Richardson. He says that he then met with Christopher Richardson to discuss this. Christopher Richardson denies that the Claimant raised racism towards others at that time (or any other).

33. The Claimant had produced a file note of a meeting between himself and Christopher Richardson that it is agreed took place on 2 March 2019. That file note suggests that the subject of the meeting was to discuss racism/discrimination as well as timekeeping. The file note includes references to previous meetings and dates are given. There is no reference to any meeting in October 2018. The Claimant's handwritten account of the meeting includes a statement that he has spoken to Christopher Richardson on two previous occasions about racism.
34. The Claimant says that he raised his concerns about the Claimant with Paul Collins who was at that time his area manager. In the diary provided by the Claimant there is a note on 15 October 2018 that says '*spoke to Paul about Chris, Rebecca*'. There is a further note on 16 October 2018 that says 'Complaint to Paul Collins about Chris – come in the morning'. A further note on the same day shows that Christopher Richardson was at work on that day but in the evening.
35. The Claimant says that no action was taken by Paul Collins. He does not suggest that he took any action himself. On his account Christopher Richardson had used serious discriminatory language in the workplace to at least 3 colleagues. None of these individuals raised any formal complaint.
36. In the file note dated 2 March 2019, which on the Claimant's account includes a discussion about racism the first meeting referred to was said to have taken place on 9 November 2018. There is no reference in the diary produced by the Claimant to any meeting between the Claimant and Chris Richardson on that date although there are other notes. One note refers to 'Paul & Darren' visiting. There are instructions given to Farhana on how to handover to Chris Richardson.
37. The Claimant says that he first raised the matter of Christopher Richardson's racism with James Coomber on 17 January 2018. James Coomber was in the store on that date but denies that there was any mention of racism.
38. On 24 December 2018 the Claimant says that Christopher Richardson said that Megan Markle should not have married Prince Harry. In his witness statement the Claimant says that 'this was at the time when it was in the media that Prince Harry would be marrying Megan Markle. That marriage took place on 19 May 2018 although we take notice of the fact that it remained a talking point for many months thereafter.
39. In our discussion and conclusions below we set out that we do not accept that any of the members of staff raised allegations that Christopher Richardson had used racist language at any point in 2018. Furthermore we set out our conclusion that Christopher Richardson used no such language towards the Claimant at this time. We have concluded that these events simply did not happen.

Farhana, Rebecca and Christopher Richards' Grievances

40. Farhana brought grievances directed against the Claimant on 12 December 2018, 18 December 2018, and 30 January 2018.
41. In the first of those grievances Farhana makes serious allegations that the Claimant is rude and aggressive. She complains that the Claimant has threatened her. She complains about rostering decisions made by the Claimant were interfering with her childcare responsibilities. She implies that the Claimant has raised her immigration status improperly. She suggests that she had raised the matter with Paul Collins but no action had been taken.
42. An investigation meeting took place on 17 December 2018. James Coomber was asked to conduct that meeting. We were provided with typed notes of that meeting. Farhana is recorded as repeating her allegation that the Claimant shouted at her and others in front of customers. She says that he threatened her saying that he knew a police officer and suggesting that she might be deported. She suggested that the Claimant was racist. She said that the Claimant had referred to her as evil. She says that the Claimant referred to Jackie Allen as his 'godmother'. One part of the complaint concerned an incident that Farhana thought had been captured on CCTV.
43. The Claimant was interviewed by James Coomber on 17 December 2018. The notes of that meeting disclose that the Claimant is recorded as saying '*All my staff love me*'. James Coomber showed the Claimant CCTV footage where Farhana had alleged that he had behaved aggressively. James Coomber is recorded as saying that in his view the Claimant's body language was enough to make a person feel uncomfortable. The Claimant denied any improper conduct.
44. Farhana's second complaint was made on 18 December 2018. It concerns somebody altering the 'clock in' records. Her third Grievance was made by e-mail of 30 January 2019. In that e-mail she says '*He threatened me several times he will continue until I resign or he will sack me. He told me he has a godmother who gave him store manager trained and she told Charles sack Farhana straight away*'.
45. By a letter dated 14 February 2019 James Coomber wrote to Farhana dismissing her grievance. We consider that his conclusions were extraordinarily perfunctory. His conclusions in respect of whether there had been any aggressive conduct were that there was no evidence other than conflicting testimony from Farhana and the Claimant. He appears to have changed his view of what was shown on the CCTV accepting only that it showed the Claimant gesturing. Overall it is an outcome that is generous to the Claimant.
46. On 3 December 2018 Kevin Lewis, Christopher Richardson's stepfather, contacted the Respondent on behalf of Christopher Richardson. It is clear that he made a telephone call on that day and followed that up with

WhatsApp messages. Finally on 21 December 2018 he sent a long e-mail referring to the Respondent's Anti Bullying and Harassment policy.

47. Kevin Lewis' e-mail raises complaints about the hours Christopher Richardson was allocated (including allocation of shifts over Christmas), the absence of breaks, an instruction to confront shoplifters and the Claimant accusing staff members of theft. We consider that these matters were perfectly proper matters of concern to raise by way of a grievance. Our overall impression of the e-mail is that it was very condescending. Kevin Lewis makes an offer to recommend a company to review McColl's policies. Kevin Lewis makes the following comments about the Claimant:

'Charles is clearly not able to be held in a position of power and is clearly unable to manage a shop. He has no compassion for staff and their lives outside the business.....'

48. Kevin Lewis goes on to say: *'Text messages from Charles that are seemingly written by a child should stop. Charles is representing the McColl's brand and using letters like "d, u and b" instead of the words "the, you and be" is embarrassing'.*
49. Christopher Richardson attended an investigatory meeting on 10 January 2019 conducted by James Coomber. He presented a document that set out his concerns. He repeats the complaints made by Kevin Lewis on his behalf in moderate terms. Those include a complaint about being called a thief. Within the document he sets out a number of allegations that the Claimant had bullied other members of staff. The notes of the meeting record James Coomber as saying that he would not consider complaints made on behalf of others.
50. The only notes we have been provided with relating to the investigation of Christopher Richardson's complaints by James Coomber are from a meeting on 6 February 2019. It appears that the only question James Coomber asked of the Claimant was to provide him with some paperwork and say: *'what do you have to say about this'*. We do not consider that this evidences a robust process. A number of allegations are not explored at all.
51. The Claimant did not at any time during the investigatory meeting make any reference to Christopher Richardson being a racist, expressing hatred of him or any such matter.
52. An outcome meeting was held on 12 February 2019 and a written outcome letter provided on 13 February 2019. Some minor aspects of the grievance were upheld relating to undertaking training in the staff's own time and the late provision of rosters. All other aspects of the grievance were dismissed. We note that the complaint about being called a thief is dismissed simply because Christopher Richardson had heard that the Claimant had called him a thief via a third party. James Coomber's letter does not suggest he felt it necessary to speak to the

third party. It appears that James Coomber relayed his conclusions to Kevin Lewis.

53. On 3 January 2019 a complaint was sent to the Respondent about the Claimant from a social worker working at the Great Ormond Street Children's hospital. The social worker informed McColl's that Rebecca's son was being treated by the Hospital for end stage renal failure. A donor match had been found and Rebecca had been contacted urgently to get her to attend the hospital. Her attendance was important not only for compassionate reasons but also for the purposes of giving consent to the potentially life saving operation. A nurse had initially spoken to a supervisor asking that Rebecca be released from work. It is recorded that the Supervisor was unwilling to discuss this. It seems that the Hospital were expecting a call from the Claimant. When no call was received a further call was made and the social worker spoke to the Claimant. She says this:

'I did contact her line manager Charles as Rebecca had not heard back from him and I wanted to inform him of the circumstances. I was really concerned about his attitude. He made allegations about her conduct that I would find to be a breach of her confidentiality, and additionally he was extremely rude to me, refusing to let me explain how challenging the last year had been for Rebecca and her family, or what had caused her need to come in urgently. He put the phone down on me after failing to listen to the reason for my call.'

54. The Claimant was asked for an explanation of his conduct in the investigatory meeting conducted by James Coomber on 6 February 2019. The Claimant acknowledges taking the telephone call. He said that the person on the phone told him they were a neighbour of Rebecca and on that basis he had hung up.
55. It does not appear that Rebecca herself took any active steps to progress a grievance. James Coomber did not take any further action in respect of this matter and tells us in his witness statement that he had not done anything because he had been unable to contact the social worker and Rebecca was on sick leave.
56. The Claimant had been suspended from work during this grievance process. We saw little documentation about the suspension itself. We consider that the grievances taken individually and together raised serious questions about the Claimant's conduct. We consider that suspending the Claimant after these allegations were made was a reasonable step.
57. For ourselves we would consider that any reasonable employer would have taken these allegations extremely seriously. The allegations made by the Great Ormond Street social worker were by themselves of an extremely serious nature. We find that James Coomber's investigations were perfunctory and lacking any proper analysis. When the three complaints were considered together, along with the complaints that

Christopher Richardson made about the treatment of others, a pattern of conduct was evident that would tend to suggest that the Claimant was treating his staff very badly. Ultimately no action was taken against the Claimant.

The Claimant's first grievance

58. On 9 January 2019 the Claimant sent an e-mail to an HR advisor. That e-mail is headed 'Grievance against Rebecca Noel'. In that e-mail, which runs to almost 4 densely typed pages the Claimant sets out complaints about Rebecca. We find that the action that prompted the Claimant to write this letter was the fact that on 7 January 2019 he had been suspended as a consequence of the complaint made by the Social Worker at Great Ormond Street. The Claimant sets out a very long list of complaints about Rebecca including a suggestion that she was behind the complaints of Christopher Richardson and Farhana. His final complaint is a suggestion of 'aggressive and rude' behaviour in a telephone call by somebody who described herself as Rebecca's neighbour who had accused him of not supporting her. We find that this was the call from Great Ormond Street.
59. In the 4-page letter there is no mention whatsoever of any racist conduct by Christopher Richardson. There is no mention of the Claimant having raised these matters with Paul Collins or James Coomber.
60. No action was taken in respect of the Claimant's grievance. On 23 February 2019 the Claimant chased the HR department by e-mail. That did prompt a response by James Coomber who informed the Claimant that as his complaints about Rebecca were historic they should have been dealt with at the time. He informed the Claimant that such matters were within the Claimant's control and should have been investigated and then escalated to an area manager if there was no improvement. James Coomber dismissed the matter by saying '*this is not a grievance*'. In his evidence before us the position taken by James Coomber was that if the Claimant had issues with the way his staff were behaving than as a manager he had recourse to the disciplinary policy rather than bringing a grievance.

4 February 2019

61. The Claimant says at paragraph 4(j) of his ET1 that on 4 February 2019 he informed James Coomber that Rebecca had complained of racism by Christopher Richardson. The Claimant does not deal with this in any detail in his witness statement. James Coomber, in his witness statement points out the fact that the Claimant had been suspended from work at this time and denies that the conversation took place. It is unlikely in our view that the conversation would have taken place during the Claimants suspension. Having regard to all of the evidence we are not satisfied that the Claimant raised this matter on that date.

Kevin Lewis – telephone call on 5 February 2019

62. The Claimant says in his witness statement that on 5 February 2019 Kevin Lewis rang him and said, 'my face should not be seen in the store'. That is the same allegation that he makes about a later telephone call he says took place on 19 March 2019. The Claimant did not mention any such telephone call during the investigation meeting that took place on 6 February 2019. The Claimant was suspended from work at this time. He did not refer to it in any e-mail prior to 19 March 2019. We find below that there was a single instance when the Claimant spoke to Kevin Lewis on the telephone and that was in March.

The 'promotion' of Christopher Richardson

63. In the course of Christopher Richardson's grievance it had emerged that he had been expected to lock the shop up on some occasions and had been doing so using a till code belonging to some other person. James Coomber asked the Claimant and Christopher Richardson to engage in an informal mediation. Had there been any extant complaints about Christopher Richardson using racist expressions then this would have been a further opportunity for the Claimant to have raised them. He does not claim to have done so. At the conclusion of the meeting James Coomber suggested that it was inappropriate for Christopher Richardson to be expected to carry out two of the supervisor's duties, locking up and supervising the till, without being formally made a supervisor. We find that the Claimant was essentially given a choice. He could stop requiring Christopher Richardson to do those things or he should promote him formally to a supervisor position. We find that the Claimant did neither of those things.
64. On 27 February 2019 Christopher Richardson was working without any supervisor or manager present and he needed a supervisor code. We have seen a text message from James Coomber to the Claimant informing him that he had changed Christopher Richardson's authority level on the till system but on a temporary basis needed the Claimant to give him a supervisor's code. Christopher Richardson was not formally promoted at this time by James Coomber, the Claimant or anybody else.
65. We find that the Claimant believed that James Coomber has promoted Christopher Richardson and he resented the instruction. It is a matter that he raised in almost every subsequent document and meeting.

Events of 2 March 2019

66. It is the Claimant's case that there were three significant events that took place on 2 March 2019. He says that on that date Rebecca Noel made a further complaint about Christopher Richardson making racist remarks. He also says that the Claimant again told him that Prince Harry should not have married Megan Markle.
67. Christopher Richardson says in his witness statement, and we accept,

that following the Claimant's return to work from his suspension the relationship between the two of them had broken down. Christopher Richardson had made a request to take holiday between 22 and 28 July 2019. He wanted the time off to celebrate his birthday. The Claimant had refused that request stating that another staff member had booked holiday. Christopher Richardson suspected that that was untrue. On 12 and 13 February 2019 he accessed the stores CCTV to see whether his request had been read by the Claimant. He had made notes of what he had viewed on the CCTV but left those notes in the office where they were found by the Claimant.

68. It is agreed that on 2 March 2019 the Claimant asked Christopher Richardson to come into the office. Franky Howard said that he had been asked by the Claimant to attend that meeting 'as a witness'. What he understood was that he might be expected to take notes. The Claimant denies that he asked Franky Howard to attend at all and says that he was not there. We found Franky Howard to be a straightforward witness. He appeared to have a vivid recollection of the meeting. He was able to describe how angry the participants got. We accept that he was present. We find that the Claimant knows that to be the case. It is not a matter that could be imperfectly remembered.
69. The Claimant has produced two file notes that he says he wrote during the meeting. Christopher Richardson accepts that each of them bears his signature. One file note gives the reason for the meeting as Discrimination/Racism and lateness time keeping and the other refers to a breach of the Data protection Act.
70. The Claimant sought to explain why he had original documents in his possession. In his witness statement he said that he had sent the original to Human Resources '*which logged it on Mr Richardson's file*'. His witness statement makes the misguided assertion that as the document was on McColl's' headed template it reflected the company's official position. He says that the Respondents' failure to disclose the document '*confirms the general attitude of McColl's, which seeks to conceal evidence of blatant racism*'. He says that only when McColl's failed to provide the original document did he search for his own notes. When the Claimant produced the copy of these notes it became clear to the Tribunal that the Claimant had not as he claimed sent the original documents to Human Resources. The document produced by the Claimant was hand-written and was the original. McColl's position was that it had not found these documents on any file. Having regard to all of the evidence we are satisfied that the Claimant retained the only copies of all of the documents that he has subsequently produced including the record of the meetings on 2 March 2019. It follows that his criticism of the Respondents for failing to produce these notes was disingenuous and misleading.
71. Franky Howard and Christopher Richardson give a similar account of the meeting, both say that the meeting rapidly became very heated.

Christopher Richardson was unrepentant about viewing the CCTV as he was sure that the Claimant had refused his holiday request maliciously. Christopher Richardson does not dispute that he became very angry. Both say that the Claimant was angry. Where there is a dispute is the question of whether any alleged racist remarks were discussed. Both Christopher Richardson and Franky Howard were adamant that it was not. The Claimant says that it was and he relies upon the file note signed by the Christopher Richardson in support. Christopher Richardson accepts that at the conclusion of the meeting he signed a number of pieces of paper but says that he did not read them.

72. The file note has internal features that are concerning. We have noted that it refers to three earlier meetings said to have occurred. There are no notes of any earlier meetings with Christopher Richardson but the Claimant has produced numerous such notes concerning others. It would be extraordinary if allegations as serious as racism were discussed without notes being made.
73. The file notes make no reference to the Megan Markle matter that is said to have taken place the same day.
74. The file note contains a record that the Claimant has previously reported the issue to 'Paul, Darrel and James'. James Coomber is adamant that there was no earlier complaint. It would be extraordinary if three managers received complaints of direct discrimination and took no action. There is no particular reason to include that in the file note. The file note suggests that unless Christopher Richardson stops his racist language disciplinary action might follow. This is an extraordinary statement. The Claimant says he holds many specialist qualifications. Even without such specialist knowledge the Claimant would have known that repeated racist remarks would merit more than what is in effect an informal warning.
75. The Claimant did not produce this document during the extensive investigation into his grievances or during the disciplinary process. Having had regard to the entirety of the evidence we are satisfied that at this meeting there was no reference to discrimination. We are not satisfied that the file in its present form was a record made at the time.

5 March 2019, James Coomber saying black people were lazy

76. The Claimant says that on 5 March 2019 James Coomber attended the Blackheath Store . He says that James Coomber made two racist remarks on that occasion. These were:
 - 76.1. In a discussion about gang violence James Coomber said that the violence was black on black, that the parents were lazy and had not brought their children up well which is why they joined gangs; and

- 76.2. there was a discussion about the recent recruitment of a supervisor, Eva. The Claimant says that James Coomber told him that he should not have recruited a black person as they tended to be lazy. He suggested that he should have recruited somebody from Eastern Europe *'because his wife is Czechoslovakian'*.
77. James Coomber denies that he made any of the remarks the Claimant attributes to him. In respect of the last remark he says that he most certainly would not have referred to his wife being from Czechoslovakia. He says that his wife is Czech and he has learnt not to refer to the Czech Republic as being part of Eastern Europe because his wife dislikes the label. We are satisfied that a person living with a Czech would be very unlikely to refer to them as a Czechoslovakian a state that has not existed since 1992.
78. The Claimant says that on the same day in a discussion about newspaper reports of stabbings in London James Coomber stated that it was unfortunate but it was black on black and expressed a view that black parents were lazy and didn't bring their children up very well which is why the youths were in gangs.
79. James Coomber denies that he said any such thing. It would be extraordinary if James Coomber, knowing that he was addressing a black parent, express a view that black parents were lazy. That would be an obvious insult to black people in general and the Claimant in particular. It would be an overt act of direct discrimination. The Claimant did not contact human resources. The Claimant did not contact any higher manager at this stage. The Claimant did not make any written record of this conversation. There is no evidence that the Claimant did anything at all to progress any complaint against James Coomber until after he had spoken to James Coomber on the telephone on 2 April 2019.
80. We have had regard to all the evidence on our general concerns that the Claimant's credibility. We are not satisfied that's events took place as described by the Claimant or at all.

6 March 2019, James Coomber said that the royal family should be kept pure

81. The Claimant says that on 6 March 2019 he told James Coomber what Christopher Richardson had said about Megan Markle James Coomber expressed his agreement with the sentiment and said that the Royal family should be kept pure. James Coomber denies that there was ever such a conversation.
82. There are no documents to support the Claimant's account of these events on 5 and 6 March 2019 other than what he has said in the later grievance meetings. No staff member interviewed during the investigation supported the account the Claimant has given. The Claimant was aware of the possibility of bringing a grievance as he had already done so having complained about Rebecca Noel. We do not

accept that these events took place.

Christopher Richardson colluded in an attack on the Claimant on 19 March 2019.

83. The Claimant says that on 19 March 2019 he was working in the store when two males and a female entered the store. He says that they asked if he was the manager and challenged him to stop them stealing. He says that they took some bottled drinks, threatened to stab him and when the Claimant threatened to call the police told him that he would be 'dead'. He says that as they left the store they assaulted him by pushing him. He says that when he followed them outside he saw them laughing and embracing Christopher Richardson. He says that when he later challenged Christopher Richardson about this Christopher Richardson did not deny knowing them and said that he could not stop them.
84. Christopher Richardson denies that there was ever such an event.
85. The Claimant raised this matter during the grievance process that followed from his grievance of 3 April 2019. Whilst he did not expressly refer to this incident in that written e-mail, he raised the matter during a meeting with Carol Harris.
86. In his ET1 he said that he had reported the matter to the Police and gave a crime reference number. The Claimant did not provide any documentary evidence of this report when ordered to give disclosure. The Respondents sought an order that the Claimant disclose any crime report. That order was granted by EJ Burgher on 17 November 2021. The Claimant then produced a document on a printed form headed 'Metropolitan Police Service – Memo'. That is not a crime report and there is no evidence that the Claimant ever approached the police to obtain a copy of a report. Sections on that memo for a contact name and telephone number are blank as is a section for a crime reference number. The crime reference number given by the Claimant is included in handwriting on the body of the memo along with a date of 19 March 2019. The memo also includes handwritten notes showing the shifts worked by staff members in the store A date is given but it is not clearly legible. The memo also has some bank details written at the top.
87. The Respondents' solicitors made a subject access request asking whether there was any reference to Christopher Richardson in the crime report with the reference number given by the Claimant. By a letter dated 22 November 2021 the Metropolitan police confirmed that there was no reference to Christopher Richardson in that crime report.
88. In the course of the evidence we were told that McColl's have a policy for recording any serious criminal activity in its stores. Such matters would ordinarily be recorded and escalated. The store had CCTV and the Claimant could have asked that that be preserved and if necessary

presented to the Police.

89. We are not satisfied that this incident took place as alleged by the Claimant or at all. This is not an incident that has been misremembered. We discuss our conclusions below.

Kevin Lewis telephoning the Claimant – March 2019

90. On 28 March 2019 the Claimant sent an e-mail to James Coomber. He started the email dealing with an operational matter before going on to write the following:

'I only saw your e-mail and read your response to my grievances against Rebecca yesterday which you declined to investigate and I will respond to that shortly. Also Christopher Richardson's father that called [sic] and made totally unacceptable remarks about me, "that my face should not be seen in the store" and his son Christopher telling colleagues that he hates me which I told you to investigate were also ignored and will respond to that as well'

91. The reference that the Claimant makes to having just read an e-mail is a reference to James Coomber's e-mail of 4 March 2019 when he declined to deal with the Claimant's grievances against Rebecca suggesting that the Claimant use his authority as a manager to deal with the situation.
92. The Claimant's e-mail does not say that Christopher Richardson had used any racist language. It does not mention the very serious threats/assault that the Claimant says had occurred 9 days previously. It does not mention the events of 5 and 6 March 2019 where the Claimant says that James Coomber used racist language.
93. James Coomber forwarded the Claimant's e-mail to Jordan Heron who we understand was a Senior Store Manager. He asked Jordan Heron to call the Claimant and sort things out. He said that it was the Claimant's job to manage his team and that he should not be bringing grievances. In relation to the telephone call from Kevin Lewis he suggested that the Claimant should not be talking to the father of an employee and that if he was concerned he should call the police.
94. Christopher Richardson denied that his father had ever called the Claimant.
95. The allegation that this telephone call was made was a matter explored during the grievance process. When the Claimant gave oral evidence he raised a suggestion that in addition to the phrase he had quoted in his e-mail of 28 March 2019 and throughout the Grievance process and in his ET1 and witness statement Kevin Lewis had used words to the effect of *'go back to Peckham'* which he said is a predominantly black area. Given the opportunities that the Claimant has had to give a full account of any telephone conversation with Kevin Lewis we do not accept that this additional information is accurate. We find that the Claimant has deliberately embellished his account.

96. We are satisfied that there was a telephone call between the Claimant and Kevin Lewis. The Claimant's account is supported by what Claudine said during the investigation and what Eva said when interviewed in November 2019 (see below). We are satisfied that during that telephone call there was a suggestion that the Claimant was unfit to manage the store expressed in terms that the Claimant might reasonably have assumed were racist. We do not accept that there was any reference to Peckham.
97. We are satisfied that at much the same time Claudine told the Claimant that Christopher Richardson had '*repeated the views of his father*'. That is what she said during the investigation into the Claimant's subsequent grievance and is supported by what was later said by Eva. We set out further conclusions in respect of this below and explain more fully our reasons for this finding.

The Claimant's telephone call to Stuart Frost

98. The Claimant says in his witness statement that he had been trying to call James Coomber and suggests that James Coomber had been trying to avoid him or take his calls. There are two e-mails from the Claimant to James Coomber in the bundle both sent on 28 March 2019. The first refers only to an operational matter. The second e-mail is the one we have referred to above. When James Coomber received that e-mail he asked Jordan Heron to call the Claimant. The Claimant says that he was called by James Heron. He suggests that he told Jordan Heron about racism by Christopher Richardson. He does not suggest in his witness statement that he said anything about racism by James Coomber. The Claimant says that Jordan Heron told him to ring Stuart Frost. It is not disputed that the Claimant did make such a telephone call. What is disputed is the content of that call.
99. The Claimant says that during the telephone call with Stuart Frost he 'told him the details of my complaints of racism and harassment'. He does not make it clear whether the scope of that complaint was limited to Christopher Richardson or directed also at James Coomber. Stuart Frost says in his witness statement that he recalled the Claimant speaking to him on 29 March 2019. He says that the Claimant stated that he had been unable to contact James Coomber. We find that is likely to be the case because Stuart Frost agrees that James Coomber was working at Biggin Hill where there was little mobile coverage. Stuart Frost says that he recalls the Claimant wanting to discuss somebody at the store being promoted to a supervisor. We have no doubt that the Claimant did raise that matter. When the Claimant was interviewed by Carol Harris as part of his grievance he described finding out that Christopher Richardson has been paid for working as a supervisor as the 'final straw'. At this stage the Claimant knew via Claudine that Christopher Richardson had repeated views of his father which linked his race to his abilities as a store manager. We find that the Claimant perceived James Coomber as supporting Christopher Richardson.
100. Where there is a divergence in the account of the Claimant and that of Stuart Frost is on the question of whether the Claimant made reference to racism. On 4 April 2019 the Claimant set out his grievances against James Coomber and

Christopher Richardson he starts the e-mail by saying 'I contacted you yesterday about the ongoing issues in my store...' he then sets out numerous allegations which include allegations of race discrimination. Stuart Frost said in his evidence that no issue of racism was raised with him at all. He says that he can be sure of that as he had never had to deal with such an issue and was sure he would have remembered such a thing.

101. We found it difficult to resolve this stark conflict of evidence. When Stuart Frost gave evidence and was cross examined he did not waiver from his account. We accept that a dishonest witness may be just as likely to be consistent as an honest witness.
102. Having had regard to all of the evidence we are not satisfied that the Claimant expressly mentioned racism on the telephone to Stuart Frost. Such a thing would be memorable and it is most unlikely that Stuart Frost would recall it. We are satisfied that he raised a complaint that Christopher Richardson had been promoted but he did not fully explain why he was concerned about that.
103. We are satisfied that Stuart Frost told James Coomber that the Claimant had called him. That caused James Coomber to send the Claimant a text message in the following terms: *'Charles I am disappointed that you didn't follow procedures and called the regional manager, you must not be calling the regional manager, if I don't answer there is a reason and you must leave a voicemail then wait for a call back, you have not left me any voicemail please follow the process going forward, I have e-mailed all branches again today'*. The Claimant later categorised that text message as a threat to his employment. We consider that a very extreme response. The text of the message is consistent with the suggestion that the Claimant had escalated the issue of Christopher Richardson being paid as a supervisor to the Regional Manager before discussing the matter with James Coomber. It would be an unusual message for James Coomber to send if he believed that the Claimant was raising allegations of racism.

The telephone call on 2 April 2019

104. It was not disputed that on 2 April 2019 the Claimant and James Coomber spoke on the telephone. Within the bundle of documents there is a screenshot from a telephone which confirms James Coomber's evidence that he attempted to telephone the Claimant at 09:13 and that the Claimant called him back at 09:35. The telephone call lasted 19 minutes. What was said during that telephone call is highly contentious.
105. The Claimant's account of the telephone call is set out in his witness statement in very brief terms. He says: *'Mr Coomber also called me on around 2nd April 2019 and threatened me with dismissal. Mr Coomber also said in the same conversation that his father was a police officer of 20 years, and he would have set me up and taking actions against me and dealt with me inside or outside of the workplace. I was terrified by these comments and feared for my life, and I suffered with severe anxiety as a result.'*

106. The Claimant has broadly maintained the same account of this telephone call throughout the internal processes that followed. His first written account is in his grievance of 4 April 2019 which he wrote after his suspension. His written account closely matches what he put in his witness statement.
107. James Coomber has an entirely different account of events. He says that the first matter raised by the Claimant was his objection to Christopher Richardson being identified as a Supervisor. He says that he told the Claimant that if Christopher Richardson was being asked to do evening shifts this would entail doing the work of a supervisor and that he should be paid for this work. That is consistent with what had been said at the end of the mediation process. James Coomber says that that angered the Claimant in his language it made him explode. Says the Claimant flew off the handle and referred to his sons and saying that if they saw Christopher Richardson's stepfather he would be stabbed. James Coomber said he got really upset and interjected that the Claimant was threatening to commit a criminal act. He says that the later stages of the call the Claimant accused him of being a racist. He says that the Claimant then became uncontrolled referred to the fact that his wife was in HR, and then suggested that James Coomber would be stabbed if he told his sons how he had been treated. James Coomber says that he ended the call.
108. James Coomber says that he was very shaken by the experience of speaking to the Claimant. He says he spoke to Stuart Frost and the Human Resources department he was told that the matter would be investigated by Sarah Tottman.
109. James Coomber has produced a report that he made to the police on the same day at 14:31. That record has an account of the telephone call that is consistent with the account given by James Coomber in his witness statement.
110. On 2 April 2019 at 15:24 James Coomber sent an email to Sarah Tottman in which he set out his account of the telephone call. The wording of that email has caused some confusion. First sentence says 'attached call log, below statement'. The attachment to the email is a screenshot which shows that the telephone call took place. The body of the email set out a record of the conversation using initials to refer to the speaker. It had been assumed by the Claimant that it was asserted that the telephone call had been recorded. The Claimant had complained that no recording had been disclosed. In fact no such assertion was ever made. The email constitutes a record of the conversation but does not purport to be verbatim. In various passages there is only a brief summary. The record that is provided is consistent with James Coomber's account of the telephone call. In particular it includes suggestions that the Claimant sons might stab Christopher Richardson's father and later on the same suggestion is made in respect of James Coomber.
111. We set out our conclusions and reasons for accepting the evidence of James Coomber below. We find that the Claimant did behave as James Coomber alleges and in particular made the threats towards Christopher Richardson, his father and James Coomber that James Coomber later reported to the police and his employers.

112. On 4 April 2019 Jackie Allen attended at the Blackheath store for the purposes of suspending the Claimant from his duties. Within the bundle of documents is an email from Jackie Allen sent at 13:58 on 5 April 2019 to James Coomber in which she purports record what was said. She sets out her recollection of the conversation by reference to the initials of the speaker followed by the words that she suggests we used. Whilst Jackie Allen did not give evidence before us her reasons for not doing so were that she was in Spain and it was not possible to obtain permission for her to give evidence. In those circumstances we felt it some weight to the witness statement which she was apparently willing to adopt.
113. Jackie Allen records in her email that when she went to the store the Claimant indicated that he knew that this was going to happen. She says that one of the first matters raised by the Claimant was that he was angry with James Coomber because he went behind his back and made Christopher Richardson a supervisor without informing him. She records that the Claimant said that this had the effect of taking hours away from Eva. This is a matter that the Claimant has complained of.
114. Jackie Allen says in her witness statement that the Claimant rapidly became heated she records the Claimant claimed to have been a police officer, saying that his wife was a lawyer and in HR saying that he knows people in government in this country and Nigeria and that he had a PhD and had worked the big companies. She says that the Claimant said that he had not physically touched 'him'. Jackie Allen records that the Claimant then made various allegations of racism. Jackie Allen's notes suggest that she suggest that she said that it was improper to make allegations of racism without some proper basis. In her witness statement she deals with the allegation made by the Claimant in his ET1 where the Claimant says that she used the phrase *'there are Blacks who hate whites and it's not only whites who are racist and blacks are racist too'*. Jackie Allen does not accept the wording that is used but does accept that after the Claimant had made generalisations about white people she told him that prejudice could be displayed by white people and black people and that both black people and white people could suffer prejudice. We find that there is little between the account of the Claimant and that of Jackie Allen in this respect.
115. We find that Jackie Allen's account of the conversation she had with the Claimant is accurate. Her account of the Claimant being angry about Christopher Richardson being paid as a supervisor is consistent with the Claimant's own grievance submitted later on the same day. It is the first thing he mentioned. She records herself telling the Claimant that he should not make allegations of racism without a proper basis. That is consistent with what the Claimant says. We are satisfied that her record of the Claimant saying at the outset that he knew that he was going to be suspended is accurate. We also accept that the Claimant said that; *'I did not physically touch him..'*
116. On 8 April 2019 a Deputy Manager, Yuliya Keene made a statement to Jordan Heron about the events of second of April 2019. She said that she had been present when James Coomber was talking to the Claimant. She said that she overheard James Coomber saying to the Claimant that he should not threaten

him and that he might call the police. She said that James Coomber was physically shaking after the telephone call and had told her that the Claimant had called him a racist and had said he was going to stab him and a colleagues dad.

117. The Claimant was invited to an investigation meeting which was to take place on 3 May 2019. That meeting was conducted by David Brown who is an area manager. In these proceedings the Claimant says that the manner in which that meeting was conducted was an act of direct discrimination. We have been provided with notes of that meeting.
118. The Claimant starts by complaining that he was not informed of the reason for his suspension before it is administered. We consider that to be somewhat disingenuous. The Claimant was well aware of the disagreement that he had had with James Coomber and we have found that when he was suspended by Jackie Allen he has said that he anticipated disciplinary proceedings. At no time in the intervening period did the Claimant ask for the reason for his suspension.
119. David Brown started the meeting asking about till policy. We find that the purpose of these questions was likely to be to explore any suggestion by the Claimant that it was improper to give Christopher Richardson a supervisor's code. In a somewhat disjointed manner David Brown moves on to the issue of whether the Claimant had made threats during the telephone call with James Coomber. James Coomber's account of the telephone call was read to the Claimant and the Claimant stated that everything that was included was a lie. He goes on to say that it was James Coomber that threatened him, '*threatened my life and family*'. He repeated his allegation that James Coomber had said that his father was a police officer and knows the good and bad guys who would deal with me. David Brown then appears to bring the meeting to a close having advised the Claimant that the matter would proceed to a disciplinary meeting.
120. The Claimant complains that he was asked leading questions by David Brown we are unable to identify any leading questions in the transcript. We would accept that the investigation was somewhat perfunctory. In essence all David Brown did was to ask the Claimant to comment on James Coomber's account. He does not ask the Claimant to expand on his own account. The Claimant was sent an invitation to a disciplinary hearing on the same day.
121. When Sarah Tottman reviewed the minutes of the meeting she wrote to the Claimant cancelling the disciplinary meeting that had been scheduled for 15 May 2019. She said in that letter that she believed that having reviewed the file the Claimant should have been asked further questions and have been given a further opportunity to explain, in his own words, his version of events. The tribunal consider that this was an entirely reasonable and fair step to have taken. The minutes of the investigation meeting record the Claimant complaining of its perfunctory nature after he is told the will be a disciplinary hearing. In our view it was a fair and reasonable step to give the Claimant a further opportunity to give his account of events.

The Claimant's second and third grievances

122. On 3 April 2019 the Claimant sent an email to Stuart Frost and copied to an employee in the Human Resources department which had the subject line “my grievance against James Coomber”. In that email he sets out his complaints that Christopher Richardson had expressed himself in racist terms and sets out his complaints about Christopher Richardson’s stepfather. He then goes on to make complaints about James Coomber alleging that he had failed to take action and that he had also engaged in race discrimination. He set out his account of the telephone call and suggested that he had been threatened with dismissal by the Claimant.
123. On 13 May 2019 the Claimant sent an email to the respondent with a subject ‘my grievance against David Brown about the investigation and the appalling manner the investigation was conducted. The Claimant describes the meeting with David Brown as ‘embarrassing, disgusting, disregarding, disgraceful, abhorring, deficient, shabby, one-sided, biased, unfair, unreasonable, childish, shambolic, whitewash, so-called “investigation”. He then goes on to suggest that James Coomber and David Brown have the ‘lowest in experience and education’.
124. The Claimant does set out in some detail many of the matters that he has raised in these proceedings.
125. We find that whilst the Claimant was perfectly entitled to bring a grievance the tone of his criticism of David Brown is not justified in any way. Put bluntly the tone of the email is arrogant and rude.
126. On 29 May 2019 the Claimant was invited to a grievance meeting by Sarah Tottman. It was proposed that that meeting took place in Brentwood in Essex and was going to be conducted by Gary Hill and Area Manager. The Claimant responded on 31 May 2019 saying that *‘due to a threat made against me by James Coomber and not feeling safe outside London’* would not attend the meeting and asked for it to be rescheduled somewhere more convenient.
127. The Claimant was then invited to a grievance hearing was to be chaired by Carol Harris and took place on 4 June 2019. The Claimant attended on that occasion and we have seen the minutes of that meeting. It is apparent that Carol Harris invited the Claimant to set out an account to support his grievances against James Coomber and then turned to his grievance against David Brown.
128. Following the meeting with the Claimant Carol Harris met with James Coomber, Claudine, Farhana and Christopher Richardson.
- 128.1. James Coomber was asked about each of the allegations that the Claimant had made against him he denied all of the racist remarks that the Claimant had attributed to him. He repeated his own account of the telephone call of 2 April 2019.
- 128.2. Claudine was interviewed by telephone on 24 June 2019. She says that she had been unaware of any issues between the Claimant and James Coomber. She suggested that James Coomber was ‘a very nice gentleman’. When asked if she had been subjected to any racism she

said that she had not been. She said that the Claimant shouts at colleagues and customers and was generally rude. She says that she gets on well with Christopher Richardson. She is asked whether Christopher Richardson ever spoke to her about black people. She is noted as responding by *saying 'only repeating views of his dad. I told him not to say or repeat things – he doesn't. as I say we all get along its good working there now'*. She was not asked whether she had reported any matter to the Claimant or when.

- 128.3. Farhana was asked mainly about James Coomber. She describes him as pleasant. She is recorded as saying that the Claimant threatened to deport her. She described him as horrible. She said that he had shouted and sworn at staff members. She said that the Claimant had said that his sons were in gangs and there had been threats of stabbing. She said that matters had improved since the Claimant was not in the store.
- 128.4. Christopher Richardson was also interviewed. He said that he had never heard James Coomber make any racist remarks. He is critical of the Claimant. He said that the Claimant had called Farhana an illegal immigrant. He says that the Claimant threatened staff by suggesting that he knows people who could stab and kill. Christopher Richardson followed up his interview by sending an email dated 12th of June 2019 in which he set out a series of complaints about the Claimant including that he had through another employee been told that the Claimant had referred to stabbing or killing him.
129. On 24th of June 2019 Carol Harris sent the Claimant a letter confirming the outcome of the grievance process. She upheld the Claimant's complaint about the meeting with David Brown on a limited basis. She agreed with Sarah Tottman that there was a failure to collect the facts in a satisfactory manner. In our view that was a perfectly fair conclusion to have reached. The Claimant's far-reaching allegations of incompetence and bias are not borne out by the record of the meeting. Carol Harris dismissed all of the other aspects of the Claimants grievances. She did refer to the evidence that had been given by Claudine. She emphasised that Claudine had no issues with Christopher Richardson. It is fair to note that the Claimant had put his allegation as being that Christopher Richardson had demonstrated extreme racist views and actions towards Claudine herself. Claudine did not accept that.
130. The Claimant has not brought any complaint about the outcome of the grievance. We did note that on a number of occasions Carol Harris use the language that there was no evidence of events occurring. When asked by the Tribunal in the hearing whether that was appropriate in circumstances where the Claimant had given an account of events she accepted that the language was not appropriate. It would have been fairer in our view to have used language such as insufficient evidence or referring to a lack of corroboration rather than apparently dismissing the evidence of the Claimant himself as having no value. We should record that it is not the first time that we have seen such language used in internal investigations and recognise that we should perhaps not hold non-qualified managers to the same standard as lawyers.

The Claimant's dismissal and his appeals.

131. The Claimant presented his complaint on 3 June 2019. He is very clear in his ET1 and indeed in his witness statement that he does not bring any complaint about his dismissal. In terms of the chronology last matter of complaint is his allegation that David Brown directly discriminated against him during the meeting on 10 May 2019. The Respondent had not fully understood this and had served witness statements dealing with the subsequent events. Once the position was understood those witnesses did not give evidence. In the light of that we shall simply summarise the events that followed.
132. A further disciplinary investigation meeting took place on 28 May 2019. Sarah Tottman chaired that meeting. We were provided with typed notes and it is evident to us that the issue of what took place on 2 April 2019 was fully canvassed. One matter of note at is that the Claimant the eminently denied that he had called James Coomber a racist in the course of the telephone call on 2 April 2019. Given that it is the Claimant's case that James Coomber did use racist language it is difficult to see why he was so adamant that he had not raised this matter during the telephone call.
133. The Claimant was invited to a disciplinary hearing that took place on 15 July 2019. Again we have been provided with the minutes of that meeting the meeting was chaired by Gary Hill. The Claimant is recorded as saying at an early stage that he was disappointed in the meeting and that he had lost confidence in its fairness. We cannot see from any of the questions that the Claimant was asked by Gary Hill why he should have come to that conclusion. The Claimant refers at the end to the fact that he's bought tribunal proceedings.
134. By letter dated 17th of July 2019 Gary Hill took the decision that the Claimant should be summarily dismissed. He records that he took into account the Claimants complaint that Christopher Richardson had arranged for others to threaten him whilst at the store and his complaint that Christopher Richardson had been promoted without his knowledge. The records that on balance he accepts that the Claimant had behaved as he was alleged to have done by James Coomber on 2 April 2019.
135. The Claimant appealed both the decision to dismiss him and the outcome of his grievances. It is sufficient for our purposes to record that whilst a hearing was arranged to take place the Claimant left the hearing before it was concluded. Neither of the Claimants appeals were successful.
136. After the dismissal and the appeals the Respondent continued to carry out an internal investigation given the ongoing proceedings we assume that the purpose of that investigation was principally to answer the complaints made by the Claimant.
137. Rebecca was interviewed on 12 November 2019. At that point the proceedings had commenced. Rebecca has not been called as a witness. The grievance and disciplinary processes had concluded. Rebecca was asked about her relationship with the Claimant. She stated that he had asked her to sleep with him promising that she would be made a supervisor if she did. That is not a

matter which we need to determine. She said that after than she did not get on with the Claimant. She was asked about her relationship with Christopher Richardson. She is reported as saying that she had a single issue with him when he had responded to a message she posted on a WhatsApp group with a picture of a dog. She had objected to that. It would appear that the Claimant resolved that matter. There is no suggestion that she perceived this incident as racism. When she was specifically asked whether she had experienced any racism she said that she had but criticised Farhana and another female member of staff.

138. A further staff member Eva was interviewed in November 2019. She said that she had only started working at the store 4 weeks before the Claimant was suspended. She said that she had had no personal experience of racism directed towards herself of the Claimant. She went on to say that she had heard rumours. The following exchange is then recorded:

Eva - They said he wasn't a good manager. Who told me, I think Claudine? It was concerning Chris' dad. Charles was working and Chris' dad was abusing him on the phone and some racist things were said. Chris told Claudine this himself.

Do you know what comments were made?

That his face shouldn't be in the store because black and all that. This is what Chris told Claudine himself.

The burden and standard of proof under the Equality Act 2010

139. The standard of proof that we must apply in every case is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.
140. The burden of proof in respect of all claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

141. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in **Igen v Wong [2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd**

[2003] IRLR 332. Most recently in ***Base Childrenswear Limited v Otshudi*** [2019] EWCA Civ 1648 Lord Justice Underhill reviewed the case law and said:

17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in *Igen Ltd v Wong* [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in *Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054. In *Efobi v Royal Mail Group Ltd* [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in *Madarassy*; but that decision was overturned by this Court in *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913, [2018] ICR 748, and *Madarassy* remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove “a prima facie case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):

“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. ‘Could conclude’ in section 63A(2) [of the Sex Discrimination Act 1975] must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it. ...”

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.”

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

142. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see **Chapman v Simon [1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see **Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**.
143. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow City Council v Zafar [1998] ICR 120**. That may not be the case if the conduct is unexplained **Anya v University of Oxford [2001] IRLR 377, CA**. Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see **Madarassy v Nomura International plc [2007] ICR 867** 'without more', the something more "*need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred*" see **Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279** per Sedley LJ at para 19.
144. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation **Anya v University of Oxford** and **Qureshi v Victoria University of Manchester and Another (Note) [2001] ICR 863, EAT**.
145. The burden of proof provisions need not be applied in a mechanistic manner **Khan and another v Home Office [2008] EWCA Civ 578**. In **Laing v Manchester City Council 2006 ICR 1519** Mr Justice Elias (as he then was) said

"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"
146. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Equality Act 2010 - Statutory Code of Practice

147. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011 ('the code'). Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

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.

Direct Discrimination

148. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

“(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.

(2) If the protected characteristic is age then A does not discriminate against B if A can show that A’s treatment of B is a proportionate means of achieving a legitimate aim.”

149. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

3.4 To decide whether an employer has treated a worker ‘less favourably’, a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer’s treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.

3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

150. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by ‘circumstances’ for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see -

MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School [2003] IRLR 512, HL. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.

Who will be an appropriate comparator?

3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

Hypothetical comparators

3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.

3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.

3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.

3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.

151. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in **Amnesty International v Ahmed [2009] IRLR 884** by Underhill P (as he was). He said

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) ...'

152. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - **Nagarajan v London Regional Transport [1999] UKHL 36; [1999] IRLR 572.**
153. The reason for the unlawful treatment need not be conscious but may be subconscious. In **Nagarajan** Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices.

Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

Harassment – Section 26 of the Equality Act 2010

The law

154. A claim for harassment under the Equality Act 2010 is made under section 26 and 39. The material parts of Section 26 reads as follows:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) 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 other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are— age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

155. The Statutory Code of Practice at paragraph 7.18 says the following about when conduct should be taken as having the effect of creating the circumstances proscribed by Sub-section 26(1)(b):

7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.

156. In ***Pemberton v Inwood* [2018] IRLR 542** Underhill LJ explained the effect of Sub-section 26(4) as follows [para 88]:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment⁴ created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

157. In ***Richmond Pharmacology v Dhaliwal* [2009] IRLR 336**, which dealt with the legislation in place prior to the Equality Act 2010 there is a reminder of the

need to take a realistic view of conduct said to be harassment. At paragraph 22 Underhill P (as he was) said:

'Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

158. The question of whether unwanted treatment 'relates to' a protected characteristic is to be tested applying the statutory language without any gloss **Timothy James Consulting Ltd v Wilton** UKEAT/0082/14/DXA. In **Bakkali v Greater Manchester Buses (South) Ltd** [2018] IRLR 906, EAT Slade J held that the revised definition of harassment in the Equality Act 2010 enlarged the definition. She said:

'In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race ...' in the Race Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant.'

159. The need for a tribunal to take a rigorous approach to the question of whether conduct related to a protected characteristic was recently emphasised in **Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam** [2020] IRLR 495, EAT where the EAT said:

'The broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In

every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be.'

Victimisation Contrary to Sections 27 and 39 of the Equality Act 2010

The law

160. A claim for victimisation is brought under section 27 of the Equality Act 2010. The material parts of that section read as follows:

27 Victimisation

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

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

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

161. Victimisation in the employment field is rendered unlawful by reason of Section 39(4) of the Equality Act 2010. That sub section provides, amongst other things, that it will be unlawful to victimise an employee by subjecting her to a detriment. The meaning of 'detriment' is the same as we have set out above when considering the claims of direct discrimination.
162. No comparator is required to establish victimisation **Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 733**. What is necessary is that the employee establishes that they did a protected act and that they have suffered a detriment. Thereafter the examination turns to the reason why the detriment was suffered and is subject to the burden of proof provisions which we have set out above. The question is whether the reason for the treatment was because the worker had done a protected act or that the employer knew that he or she intended to do a protected act, or suspected that he or she had done, or intended to do, a protected act? See - Baroness Hale in **Derbyshire and ors v St Helens Metropolitan Borough Council and ors 2007 ICR 841, HL**, and Lord Nicholls in **Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL** both cases decided before a change in the wording included in the Equality Act 2010 but not affected on this question.
163. The test of causation 'because' is not to be approached by asking 'but for the Claimant doing the protected act would the treatment have occurred' but by asking whether the protected act was the reason for the treatment **Greater Manchester Police v Bailey [2017] EWCA Civ 425** and **Nagarajan v London Regional Transport** (above).
164. An employer's failure to investigate a complaint of discrimination or harassment will not constitute victimisation under S.27 unless there is a link between the fact of the employee making the complaint and the failure to investigate it — **A v Chief Constable of West Midlands Police EAT 0313/14**.

Discussion and Conclusions

165. Almost all of the decisions that we have to take in this case are questions of fact as to what happened between the Claimant and his colleagues. We have set out some conclusions above. In this section we shall go through the Claimant's claims in turn, drawn the findings of fact above and explain in a little more depth why we have accepted or rejected a particular claim.
166. Before turning to the claims there are a number of matters of general application which we shall deal with. The first of these is the evidential weight to be given to the diary produced by the Claimant.
167. We find that the diary produced by the Claimant had been present at the store. That is clear from the fact has entries from other staff members. The Claimant accepted in evidence that the diary was left in the store and was used to record matters that would assist a handover. One particular entry made on Friday 9 November **2018** provides a good example of this. Instructions are apparently left for Farhana in the diary in respect of the tasks the Claimant was asking her to do with an instruction that she then 'Handover to Chris'.

168. We have considered whether it was necessary for us to make findings as to how the diary and documents recording staff matters came into the Claimant's possession. His account is that, coincidentally, all of these documents were in his bag when he was suspended and sent home. The Respondents have asked us to infer that the Claimant was responsible for a burglary where the Blackheath store was accessed by a person privy to the alarm code. We find it unnecessary to resolve this matter. What is clear is that the Claimant improperly retained documents that belonged to McColl's and that, insofar as they supported his case, he could have been expected to disclose them when first ordered to do so. In his application to adduce the diary into evidence the Mr Brown asserted on the Claimant's behalf, no doubt under his instructions that *'the evidence has just come to light following a house search'*. When he was giving evidence the Claimant had asserted that his witness statement dated 24 August 2021 had been prepared by reference to the diary. We do not accept that the diary had *'just come to light'*.
169. The diary is a standard office diary for 2018. It has two pages at the front or rear which are basically a calendar but described as a 'Planner' for 2019. It has the diary pages where entries can be made for each day with 7 days spread over 2 pages.
170. Within the diary there are hand-written notes made by the Claimant that, on their face, record the Claimant noting complaints made by others about Christopher Richardson's conduct. There are some references to other members of staff.
171. Mr Singh asked the Claimant to explain why he would have made entries about disciplinary issues in a diary to which all of the staff had access. He first explored with the Claimant the extent of his knowledge of good employment practice. On a number of occasions the Claimant had included references to his qualifications and skills in correspondence to his managers. One example of that is an e-mail sent on 9 January 2019 when the Claimant brought a formal grievance against Rebecca. He said:
- 'Even though I got another job just a week after i [sic] had McColl's job that was going to pay me twice what i was offered in McColl's and with my lots of work experience with Wilko stores, Starbucks, AllSport, Homebase, Poundland, Primark and BHS where I worked as a store manager, Area Manager, Director/Operations manager, Assistant General Manager and as Director of Sales as a British expatriate in Angola and with my high academic experience with three Master's degrees including a post graduate diploma and a chartered member of CIPD and a Fellow of CIM and now a PhD student in Human Resources, I accepted McColl offer [sic].*
172. Mr Singh did not directly challenge whether the Claimant could possibly have held all the qualifications he claimed including specialist qualifications in human resources. What he put to the Claimant was that somebody with those qualifications would be familiar with the need to keep disciplinary matters confidential and would know how and when those might be formally escalated.

173. We consider that Mr Singh's points were well made. It is unnecessary for us to make any finding about whether the Claimant holds the qualifications that he has claimed. We note that he makes similar references whenever he was trying to get his own way. In later correspondence he contrasts his own claimed qualifications with the abilities of his managers in a manner that in our view is both rude and overbearing.
174. If the Claimant holds the qualifications he claims, it is incredible that he recorded disciplinary issues in an open diary.
175. When Mr Singh pressed the Claimant on why he would refer to disciplinary matters in an open diary, the Claimant put forward an explanation that the diary entries were in a code devised by him and could not have been understood by the staff. The Claimant was quite unable to explain what that code might have been. Whilst the diary entries were brief there was no sign that they were in code and they would inform any reader that there had been complaints. We do not accept this explanation and find that it was invented to deal with an obvious difficulty.
176. We have had regard to the totality of the evidence. We have come to the conclusion that it is more likely than not that the diary was not completed at the time of the relevant entries. We have found the Claimant's explanations in respect of the diary and his failure to reference it at an earlier stage in the internal process and his failure to disclose it until the third day of the final hearing are all unsatisfactory.
177. We do not need to make any findings about whether the Claimant hold all of the qualifications that he has referred to in his correspondence. What is clear to us is that the Claimant has worked in a number of management positions. We find that he was supported by an HR Department within McColl's. He would have been aware that if he raised allegations of discrimination through formal channels they would have to have been investigated. We have taken this into account when assessing whether the Claimant is giving an accurate account of the events which predated the telephone call 2 April 2019. There are some instances where the Claimant has raised written contemporaneous complaints. However, there is a paucity of complaints about other matters. We find that there is a pattern of the Claimant raising complaints only when complaints are raised against him.
178. Amongst the general matters which we have had regard to is the tone and content of correspondence generated by the Claimant. Whilst the Claimant had the right to be upset when he learnt that Christopher Richardson had repeated a racist view of his Stepfather that does not in our view excuse or explain the manner in which the Claimant expresses himself. Littered through the Claimant's correspondence are reference to his qualifications and those of his wife. Whether he holds those qualifications or not we find that his purposes in referring to them are to exert pressure and bully in order to get his own way. In the latter stages the Claimant refers to going to the press, engaging a human rights organisation and to his own tribunal proceedings.

179. One matter of particular significance is that the Claimant refers to his own experience as a police officer when attempting to get his own way in correspondence. That is exactly what he has accused James Coomber of doing during the telephone call on 2 April 2019. We find that the Claimant is projecting his own behaviour onto that of James Coomber.
180. In his closing submissions on behalf of the Claimant Mr Brown made the powerful argument that a tribunal dealing with a case of race discrimination should not be put off from making a finding of discrimination simply because they did not regard the employee to be a in his words “perfect victim”. We agree that Mr Brown is right to make that point. The fact that a person behaves badly does not mean that they themselves cannot be the victims of discrimination. Mr Brown did not concede that the Claimant had behaved badly nor did he invite the Tribunal to come to that conclusion.
181. The evidence that the Claimant was a far from perfect manager was in our view overwhelming. We shall not recite all of the findings of fact that we have made in support of that conclusion but would draw attention to what we regard as a shocking management approach when the Claimant put the telephone down on a Social Worker who was trying to explain why it was necessary for Rebecca to attend Great Ormond Street Children’s Hospital when her child needed a life-saving operation. There is no reasonable basis to doubt the account set out in the social worker’s letter and the Claimant’s explanation is incredible. We have seen the records of interviews with a number of employees excluding James Coomber and Christopher Richardson. We have heard from Frankie Howard. Having regard to all of that evidence we have concluded that the Claimant behaved very badly towards his staff which engendered a huge amount of resentment towards him. We find that in particular Christopher Richardson resented the way that he and others had been treated by the Claimant and thought it beyond the pale. Below we have found that Christopher Richardson behaved unlawfully in the workplace. Part of our reasons for doing so are that we have concluded that Christopher Richardson had such a lack of respect for the Claimant that he repeated a discriminatory comment within the workplace. In respect of the that allegation the Claimant’s own poor behaviour made it more rather than less likely that Christopher Richardson behaved as alleged.
182. With those matters in mind set out our conclusions in respect of the relevant claims. We do so under headings. We considered during our discussions that the clearest way of identifying the issues was to work from the ET1 and the numbered paragraphs set out in the addendum to that document. We mean no disrespect by not adopting more disparate approach used in the agreed list of issues. Having concluded our deliberations we did doublecheck that we had covered all matters.

The Harassment claims

Paragraph 4(a) and (c) Christopher Richardson regularly expressing racist views.

183. In order to succeed in a claim under section 26 it is necessary for the Claimant to establish that there has been some unwanted treatment. There are considerable disputes of fact which we need to resolve. It is convenient to divide the allegations made by the Claimant into two periods. The first being prior to the Claimant's suspension being lifted on 6 February 2019 the second being the latter period.
184. We are not satisfied that Christopher Richardson expressed any racist views either directly to the Claimant or indirectly through other members of staff in the period prior to 6 February 2019. We have had regard to all of the evidence in coming to that conclusion. Of particular significance are the following matters:
- 184.1. When interviewed about Christopher Richardson's grievance the Claimant at no time raise any question about Christopher Richardson holding or expressing racist views. The Claimant is not shy about making such allegations. He reached the conclusion that David Brown was a racist simply because of the way he was questioned (or perhaps not questioned). If the Claimant had any basis for believing that Christopher Richardson had antipathy towards people of his race we are certain that he would have raised it when Christopher Richardson criticised him.
- 184.2. When the Claimant brought his grievances in January 2019 he did not make any allegation that Christopher Richardson had behaved in a racist manner or expressed racist views. This is astonishing given that the Claimant says that Christopher Richardson expressed racist views on Christmas eve.
- 184.3. The Claimant acknowledged during the grievance process that Christopher Richardson had been one of his trusted employees. That is inconsistent with his suggestion that Christopher Richardson express racist views from the outset.
- 184.4. We have had regard to the evidence of the employees and particularly Claudine, Farhana and Rebecca. These witnesses do not support the suggestion that they raised complaints of racism with the Claimant. In the case of Farhana and Rebecca it appears that they held the Claimant in very low esteem. The Claimant describes Rebecca as a liar and a fantasist. It is very clear that the two did not get on at all. The suggestion that she would confide in him appears very unlikely.
- 184.5. We need to acknowledge that we have found in the later period that on one occasion Christopher Richardson repeated racist views attributed to his stepfather. We have regard to that matter but do not consider that to be determinative of whether there were any similar views expressed or indeed held during the earlier period. We have taken it into account.
- 184.6. We have had regard to the entirety of the evidence. In some cases, and in particular the suggestion that Christopher Richardson encourage shoplifters on 19 March 2019, we have found that the Claimant is either simply made something up or has greatly embellished what might have

happened in order to support his case. We have had regard to the circumstances in which the Claimant has produced documentation.

- 184.7. The final matter which we have taken into account is the manner in which the Claimant gave his evidence which was frequently unsatisfactory with the Claimant giving long discursive answers rather than simply answering the questions that were put to him.
185. We turn then to the second period. In looking at that period there is overlap between the allegations at paragraphs 4(a) and (c). Drawing on our findings of fact set out above we are satisfied that far from improving the relationship between the Claimant and Christopher Richardson the grievance and mediation process drove a wedge between. Christopher Richardson says in his witness statement that prior to his grievance his relationship with the Claimant had been manageable but there was a significant downturn after that point. We accept that evidence.
186. It is clear that Christopher Richardson distrusted the Claimant. For that reason he investigated the CCTV when his holiday request was turned down. The Claimant we find on his part bitterly resented the fact that he had been suspended and subjected to an investigation in response to complaints some which emanated from Christopher Richardson. His language in later documents show that he viewed those complaints which were about fairly mundane workplace matters malicious and unfounded.
187. We were shall return below to the events of 2 March 2019 but Christopher Richardson was unembarrassed about saying how angry he was at the way in which the Claimant conducted himself on that occasion. Before us Christopher Richardson did not try to hide the fact that he loathed Claimant and that he welcomed his dismissal.
188. The relationship between Christopher Richardson and the Claimant would not have been assisted by the intervention of Christopher Richardson's stepfather. We accept that there was a telephone call in March where Christopher Richardson's stepfather intervened on his stepson's behalf. We would accept that Kevin Lewis said something to the effect Claimant should not be managing the store. This would have further poisoned the relationship.
189. We consider that Kevin Lewis's letter is remarkably condescending towards the Claimant. It is a matter which does call for some explanation and would support an inference that Kevin Lewis had some antipathy towards the Claimant.
190. We have had regard to the evidence of Claudine and Eva. We make all proper allowances for the fact that that evidence is hearsay and in the case of Eva multiple hearsay she's repeating matters she learnt from Claudine. Both of these individuals refer to Christopher Richardson making a remark which Claudine considered inappropriate for the workplace. Claudine referred to it is inappropriate in circumstances where she was being asked about race discrimination.

191. Christopher Richardson denied repeating any racist viewpoint in the workplace but had no explanation as to why Claudine would give the account that she had. He did not suggest that there was any antipathy between them and indeed Claudine in her statement appears to have a good opinion of Christopher Richardson.
192. We have concluded that at a point in late March when the relationship was at a very low ebb Christopher Richardson foolishly stated in the workplace words to the effect that his stepfather thought the Claimant to be an inadequate manager linking his inability in some way to his race. We find that this must have been the case in order that Claudine, who appears to have shared the view that the Claimant was a poor manager, sought it was inappropriate to express such views. Claudine says that the matter was not repeated.
193. We do not accept that there were any other instances where Christopher Richardson expressed racist views directly to the Claimant or at all.
194. The Claimant does not suggest that Christopher Richardson made this remark that we have found proven directly to him. That is presumably why he cannot tell us exactly what was said. We have considered whether in those circumstances there was any unwanted conduct. We find that there was. We do not consider that the fact that the remark was made directly makes any difference.
195. We then turn to the question of whether that unwanted conduct related to race. We find that it did. On our findings the remark that was repeated linked the Claimant's management skills, or lack of them, to his race. That in our view is sufficient to establish that the remark related to race.
196. We have concluded that a remark made out of a persons hearing is unlikely to have been made with the purpose of creating the prescribed environment described in Section 26. We have gone on to consider whether it had the effect of doing so. We are satisfied that it did. However poor the Claimant's management skills he could properly be offended by learning that Christopher Richardson was repeating in the workplace a view, even if he did not share it, that there was a link between inability and race. It was in our view reasonable for the Claimant to be offended and we accept that subjectively he was.
197. Accordingly on the limited basis that Christopher Richardson made this single remark in the latter part of March 2019 we uphold this complaint.

Paragraph 4b – Christopher Richardson saying he hated the Claimant

198. The Claimant's case on when Christopher Richardson said that he hated the Claimant is vague. However, given that Christopher Richardson accepts that he came to hate the Claimant during the period prior to his grievance we find it more likely than not that the Claimant would have mentioned this to his colleagues. We are satisfied that the Claimant learnt of this. We are satisfied that this was unwanted conduct.

199. We shall not deal with the question of whether the conduct had the purpose or effect of violating the Claimant's dignity or creating the proscribed environment as it is unnecessary to do so.
200. We have considered whether the treatment complained of related to race. We consider that if a person were to express hatred of another in terms which were not themselves related to race but they did so motivated in any way by considerations of race the treatment would relate to race.
201. We consider that the Claimant had established unwanted conduct and he has established that Christopher Richardson had repeated racist views in the workplace on one occasion. We find that that is sufficient to pass the burden of proof on to Christopher Richardson to prove that his remarks were not related to race. We find that he has discharged that burden. For the reasons set out in our findings of fact we are entirely satisfied that there were numerous reasons why Christopher Richardson might, and we find did, hate the Claimant that were nothing whatsoever to do with his race. Whilst there was evidence that the Claimant had repeated the views of his stepfather Claudine's account makes it clear that the Claimant was repeating somebody else's views that does not mean that he shared them. He must have stated that they were the views of somebody else or Claudine would not have known that.
202. Having regard to the totality of the evidence we are satisfied that the reason Christopher Richardson said that he hated the Claimant was nothing whatsoever to do with race. It follows that the unwanted conduct was not related to race.

Paragraph 4(c)

203. We have dealt above with the remark that Christopher Richardson made to Claudine. In this paragraph the Claimant appears to add a second allegation that James Coomber was told of this remark and took no action. The allegation was that James Coomber said that Christopher Richardson was from a minimum wage background. This is said to have taken place on 30 March 2019. James Coomber says that he did not speak to the Claimant on that day. We accept his evidence. His account is consistent with his record of the telephone conversation of 2 April 2019 when he says that he was aware that the Claimant had phoned him on Friday but that they had not spoken. The Friday before 2 April 2019 was the 29 March 2019. Below we have accepted the accuracy of that note. It was made before the date became an issue. Whilst the actual date is less important than whether the matter was reported it is material that the Claimant has given a date when the conversation could not have taken place.
204. Having had regard to all of the evidence we are satisfied that this matter was not reported to James Coomber as alleged we do not have to grapple with the question of whether if it had been the response was sufficient to amount to an unlawful act under Section 26 of the Equality Act 2010.
205. We have upheld the only other part of this allegation – see above.

Paragraph 4(d) - Expressing views about Megan Markle.

206. The Claimant has alleged that firstly Christopher Richardson and latterly James Coomber made racist remarks about the marriage of Prince Harry and Megan Markle. The first of these allegations was said to have taken place on 24 December 2018. We do not accept that any such remark was made by Christopher Richardson on 24 December 2018. Our reasons are the same as set out in respect of the earlier period for allegation 4(a). Had such a clearly discriminatory remark been made we are confident that the Claimant would have raised it when Christopher Richardson brought a grievance against him.
207. We do not accept that Christopher Richardson made a similar remark on 2 March 2019 or that James Coomber endorsed those views. We have rejected the evidence of the Claimant that he had a discussion about racism with Christopher Richardson on 2 March 2019. We do not accept that the file note was a contemporaneous record of the discussions.
208. We find that there was no reference made by Christopher Richardson on 2 March 2018 to the royal wedding as alleged by the Claimant.
209. Having regard to all of the evidence and our general findings set out above we do not accept that James Coomber made the crass remarks that the Claimant attributes to him about keeping the royal family 'pure'.
210. It follows that we have not found that there was any of the alleged unwanted conduct and this claim must fail.

Paragraph 4(e) - the incident of 19 March 2019 with shoplifters.

211. We have made findings of fact set out above that this incident never occurred. We are unimpressed by the Claimant's account of going to the police. Had he done so he would have been able to obtain a crime report and not merely a memo with a crime reference number. It is extraordinary to believe that the Claimant was assaulted on behalf of Christopher Richardson by thieves and took no steps whatsoever to escalate that formally. He took no steps to preserve vital CCTV evidence or to bring that evidence to the attention of the police. We are satisfied that this incident never happened at all. We regret to say that there is no possibility that this is a matter that has merely been misremembered.
212. It follows that the Claimant has not established any unwanted conduct by Christopher Richardson in this respect.

Paragraph 4(f) -Telephone calls from Kevin Lewis

213. The Claimant has said that there were two telephone calls to him from Kevin Lewis. We have not accepted that there was a call on 5 February 2019. It would be surprising if there had been. The Claimant was suspended and Christopher Richardson's grievance had not been concluded. We have accepted that there was a telephone call in March 2019. That is supported by a contemporaneous e-mail.
214. We are satisfied that Kevin Lewis said words to the effect that the Claimant's face should not be seen. We were unimpressed when the Claimant sought to

add a reference to Peckham. We find that there was no such reference at the time. The Claimant has given a number of accounts of this not least in his witness statement and ET1 without that detail. Again we regret to say the Claimant was embellishing his case.

215. We are satisfied that there was unwanted conduct.
216. Mr Singh argued that as a matter of law the Respondents are not liable for the actions of Kevin Lewis. He referred us to **Unite the Union v Nailard [2018] EWCA Civ 1203** in support of his arguments.
217. We find that neither McColl's nor Christopher Richardson can be liable for the actions of Kevin Lewis. He was not employed by either of them. We do not find that he was an agent of either of them.
218. Put as a claim of harassment relying on the conduct of Kevin Lewis we find that the claim must fail.
219. The Claimant does put a different case. He says that he reported the matter and that James Coomber took no action. That is not entirely correct. The instruction given was that the Claimant should not talk to Kevin Lewis and if concerned he should call the police. We should state in terms that we agree with the Claimant that James Coomber should have done more. He did not look into what the Claimant said. He had been willing to engage with Kevin Lewis in respect of Christopher Richardson's grievance. We do not see why he could not have looked at this more carefully. It would have been reasonable to have instructed Christopher Richardson to ask Kevin Lewis to desist from contacting the Claimant.
220. We are satisfied that here was unwanted conduct. However, it is clear from **Unite the Union v Nailard** that in order to hold an employer liable for failing to act in a third-party harassment case it is necessary that the decision maker was themselves influenced consciously or unconsciously by race (or the other relevant protected characteristic).
221. In our findings of fact we have referred to the approach of James Coomber to what in our view were very serious grievances brought by or on behalf of three employees against the Claimant. We consider that the approach was wholly lacking in any rigor. A responsible employer would have taken the matter far more seriously. All of these failures were to the Claimant's benefit. Our finding, putting it bluntly, was that James Coomber dealt with these matters in a very offhand way. His approach to the Claimant's earlier grievance was no different.
222. Approaching this matter by asking whether the Claimant has proven facts from which we might, absent any explanation from James Coomber conclude that he was motivated by race we find that he had not. However if we are wrong about that we are satisfied that the reason that James Coomber took no action was not in any way influenced by considerations of race. He took no action because he considered that his instruction was sufficient. We disagree but that is beside the point. The explanation has nothing to do with race.

Paragraph 4(g) – Christopher Richardson viewing CCTV on 12 and 13 March 2019

223. There was no dispute that Christopher Richardson had viewed the CCTV in the store on 12 and 13 of March 2019. Furthermore there was no dispute that the purpose of doing this was because Christopher Richardson believed that the Claimant had been dishonest when refusing him holiday. The Claimant discovered this when he found Christopher Richardson's notes.
224. We believe that the Claimant could quite reasonably have believed that he has been spied upon by a member of staff. Next matter we have to deal with is whether or not that conduct related to race. The conduct itself is not inherently connected with race and therefore we need to ask whether or not Christopher Richardson had been influenced consciously or unconsciously by the Claimant's race.
225. As the Claimant has demonstrated that on one occasion Christopher Richardson had repeated the racist views of his stepfather there is in our view sufficient to pass the burden of proof to Christopher Richardson to show that his actions were in no sense whatsoever motivated by race.
226. Christopher Richardson says that he did what he did because he simply did not believe the Claimant's explanation for refusing him annual leave. If that was the only motivation than the treatment would not have been related to race.
227. We take a similar approach to our findings that under paragraph 4(b). Christopher Richardson had numerous reasons to dislike the Claimant and to mistrust him other than his race. The refusal of his holiday request no doubt added to that. Christopher Richardson has satisfied us that his reason for what is essentially spying on the Claimant was the fact that did not trust the Claimant and thought he was lying about the issue of annual leave. We would acknowledge that a lack of trust can have its roots in conscious or subconscious discrimination but it need not necessarily do so. It is a question of fact whether race played a part in any lack of trust. Having had regard to the entirety of the evidence we accept that that lack of trust was not on this occasion motivated in any way by considerations of race.

Paragraph 4(h) - Christopher Richardson conspiring with Farhana to get the Claimant into trouble

228. As we understand this complaint the Claimant is alleging that the grievances brought by Christopher Richardson and Farhana were false orchestrated, designed to get Claimant into trouble and were related to race because they were motivated by race.
229. There was insufficient evidence to conclude that there was a conspiracy between Christopher Richardson and Farhana. We have no doubt that they would have talked to each other about their workplace issues. That is not the same thing as conspiring. They did not bring their grievances at exactly the same time other they were dealt with together. Christopher Richardson's grievance was crafted and brought on his behalf by Kevin Lewis. As a matter of fact the Claimant has not established any conspiracy.

230. It is only fair to deal with the matter on the alternative basis that Christopher Richardson's complaints were brought in order to get the Claimant into trouble and were motivated by race. We would accept that whenever an employee brings a grievance making a complaint about a manager a possible outcome is that that manager would be criticised. Facing a grievance could be reasonably regarded as unwanted conduct.
231. We are critical of the tone of the letter sent by Kevin Lewis on behalf of Christopher Richardson. We consider it was in place is gratuitously offensive to the Claimant where it criticised him for his text messages. We consider that the Claimant could quite reasonably have regarded those passages as offensive. Once again this is a letter written by a third party. We consider it somewhat artificial to regard Kevin Lewis as acting as an agent of his stepson. There would be no intention to create legal relations between family members. The only basis upon which this case can succeed is by establishing that Christopher Richardson in allowing Kevin Lewis to write a grievance on his behalf was motivated by race. We shall assume that Christopher Richardson bears the burden of showing that he was not.
232. On that basis this claim cannot succeed.

Paragraph 4 j – The failure of James Coomber to take action about Christopher Richardson

233. The Claimant says that he had reported Christopher Richardson's racist views to We are satisfied that the reason that Christopher Richardson brought the grievances that he did was nothing to do with the race of the Claimant. Christopher Richardson had genuine concerns about his working conditions. We are satisfied that the reason he was a party to those complaints was because he wanted the matter to be addressed. We are satisfied that that was his only motivation and he was not influenced in any way by the Claimant's race.
234. James Coomber on a number of occasions. Insofar as it is necessary to supplement our findings of fact we do so here. We do not accept that the Claimant ever raised allegations of racism with James Coomber. The closest that the Claimant comes to making that complaint in writing is when he complains about receiving a telephone call from Christopher Richard's father on 28 March 2019. Even in that email he makes no reference whatsoever to any racism.
235. James Coomber is adamant that the matters were never raised with him. As we have indicated we do not believe that there were in fact any racist views expressed by Christopher Richardson at any time other than in late March 2019. It follows that the Claimant had nothing to report. It is an extraordinary assertion by the Claimant that he reported direct race discrimination in December 2019 and took no formal action to escalate the matter beyond James Coomber until he spoke to Stuart Frost. We have found that even when the Claimant spoke to Stuart Frost he did not actually mention any race discrimination. The Claimant had access to human resources and claims to have had a good working

knowledge of practices policies and procedures. We do not accept at all that the Claimant would simply have put up with things.

236. If the Claimant had established that he had complained to James Coomber he would have faced the task of showing that any inaction was related to race. We consider that given James Coomber's unwillingness to involve himself in the disputes between the Claimant and his staff he would have been unable to discharge even a prima facie case that there was material from which the tribunal could have inferred that inaction was related to race.
237. Given that the Claimant has failed to establish that he actually complained we do not need to deal with these matters.

Paragraphs 4(j) and 4(m) comments made on 5 March 2019.

238. The Claimant alleges that on 5 March 2019 James Coomber suggested he should not be employed Eva because black people were lazy and that he should have employed an Eastern European like his wife. The suggestion is also made that he reduced Eva's hours. We draw on our findings of fact set out above. We are satisfied that the Claimants account is entirely untrue. We have not dealt with the reduction of Eva's hours however there were documents within the trial bundle which showed that as a matter of fact her hours were not reduced. Insofar as her hours were affected we are satisfied that race played no part in it.
239. We have entirely rejected the Claimant's account of the conversation about stabbings in London. We do not accept that James Coomber made the remarks that the Claimant attributes to him.
240. It follows from those conclusions that the Claimant has failed to establish the unwanted conduct upon which these allegations rely.

Paragraph 4(g) - reprimanding the Claimant in a text message and threatening him in a telephone call.

241. The Claimant has conflated a number of issues in this paragraph we shall deal with them separately.
242. It is correct that James Coomber reprimanded the Claimant in his message of 29 March 2019. Reprimand is the word used in the ET1. At other times the Claimant has suggested that this was a threat to his employment which is not the case. We have found that the Claimant spoke to Stuart Frost who was James Coomber's manager when he was unable to speak to James Coomber himself. On our findings of fact the Claimant simply raised an operational matter which was the question of why Christopher Richardson had been appointed as a supervisor. That can have been the only matter reported to James Coomber when he spoke to Stuart Frost.
243. James Coomber's message simply reminds the Claimant that he should deal with him rather than going above his head to his line manager. We reject any suggestion that James Coomber was aware that the Claimant was seeking to

escalate allegations of race discrimination either about Christopher Richardson or himself.

244. We would accept that the Claimant wanted to speak to somebody about his concerns about Christopher Richardson being promoted in circumstances where at this stage the Claimant had been told that he had repeated racist views. We would accept that being criticised for speaking to Stuart Frost was unwanted conduct.
245. In order to amount to harassment the conduct must relate to race. On its face the conduct is not inherently connected with race in any way and it would be necessary to show that James Coomber was consciously or subconsciously motivated by race when he sent the text message.
246. We are not satisfied that the Claimant has established facts from which we could infer that James Coomber was motivated by race. As such the claim does not succeed. However if we are wrong about that we accept James Coomber's explanation for sending a text message that he did not consider it appropriate for the Claimant to raise what he believed at the time to be an ordinary operational matter to his manager without first discussing the matter with him. That is a reason which has nothing whatsoever to do with race. Even if the burden of proof had passed to the Respondents we find that they have satisfied us that the unwanted conduct was not related to race.
247. In the light of the conclusion that we reached above it is unnecessary for us to deal with the question of whether the purpose or effect of sending that text message was to violate the Claimant's dignity or create the prescribed environment.
248. The second part of the same allegation relies upon the Claimant's account of the telephone call that took place on 2 April 2019. In his ET1 the Claimant suggests that James Coomber suggested set the Claimant up and taken action against him either inside or outside the workplace. The Claimant said that he feared for his life. We are faced with two conflicting accounts of the telephone call we have not up to this point in the decision resolved this issue. We are not satisfied to the relevant standard that the Claimant's account of this telephone call is true.
249. In reaching this decision we have had regard to all of the evidence taken together. We have set out our concerns about the Claimant's credibility elsewhere. Some of the allegations made by the Claimant were so extraordinary that we have concluded they were made falsely rather than misremembered. A particular example is the alleged events with the shoplifters which we have concluded never took place.
250. A matter which has led us to reject the Claimant's evidence in this particular allegation concerns his suggestion that James Coomber use his father's position as a police officer to threaten the Claimant. Within the correspondence there are numerous instances where the Claimant refers to his experiences at police officer and his qualifications and similar matters in order to put pressure on others. We have concluded that the Claimant has attributed to James

Coomber the sort of tactics that he uses himself. James Coomber told us that he had informed the Claimant early on that his father was a police officer simply as a way of explaining his own background. He says his father had retired in 2017. In those circumstances it would seem unlikely that James Coomber would refer to his father as being able to assist him to take action against the Claimant.

251. James Coomber's account of events is supported by the fact that he reported the matter to the police on the same day as it occurred. It might have been a false account but it would have been a brazen act to have reported this matter knowing that it might lead to an investigation if it were a complete fabrication. He, unlike the Claimant, has obtained a copy of the crime report and his account given to the police is consistent with the written record of the conversation that he made on the same day. His account is supported by a witness said to have been present. The only place light weight on that evidence as the individual did not attend to be cross-examined.
252. James Coomber's account is also supported in our view by the response recorded by Jackie Allen when the Claimant was suspended. He is recorded as saying that he had not physically touched James Coomber.
253. An additional matter that lends weight to James Coomber's account is the fact that when interviewed colleagues in the store referred to the Claimant making threats to stab people.
254. We would very much doubt whether the Claimant intended any of his language to be taken literally. From the description given by James Coomber it appears that the Claimant simply lost control of himself and was lashing out. However the Claimant's reference to his sons being involved in antidiscrimination groups is consistent with the way he has behaved in correspondence.
255. Taking all of these matters together we find that it is more likely than not that James Coomber's account of the telephone call on 2 April 2019 is accurate. What follows from that is that we reject the Claimants account which is diametrically opposed. We find that James Coomber made no threats to the Claimant and did not mention his father at all.
256. Given that we have entirely rejected the Claimant's account of this telephone call we do not find that there was any unwanted conduct that is capable of amounting to harassment. Nothing James Coomber did was with the purpose of violating the Claimant's dignity or creating the prescribed environment. Nothing that he did could reasonably have been regarded as creating the prescribed environment. It was not James Coomber who was creating an intimidating, hostile, degrading, humiliating or offensive environment it was the Claimant creating such an environment for James Coomber.
257. It follows in those conclusions of this claim must be dismissed

Paragraph 4i - complaints by Rebecca

258. The Claimant says that on four occasions Rebecca complained about race discrimination by Christopher Richardson. Again we draw on our findings of fact set out above. We are not satisfied that on any occasion Rebecca raise an allegation of race discrimination by Christopher Richardson. She was interviewed and ask specifically about this she did mention an instance where she had complained about Christopher Richardson sending a picture of a dog in a group chat. She did not suggest that that was racism. We have rejected the Claimants account that he spoke to Christopher Richardson on a number of occasions about this.
259. The Claimant goes on to say the same paragraph of his ET1 that he reported the matter to his first area manager and then to James Coomber. We have rejected any suggestion that he reported the matter to James Coomber. As such we have rejected the entirety of the factual basis of this claim.
260. Had we accepted that the matter had been reported, the failure to respond would only amount to unlawful harassment if the failure itself was related to race. We do not need to deal with that issue.

Paragraph 4(n) - Jackie Allen saying there are Blacks who hate whites and it's not only whites who are racist and Blacks are racist too.

261. The entirety of the complaint that is set out includes an allegation that Jackie Allen failed to tell the Claimant why he was being suspended. We have not dealt with the facts relating to that. It does appear that the Claimant was sent or handed a letter that informed him of his suspension the copy of the letter included in the bundle does not actually set out the reasons for that. We are satisfied that the Claimant knew exactly why he was being suspended. We find that during the meeting with Jackie Allen Claimant said at an early stage that he had expected to be suspended. The Claimant is recorded as immediately saying that he had been angry with James Coomber about the promotion as he saw it of Christopher Richardson. All of these matters relate back to the telephone call that had taken place two days before.
262. We are not satisfied that any failure to inform the Claimant of precisely why he was being suspended related to race. As in previous allegations it would be necessary to show that race was a motivating factor as a failure to inform someone of the reasons for a suspension itself is not inherently related to race. We would accept that it might be possible to rely on the motivation of people other than Jackie Allen. However, given our findings about the content of the telephone call on 2 April 2019 there was an overwhelming ostensible reason for the decision to suspend the Claimant. The managers who took the decision to suspend the Claimant had a reasonable basis for doing so. There is no evidence to suggest that anybody intended to keep the reason for the suspension from the Claimant as the reasons were obvious to all. We do not find that the failure to inform the Claimant of precisely what allegation he would be facing was related to race.
263. An additional reason why this allegation must fail is that we are not satisfied that the purpose or indeed the effect of not informing the Claimant precisely of

the reason for his suspension was to violate his dignity or create the prescribed environment. An omission of this nature in these circumstances is in our view not conduct capable of amounting to harassment.

264. There is little dispute that Jackie Allen told the Claimant that black people could be racist as well as white people. We think it more likely that Jackie Allen has used the phrasing in her own witness statement rather than the phrasing set out in the ET1 but in any event the meaning is the same.
265. We are prepared to accept that in the context of the suspension meeting notwithstanding their previous good relationship the Claimant was offended by what Jackie Allen said. We shall proceed on the assumption that this is capable of amounting to unwanted conduct. The conduct does relate to race.
266. We need to assess whether or not what Jackie Allen said had the purpose or effect of violating the Claimant's dignity or creating the prescribed environment. In assessing whether this amounts to harassment context is all important. It is clear that the reference to race and racism was raised because the Claimant was making allegations of racism. In Jackie Allen's witness statement she says that the Claimant was generalising about white people. We have not heard from Jackie Allen but as indicated above consider we can give her statement some weight. Her note of the meeting produced close to the time does record the Claimant making allegations of racism. It does not capture the phrase that the Claimant objects to.
267. The words used by Jackie Allen are true. She does not deny the fact that white people could be racist she simply says that black people can also be racist. That is clearly correct. It can only be interpreted in the context of this discussion is being Jackie Allen suggested the Claimant that the fact that a person is white by itself does not support an allegation of racism.
268. Having regard to the context we are satisfied that it was not Jackie Allen's purpose to violate the Claimant's dignity or create the prescribed environment. We do not need to hear from her to reach that conclusion. Jackie Allen and the Claimant had a good relationship prior to this meeting. It is highly unlikely that Jackie Allen made her statement with the purpose of offending the Claimant (as shorthand for the unlawful conditions).
269. We then need to consider whether the statement made by Jackie Allen had the effect of violating the Claimant's dignity or creating the prescribed environment. A matter will not be taken to have that effect if it is not reasonable for it to do so. That is an objective measure. It is important to have regard to the context of any remark in making that assessment. We are satisfied that it would not be reasonable to regard the factual statement made by Jackie Allen as having the effect of violating the claimant's dignity or creating the prescribed environment. All that Jackie Allen could reasonably be taken to have done is to suggest to the Claimant that allegations of racism should be made on a proper basis and secondly that they should not be made simply on the basis of the race of the person complained of. That is a perfectly reasonable thing to say and particularly in the context of the Claimant making what had transpired to be unfounded allegations of racism against James Coomber.

270. It follows that we have concluded that the words used by Jackie Allen did not amount to harassment for the purposes of section 26 of the Equality Act 2010.

The claims of direct discrimination

271. the Claimant brings for separate claims of direct discrimination because of race. The particulars are set out in paragraph 8 of the ET1 and it is those paragraph numbers we address in this decision.

Paragraph 8 a - instigating disciplinary proceedings based on allegations known to be false.

272. The factual premise of this allegation is that James Coomber was dishonest when he reported his account of the telephone call that took place on 2 April 2019. Unless we accept that the account was false the claim cannot succeed on the basis set out in the pleadings.

273. We have set out above our conclusions. We are not satisfied that the account of James Coomber was false. It follows from that that the claim must fail.

274. The Claimant seeks to compare his treatment to that of Christopher Richardson and James Coomber stating that neither of those individuals were disciplined. Whilst it is academic because we have not accepted that a false allegation was made we think it fair to deal with the Claimant's case as fully as possible.

275. We are entirely satisfied that the only reason that disciplinary action was taken against the Claimant was that Stuart Frost initially, David Brown and then Sarah Tattman all believed that there was a disciplinary case to answer that the Claimant had behaved in a threatening way towards James Coomber. We are entirely satisfied, that the sole reason for that treatment to the exclusion of any question of race was that belief. The difficulty for the Claimant is that there was very clearly a case to be answered given the weight of the evidence that supported James Coomber's account. Having come to that conclusion it is simply unnecessary to deal with comparators to ascertain reason for the treatment.

276. It appears that the Claimant is saying that when an allegation was made against him by James Coomber the matter proceeded to a disciplinary investigation. In contrast, when he made allegations against Christopher Richardson and James Coomber the matter proceeded to a grievance hearing and no disciplinary action was taken.

277. It is not clear to us from the pleaded case whether the Claimant is complaining about disciplinary proceedings being instigated against him or not instigated against others. We would accept that it is theoretically possible for a worker to argue that it is a detriment when a worker of a different race is treated more favourably.

278. It is correct that when the Claimant made his allegations against Christopher Richardson and James Coomber they were dealt with under the grievance policy. The Claimant cannot reasonably complain about that as he had

instigated grievances. Had the grievances been upheld and no disciplinary action taken then there would be a question why that was the case. However the grievances were not upheld. In respect of the allegations against James Coomber the decisions made in the grievance process align with our own conclusions. He had done nothing wrong. In those circumstances he cannot be a proper comparator for a claim that somebody else was treated more favourably in equivalent circumstances. In respect of Christopher Richardson the grievances were also not upheld. The only matter where we have disagreed with Carol Harris is in respect of the repetition of racist views. We have not disagreed with her factual conclusions as she appears to have accepted the same facts as we have. What she did was to accept Claudine's account that when she told Christopher Richardson not to repeat such matters he desisted. It is clear from her grievance outcome and her evidence that she regards that as not sufficiently serious as to merit upholding the grievance which had been put much higher. We find that in those circumstances Christopher Richardson was not in all of the same material circumstances. He was not believed to have done anything seriously wrong. In those circumstances no disciplinary action was taken.

279. Accordingly even assessing the Claimants case on the basis that others were treated more favourably than him the Claimant has not established that the reason for the more favourable treatment was his race or the race of his comparators.
280. For the reasons set out above this first claim of direct discrimination does not succeed.

Paragraph 8(b) – David Brown concluding that the case should proceed to a disciplinary hearing

281. It is not disputed that David Brown did decide that there was a case to answer and informed the Claimant that the matter would proceed to a disciplinary hearing. We have found that questioning during the meeting was unobjectionable in itself. It certainly did not justify the criticisms that the Claimant made in his grievance. Where David Brown fell down in our view was that he did not take his time and go through the individual aspects of the allegations against the Claimant. We do not differ in that respect from the conclusions reached by Sarah Tattman who decided to undertake a fresh investigation.
282. As a tribunal we have seen investigation meetings which are of similar brevity. In fairness to David Brown read out James Coomber's account of the telephone call and asked the Claimant to comment. That did allow the Claimant to give his account of the core allegations against him. The skill demonstrated by David Brown was poor but in no sense appalling.
283. We have regard to the fact that David Brown had before him a statement from James Coomber which if accepted as true quite plainly merited disciplinary action. David Brown's task at that meeting was to investigate the matter sufficiently to decide whether there was a disciplinary case to answer. His

conclusion that there was a case to answer was one which was certainly available to him even following the brief hearing that he held.

284. We have to decide whether the Claimant has proven facts from which we could in the absence of any explanation from the Respondents conclude that the treatment complained of was because of race.
285. We remind ourselves of our direction above in respect of the burden of proof. Discrimination cannot be inferred only from unreasonable conduct coupled with the fact that a person has a protected characteristic. Without something more there is no basis upon which we could conclude that any errors which we have identified were discriminatory. We would need to identify more. Whilst we have found that Christopher Richardson did act unlawfully on one occasion we do not accept that that provides the something more that the necessary for us to conclude that David Brown's actions were discriminatory. We were unable to identify any other factual matter proven by the Claimant which could support an inference of discrimination. We have concluded that the Claimant has not proven sufficient facts to require the Respondent to prove the reason for the treatment was not materially influenced by race. It follows that the Claimant has not shown that this treatment was an act of direct discrimination.

Paragraph 8(c) - James Coomber refusing deal with the Claimant's complaints of race discrimination.

286. We rely on our findings of fact set out above. The Claimant has not satisfied us that he ever made a complaint of race discrimination by Christopher Richardson to James Coomber. That finding is sufficient to dispose of this claim.

Paragraph 8(d) - James Coomber and McColl's promoting Christopher Richardson to supervisor

287. It is not factually correct that James Coomber promoted Christopher Richardson to the formal position of supervisor on 27 February 2019. What he actually did was provide him with the till code for a supervisor and asked that he be paid as a supervisor so to all intents and purposes the Claimant is correct.
288. The Claimant's pleaded case is that this decision was taken without consultation. That is not correct. We find that at the conclusion of the mediation process it had been established that Christopher Richardson had been working on evening shifts and without a supervisor and had needed to cash up at the end of the evening and occasionally override transactions. He had been doing so using somebody else's till code. James Coomber's initial position was that set out in his witness statement. He had informed the Claimant that he could not allocate those duties to Christopher Richardson unless he was given a till code and paid the small amount of money given to supervisors for undertaking these duties. In other words he left it to the Claimant to decide whether Christopher Richardson should be made a supervisor or not. The Claimant did not take any action but Christopher Richardson continued to need to use a supervisor's till code because he was still doing evening shifts. When he reported the position to James Coomber James Coomber took the step of allocating him a supervisors code. James Coomber sent a message to the

Claimant informing him of that. We had no evidence that the Claimant responded or took exception and that time.

289. We would accept that the Claimant could reasonably anticipate having a discussion about who was to be promoted as a supervisor in the store that he managed. On our findings there was such a discussion. We are not satisfied that the actions of James Coomber on 27 February 2019 could be reasonably considered to be a detriment. That would be sufficient to dispose of the claim.
290. However if we are wrong about that, we are satisfied that the reason, and the only reason, that James Coomber took the decision to allocate a supervisor code to Christopher Richardson and to pay him accordingly was because he believed that Christopher Richardson was still being required to undertake evening shifts which necessitated the use of a supervisors till code. That is a reason which is not connected in any way with race and the decision was not an act of direct discrimination. For these reasons that claim fails.

Victimisation

291. The Claimant has brought three claims under section 27 of the Equality Act 2010. In his ET1 he set out 4 alleged protected acts under paragraph 9. Under paragraph 10 he sets out three acts which he says were done because he did one or more of those protected acts
292. We shall deal firstly with question of whether or not the Claimant did any protected acts.

Paragraph 9(a) the verbal complaints to Stuart Frost and Jordan Heron on the 28th and 29th of March 2019.

293. We have set out our findings above about the conversations between the Claimant and Stuart Frost which took place on 29 March 2019. We have reached the conclusion that race discrimination was not mentioned. It follows from that conclusion that there was no protected act on this occasion.
294. There was far less evidence or focus on the question of whether the Claimant had spoken to Jordan Heron. We find that he did because Jordan Heron was directed to speak to the Claimant by James Coomber on 28 March 2019. We find it likely that the Claimant did raise his concerns not least about Christopher Richardson's stepfather and the burning issue for the Claimant that Christopher Richardson was being paid as a supervisor. We find it more likely than not that the Claimant who had formed the view at this stage not unreasonably that there had been some discriminatory element as we have found. We are satisfied that this would amount to a protected act for the purposes section 27(1). It would amount to making an allegation that Equality Act 2010 had been infringed.

Paragraph 9(b) raising the issue of discrimination with James Coomber during the telephone call 2 April 2019

295. The way this is put in the ET1 is an allegation that the Claimant told James Coomber about race discrimination in the store and an allegation that James Coomber had Christopher Richardson by way of a reward.
296. We have accepted James Coomber's account of the meeting. It is correct from that account that one of the matters which the Claimant had immediately raised was the promotion of Christopher Richardson it is not suggested that James Coomber's note of the meeting is complete. One note suggests that Claimant was shouting for five minutes on two occasions. The note does suggest that the Claimant makes an allegation that James Coomber is racist. Whilst the Claimant later denied that was the case for reasons which do not understand we are satisfied the note is accurate.
297. We find it more likely than not, given the fact the Claimant was at this stage making allegations of race discrimination that he would have included in his criticisms of Christopher Richardson and his stepfather, his view that they were behaving in a way which was racist.
298. We are satisfied that the Claimant did make allegations of discrimination and that is sufficient to amount to a protected act for the purposes of section 27(1) unless the allegation that was made was both false and in bad faith. We would accept that the Claimant had a genuine belief that Christopher Richardson and his stepfather had discriminated against him. We do not find that he acted in bad faith in raising this matter. The fact that he raised it in a manner which included making threats does not mean he did not act in good faith. The allegations that the Claimant made in respect of James Coomber were false in the sense that they were incorrect. Go as far as to find that they were baseless however that is not to be equated with acting in bad faith more is required. We are therefore satisfied that the Claimant did do a protected act during telephone call that took place on 2 April 2019.

Paragraph 9(c) - the Claimant's grievance 3 April 2019

299. the Claimant's grievance sent to Stuart Frost on 3 April 2019 does include the same allegations as we set out above. For the same reasons we have concluded that that grievance did amount to a protected act for the purposes of section 27 of the Equality Act 2010.

Paragraph 9(d) - the further grievance alleging race discrimination against David Brown and others.

300. On 13 May 2019 the Claimant's further grievance focused on the decision by David Brown to proceed to a disciplinary hearing after the investigatory meeting. He does in terms state that that was an act of direct discrimination. This would be protected act provided that the actions were not both false and in in bad faith. In our view there is some strong evidence that at this stage the Claimant is acting in bad faith. There was precious little basis to make an allegation of race discrimination against David Brown. This allegation has the appearance of being an attempt to derail the disciplinary process. We make some allowances for the fact that the Claimant did have some legitimate complaints both that

discrimination he had encountered and perfunctory nature of the investigatory meeting. We are persuaded that the grievance did amount to an additional protected act.

301. We then turned the question of whether the Claimant was subjected to a detriment because of any of these acts.

Paragraph 10(a) - subjecting the Claimant to a disciplinary investigation

302. The way this allegation is put in the ET1 is that the Claimant was subjected to a false allegation. That carries with it the suggestion that James Coomber was dishonest in his account of the telephone call of 2 April 2019. We have rejected that and found that James Coomber's account was accurate.

303. Given that the Claimant had actually behaved in the manner James Coomber suggested it is difficult to see how he can sensibly argue that proceeding to a disciplinary investigation was a detriment. We shall put that point to one side and move directly to the reason for the treatment. We shall assume that the Respondents bear the burden of proof.

304. It was Stuart Frost who decided that there should be an investigation on the basis of what he was told by James Coomber. What he was told was that the Claimant had threatened James Coomber, Christopher Richardson, and Kevin Lewis. He delegated the investigation to Sarah Tattman. We are satisfied that the reason and only reason for the decision to proceed through the disciplinary process was that there is a strong case to answer of inappropriate and threatening behaviour. That is nothing to do with any of the protected acts. For completeness the fourth protected act had not taken place at that stage and could not have influenced the decision. We are satisfied however that the same reasons remained in place throughout the disciplinary process. When the allegations of racism were explored during the disciplinary investigation Claimant denied he made any allegations of race discrimination by James Coomber during the telephone call. It is consistent with the way the Claimant has run this case that he has subsequently relied upon the same call as a protected act by reference to criticisms of James Coomber.

305. We are satisfied that the protected act had nothing whatsoever to do with the decision to proceed with the disciplinary process.

306. We are satisfied that the ostensible reasons given were the exclusive reasons.

Paragraph 10(b) – Subjecting the Claimant to a biased and flawed investigatory meeting with David Brown.

307. The factual basis this particular claim repeats the claim brought as a claim of direct discrimination. We would not have categorised meeting as being biased. There is nothing in the evidence that we have seen that would lead to that conclusion. There is a difference between a lack of rigour and bias although we would accept that one can evidence the other.

308. The fourth alleged protected act cannot have any influence on how the meeting was conducted because it came afterwards.
309. In common with a claim of direct discrimination the proper approach is to ask whether or not the Claimant has established facts from which we could infer that the failings we have identified the meeting were because he had done the protected acts. In common with our conclusions in the direct discrimination claim do not consider that the fact that the Claimant has established one unlawful act by Christopher Richardson is of any assistance to us. It is not a matter which could on the facts of this case properly support an inference of victimization.

vParagraph 10(c) -promoting Christopher Richardson.

310. As we have set out above Christopher Richardson was not formally to a supervisor until much later. It is correct that he was given a supervisor code from the 27 February 2019.
311. The date of the promotion, if that is what it was, makes it impossible for this claim to succeed. Even if we were to assume that promotion of Christopher Richardson was a detriment his promotion predates any of the protected acts relied upon by the Claimant. It cannot therefore be the case that the promotion was 'because of' any protected act.
312. Suspect that in reality the Claimant's case is a complaint that the situation that arose on 27 February 2019 was allowed to continue after his complaints. In fairness to the Claimant we shall deal with the case on that basis.
313. We shall assume that it is for the Respondents to show that the protected act was not a material influence on the decisions. James Coomber explained with in his witness statement why he had taken the decision to allocate Christopher Richardson a supervisor's code and to pay him for the duties that he was actually performing. He had explained and we accept that he had given the Claimant an option to remove those duties from the Claimant that he believed that at least that the situation persisted. We find that those reasons were the only reasons why he acted as he did. Those reasons have got nothing to do with the fact that the Claimant did protected acts. It follows that even on a more generous reading of the Claimant's claim this claim for victimisation cannot succeed.

Time Limits and the liability of McColl's

314. The Claim that we have found proven is an allegation that took place in the later part of March 2019. The Claimant contacted ACAS on 28 May 2019 and presented his claim on 3 June 2019. It follows that there was no jurisdictional bar to us hearing the claim.
315. It was not disputed that McColl's is liable for any of the acts that we might find proven. It follows that any award of compensation would be made jointly and severally against both Respondents.

316. It is hoped that the parties will be able to agree any further issues of remedy. The matter will be listed for a further hearing to deal with any remaining matters.

The Employment Judge's apologies

317. As the parties are aware the Tribunal met in chambers on the last day of the hearing and the decisions recorded above were written in note form at that time. The Employment Judge had numerous other outstanding judgments at that time. Shortly after the hearing he sat on a case lasting nearly 2 months. There have been many cases since. There were a number of issues in this case and the decision is a long one and took some considerable time to write.
318. The Employment Judge extends his apologies to the parties for the delay in providing this judgment and reasons. He is acutely aware that the parties have been anxiously awaiting the outcome of the proceedings. He apologises for any additional anxiety that the delay has caused.

**Employment Judge Crosfill
Dated: 26 June 2022**