EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102962/2020

Held in Glasgow on 10-12 May 2022

Employment Judge L Murphy
Tribunal Member D Calderwood
Tribunal Member J Ward

Mr M Naeem	**Claimant** **Represented by:** **Mr M Ross - Solicitor**
Teleperformance Ltd	**Respondent** **Represented by:** **Mr K Gibson - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's claims of direct race discrimination and victimisation are not well founded and are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent at their Airdrie call centre as a Customer Service Representative from 29 January 2019 until he was summarily dismissed on 10 February 2020.

2. The claimant complains of direct race discrimination under section 13 of the Equality Act 2010 ("EA"). The claimant is of Pakistani ethnicity. The claimant compares himself with a hypothetical comparator of white British ethnicity. The claimant makes no claims for financial losses, having secured alternative work after this dismissal. The issues for determination by the Tribunal in the claimant's direct race discrimination complaint are as follows:

(i) Did the respondent do the following things:

(a) fail to allow the claimant to undertake the same 'floor-walking' opportunities during his employment as comparable employees of white British ethnicity?

(b) decide on or about 31 January 2020 to commence a disciplinary investigation process?

(c) dismiss the claimant on 10 February 2020?

(d) fail during the disciplinary process to follow its own disciplinary procedure?

(ii) Were these acts or omissions less favourable treatment because of the claimant's Pakistani ethnicity? The Tribunal will require to decide whether the claimant was treated less favourably than a hypothetical comparator of white British ethnicity would have been treated by the respondent.

(iii) If so, what injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

(iv) Should interest be awarded on any award for injury to feelings and in what sum?

3. The claimant also complains of victimisation under section 27 EA. He relies upon his raising of a grievance in relation to the behaviour of the respondent's employee, David Lally, on 19 March 2019 as a 'protected act' for the purposes of s.27(2) EA. The respondent conceded at a preliminary hearing on 25 August 2020 that this amounted to a protected act under the relevant provision. The issues for determination by the Tribunal in the claimant's victimisation complaint are as follows:

(i) Did the respondent do the following things:

(a) fail to allow the claimant to undertake the same 'floor-walking' opportunities during his employment as comparable

employees who had not done or were not believed to have done a protected act?

(b) decide on or about 31 January 2020 to commence a disciplinary investigation process?

(c) dismiss the claimant on 10 February 2020?

(d) fail during the disciplinary process to follow its own disciplinary procedure?

(ii) If so, in doing these acts or omissions (or any of them) did the respondent subject the claimant to detriment?

(iii) If so, was it because the claimant raised a grievance in relation to the behaviour of David Lally on 19 March 2019?

(iv) If so, what injury to feelings has the subjection to detriment caused the claimant and how much compensation should be awarded for that?

(v) Should interest be awarded on any award for injury to feelings and in what sum?

4. The claimant gave evidence on his own behalf. The respondent led evidence from James Stewart (the claimant's Team Leader and Investigating Officer), Sinead McMillan (Dismissing Officer) and Callum McKerrell (Appeal Manager). Evidence was taken in the form of witness statements with some supplementary oral evidence in chief. A joint inventory of productions was referred to. Three items were added of consent to the joint file during the preliminary discussion. Both Mr Ross and Mr Gibson helpfully provided written submissions to which they spoke.

Findings in fact

5. Having heard the evidence, the Tribunal makes the following findings in fact, on the balance of probabilities:

Background

5.1 The claimant was employed by the respondent as a Customer Service Representative from 28 January 2019 to 10 February 2020 at the respondent's call centre in Airdrie. He is a British citizen of Pakistani ethnicity. The respondent operates a number of call centres across the world. The claimant's role involved taking calls on behalf of the respondent's client, EON. His principal duties involved dealing with incoming calls by EON customers and attempting to resolve their queries or complaints, escalating these where appropriate.

5.2 On commencing his employment with the respondent, the claimant spent two weeks in training with other new employees. Much of the training was software focused and he was shown how to operate the respondent's systems, how to check inboxes and write emails. The claimant and the other new recruits were set up to buddy with existing staff to hear them dealing with live calls. He and his new colleagues were given guidance on which teams to contact for specific issues. They were provided with scripted questions to ask customers on receiving their calls to identify the customer's particular problem and how to fix it.

5.3 After this initial training, the claimant and his new colleagues spent two weeks in what was called 'grad bay'. In this period, they were integrated into the call centre floor and began taking live calls from clients. The Team Leader was available to assist where required. The claimant was not given training on two modules calls 'soft skills' and 'complaints handling' at this or any time. Neither did he undergo training on two modules called "Treating customer fairly" and "handle with care" at this or any time.

5.4 On commencing employment with the respondent, the claimant was given written terms of employment which also referred to an employee handbook. No hard copy of the handbook was supplied

but the respondent informed the claimant in an email attaching the contract that the handbook could be found on the intranet. The respondent had published disciplinary, grievance and equal opportunities policies in the handbook, as well as a policy or policies dealing with parental rights including maternity and paternity rights. Though the respondent's email referred to the handbook being on the intranet, in fact, the claimant was unable to access any of the policies and procedures by this means. When his wife was expecting a child, he asked for access to the relevant policy relating to his paternity rights. His Team Leader was unable to assist the claimant to access the policy on the intranet and ultimately provided him with a hard copy. The claimant did not ask for access to or copies of the respondent's other policies and procedures.

5.5 Within the respondent, the term "campaign" is used to refer to the client on whose behalf customer calls are dealt with. Therefore, the claimant's team worked on the EON campaign. Lorna Young was the manager who managed the respondent's whole EON campaign. Within that campaign there were a number of teams whose Team Leaders reported to Ms Young. The respondent also employed other teams dedicated to other client campaigns, dealing with calls for different clients in diverse sectors.

5.6 Separately, the term 'campaign' was sometimes used to refer to a specific project or marketing initiative on behalf of a client. Initially, the claimant was hired to work on the "Credit Meter" campaign for EON. During this period of his employment, the claimant's Team Leader's first name was Stewart. While working on the 'Credit Meter' campaign, the claimant developed concerns about the behaviour of one of the respondent's employees, David Lally. Mr Lally undertook floor-walking duties from time to time and interacted with the claimant in this context. Floor walking duties were undertaken by Team Leaders and sometimes by high performing customer service representatives. During 'floor-walking' they were freed from their call

handling responsibilities and expected to walk the call centre floor to assist colleagues on calls who were having difficulties. Mr Lally was employed by the respondent as a Team Leader, though he was not the claimant's Team Leader. At the material time, the claimant did not know Mr Lally's precise job title. Mr Lally used to interact with the claimant when Mr Lally was floor-walking and the claimant was taking calls on the call centre floor.

Grievance about D Lally

5.7 On 19 March 2019, the claimant raised a grievance about Mr Lally. The complaint handwritten and was in the following terms:

Dear Manager

I would like to raise a formal complaint / grievance as one of the floor walker (David) is focusing on me more than what is required. His behaviour is also not very professional and helpful and makes me feel unhappy when I ask for the help and I feel he is "Micro Managing" me.

Why I feel this

- I was first week in normal area of advisor and forgot to put myself on the break. No one else picked it up but "David" and he informed "Lorna Young" so she could shout at me for this unintentional mistake

- On past Saturday I meant to finish at 6pm and it took me another 4/5 minutes to add notes on the account and "David" shouted at me to log myself out

There are more than 100 people in this place and why has to focus at myself only?

- Every time I raise my hand for the help … (see below)

(1) He does not response and pretend to look somewhere else and ignore me

(2) If I have raised hand already and someone else raises the hand sitting nearby "David" keeps others on the first priority

(3) When "David" comes for the help he never gives a "SMART" information / help. For example, if customer is not happy and I ask him how can we answer the query, he would simply say contact "Res Billing" or "Res Manager" when these names do not exist on the CCP and "David" will skip in seconds and would not complete the help and which causes more delay in process and embarrassment and ultimately I feel stressed or feel I am not well-come to work at this place.

- Yesterday (Monday) one of the floorwalker approached me and informed that I booked a smart meter incorrectly (which I apologized) and informed that I can remember it was one of the floor walker who advised me to book (3) face meter for the smart meter installation. Floor walker went back and asked who was the person who advised to book smart meter and I replied it was "David" or "Lisa" and floor walker informed me that it is "David" who is asking about this.

I informed I am not too sure then but I felt it was "David" I feel.

I would like you to look into this sympathetically as I strongly feel such behaviour is not welcoming and "David" has got some concernce about myself and I am happy to put myself forward to clear any concerns that he has got however his behaviour and conduct is not faire toward me

Best wishes

…"

5.8 The respondent never responded to the claimant's complaint about Mr Lally. The claimant never chased the respondent for a response to his grievance.

Transfer to Pay as you Go Meter campaign

5.9 Approximately 4-6 months before his employment ended, the claimant was selected to transfer to the "Pay as you Go Meter" campaign (also for EON). Within the call centre, this campaign was considered the most difficult and complex because of the antiquated software system in place and because customer calls could often be fraught as customers may lack access to energy supply. This might be, for example, because they had not topped up or could not top up their meters. The campaign was also challenging because of the billing and payment practices and because of difficulties in reconnecting supply after it has run out. There were pressures on the claimant's call centre team to resolve issues if at all possible without resort to organizing a visit by an EON engineer to the customer's property. This was understood by the claimant to be due to a lack of engineering resource.

5.10 While working on the EON "Pay as you Go meter" campaign, the claimant's duties included passing on customer complaints to relevant teams, issuing replacement keys or top up cards to enable customers' access to energy to be restored, spreading customers' balances on their meters over weekly payments, booking smart meter appointments, assisting customers without energy supply, arranging EON engineer call outs, and assisting colleagues. His Team Leader changed to James Stewart when he moved to this campaign.

5.11 The claimant was given no formal training on named modules but James Stewart provided occasional soft skills training.

5.12 On the call centre floor, there were instances of unprofessional behaviour by the respondent's call handlers. These were sometimes

witnessed by the claimant. There were occasions where a customer showed dissatisfaction, and the call handler put them on mute and swore. There were occasions when call handlers shouted at customers. There were occasions when call handlers handling a difficult call deliberately disconnected the call, cutting the customer off. On such occasions, the call handler often attributed the disconnection inaccurately to 'systems issues' in the notes they put on the account.

5.13 These instances of poor call conduct were not always detected by Team Leaders or managers, though sometimes they were. The claimant did not report these instances to his Team Leader when he observed them. When such behaviour was detected, disciplinary processes, were commonplace in the Airdrie call centre. Call conduct was an issue which was very frequently dealt with by Team leaders and managers under the respondent's disciplinary procedure.

5.14 The claimant was told by three or four of his colleagues that they had been subjected to investigations or 1-1s for organizing engineer calls outs in circumstances where the call out was arranged with the customer but the customer was not home when the engineer arrived. The claimant and his colleagues were strongly encouraged to seek to identify if they could themselves resolve the problems during their calls with customers by asking them questions designed to identify the issue remotely over the phone and suggesting the appropriate 'fix'.

Floor-walking

5.15 All employees at the claimant's level on the "Pay as you Go Meter" campaign were given the same daily and weekly targets. One KPI related to the booking of smart meter installations. The claimant performed well on this KPI while he worked on this campaign. On a number of days he achieved or exceeded his targets. An incentive

which Mr Stewart provided in this regard was the opportunity for top performing employees to do 'floor-walking'.

5.16 The claimant was given some opportunities to do floor-walking. He did not decline opportunities when offered to him. However, he did sometimes ask that the floor-walking time be restricted. In the period from 27 December 2019 to 16 January 2020, the claimant was given 4 opportunities to floor-walk on 27 and 30 December 2019 and on 8 and 16 January 2020. He took up these opportunities.

5.17 Because the claimant sometimes asked for his time on floorwalking to be shorter, Mr Stewart's perception was that the claimant did not particularly welcome or relish these opportunities. Mr Stewart believed that the claimant found these duties boring as there were periods when there would be no queries on the call centre floor from fellow agents. Mr Stewart also perceived that the claimant was a quieter member of the team who didn't tend to get involved in conversations with other team members while walking the floor.

Calls in January 2020

5.18 On or about 17 January 2020, James Stewart was informed of a customer complaint about one of the claimant's calls. He listened to a recording of the call. The claimant disconnected the call. Mr Stewart had a brief discussion with the claimant about the call at the back of the claimant's head while the claimant was sitting on the call centre floor. The matter was discussed informally. The claimant was not informed that the matter would be progressed and believed the matter was dealt with. He was not provided with any note of the discussion by Mr Stewart.

5.19 After the incident, Mr Stewart discussed the claimant with Kayleigh McNally. Ms McNally's remit included listening to a selection of calls to audit quality. Ms McNally listened to a number of the claimant's calls over a period and informed Mr Stewart she had not identified issues with the claimant's handling of calls. Nevertheless, it was

agreed between Mr Stewart and Ms McNally that she would do a number of 'dip checks', meaning that she would choose a selection of the claimant's calls with customers to listen to them to see if she identified any further instances of concern. The claimant was not informed this action was being taken.

5.20 On 28 January 2020, the claimant made a call to customer. The customer in question was based in the UK. She was without gas supply in a property which she had not yet moved into but was soon due to do so. She was present in the property at the time of the call. The customer initially had been speaking to a call handler in the respondent's call centre in South Africa where there is a team which also works on the EON campaign. The call handler in South Africa was unable to assist with the query and was attempting to transfer the caller to the claimant. In the process of doing so, the call was disconnected. The claimant noticed this and called back the customer.

5.21 When the claimant spoke to the caller, she was already unhappy about having been cut off. In response to the claimant asking the appropriate scripted questions, the caller told the claimant that she has autism, chronic disease syndrome and asthma. The customer advised there was credit on the meter and the claimant was attempting to assist the customer to reinstate her power supply. To that end, he asked the customer, among other things, whether she could locate a lever like a handle near the meter. The customer could not locate the lever.

5.22 The customer told the claimant that it was stressing her out, that she was on her knees in the kitchen and that it was cold. She asked the claimant if he could call her back, to which he replied, "so what do you expect from me?" When the customer told him she expected him to put the gas back on, he told her: "I cannot put my hand through the phone and turn it on. I'm trying to help you. You need to

be patient." The customer then said she was not kneeling on the floor waiting.

5.23 The claimant subsequently repeated his suggestion that the customer to try and locate the lever. She repeated that there was no lever and the claimant repeated it must be beside the meter. The customer then said words along the lines "did you not listen to me when I said no lever has been switched off?" The claimant retorted with words along the lines: "Do you listen to me or not? I find you very disrespectful and unreasonable".

5.24 The claimant and the customer spoke over each other at times. The customer raised her voice. The claimant did not. The customer complained about being asked the same things repeatedly. The claimant told the customer he found her disrespectful and unreasonable. The customer said that she was not; she was autistic. She asked the claimant's name and he told her "Naeem". She asked him a question along the lines: "Naeem from where?" and he answered along the lines: "You don't need to know where I am at the moment". The claimant speaks English with a Pakistani accent and was concerned that the customer's question may be racially motivated.

5.25 The customer told him she wanted to raise a complaint. The claimant said to the customer that he was trying to help her but that she was not trying to help the situation. The customer repeated that she was autistic. The claimant warned the customer that he would disconnect the call. He repeated that the customer was being unreasonable. She was angry and raised her voice. The claimant warned her again he would disconnect the call. He then did so.

5.26 The respondent had a system called ICE on which the call handlers were expected to record notes of the call to the customer's account. After the call, the claimant recorded the following comments on ICE:

"*colleague transferred the call as customer is off Gas supply. Customer reluctant to go through meter screen and answer repetitive necessary question and behaving unreasonable. I informed customer I am not accept unreasonable behaviour whilst Im fully trying to help but customer believes her Autism entitles herself. I informed customer I am disconnecting call as customer is not allowing me to help the situation and to avoid any unhappy situation*."

5.27 EON customers were sent a text after a call with the respondent's call centre workers asking about the service they had received. This was done under a system known as Heartbeat. If they wanted, the customers could provide feedback in the response and rate the call with a numeric score. Low scores on Heartbeat triggered a notification to the relevant Team Leader who could look into the matter.

5.28 On receiving her text message, the customer to whom the claimant had been speaking made the following comments on the Heartbeat system:

"*The man I spoke to was dismissive rude refused to give me his name then hung up on me leaving me with no hot water or heating*".

5.29 The comments on Heartbeat referred to the customer's call with the claimant and not to the disconnected call with his South African colleague or any subsequent call made or received that day by another call handler. Mr Stewart checked the time and date stamp of the Heartbeat comments to verify this was so.

5.30 The respondent also operated a system called the CAST system (Care and Assessment Tool). The purpose of this was to capture information regarding any vulnerabilities identified with respect to a customer. The claimant sought to update the CAST system to record the customer's vulnerabilities (that is to say, her autism, asthma and chronic disease syndrome). Though he tried to do so,

the information did not upload on to CAST. This was not a deliberate omission on the claimant's part.

5.31 On 31 January 2020, Mr Stewart discussed with Ms McNally the claimant's call on 28 January 2020 which had been flagged to him by the customer's comments on Heartbeat. At that stage, Ms McNally told Mr Stewart about another of the claimant's calls she had listened to at some point between 17 and 31 January 2020 as part of her 'dip checks' on him. She identified a concern in that call that the customer had no credit on her meter and children in the property. This was a vulnerability which the claimant had not recorded on the CAST system. Ms McNally had not raised the matter with the claimant at the time or given him an opportunity to hear the call back. Mr Stewart did not listen to the call.

Disciplinary Process

5.32 The respondent's published disciplinary policy and procedure in force at the material time. The policy provided for an informal stage. It said, among other things under a list of managers' responsibilities that:

"8.2.2 Responsibilities

…

I am a manager – what do I need to do?

…

- *Save for matters of potential gross misconduct, always deal with any conduct issue informally in the first instance (as detailed in the Informal Stage of the Disciplinary procedure);*

5.33 There follows a section (8.2.3) which describes the informal procedure which begins "*Any misconduct issue which is deemed to*

be minor should always be dealt with informally in the first instance…"

5.34 Section (8.2.4) deals with the formal stage of the disciplinary procedure and begins with the sentence: *"If any conduct issue is repeated which has already been dealt with under the informal stage of the Disciplinary Procedure, or if any other misconduct issue has arisen since, the manager may move to invoke the formal stages of the Disciplinary Procedure, which could lead to a formal warning or dismissal as an eventual outcome*."

5.35 That section includes a part headed 'Stage 3 Dismissal". It provides so far as relevant:

"If the employee is referred to a Disciplinary Hearing under this procedure and is found to be responsible for further misconduct following a Stage 2 Final written Warning or commits an act of gross misconduct, then a potential outcome could be dismissal from their employment.

…

"Summary Dismissal" would be reserved for cases of dismissal for gross misconduct, in which case the dismissal will take immediate effect and the employee will not be entitled to work their contractual or statutory notice period….

….

5.36 Section 8.2.9 is headed "***Appendix 2 – Examples of Gross misconduc***t". It sets out a non-exhaustive list of examples of misconduct that are normally regarded as gross misconduct by the respondent and could therefore result in summary dismissal for a first defence. The list includes the following:

"*Behaving in a way that is found to be offensive by clients, customers or other employees*."

5.37 Section 8.2.10 of the Disciplinary Policy and procedure is headed "***Appendix 3 – Disciplinary Hearings Standard Procedure***". It provides that the exact procedure may differ depending on the circumstances. If the investigation has determined there is a case to answer, it sets out a procedure to be applied. That includes informing the employee in writing of details of the allegation (8.2.10 – para 2(a)) and copies of evidence gathered during the investigation (8.2.10 – para 2(f)).

5.38 Mr Stewart arranged a meeting to investigate the matter on 31 January 2020. He took the decision to proceed in this way following discussion with his manager, Lorna Young. At this stage, Mr Stewart had not read the claimant's personnel file and was not aware of the unresolved grievance the claimant had raised about D Lally.

5.39 The decision to investigate was made on the same date the investigation meeting took place (31 January 2020). In advance of the meeting, Mr Stewart prepared a list of questions he wanted to ask the claimant. It was arranged that Ms McNally would attend as notetaker. Ms McNally or Mr Stewart prepopulated the respondent's template hearing notes with these proposed questions. Mr Stewart did not, in the event, ask all the questions which had been prepopulated into the notes template. Ms McNally did not remove those prepopulated questions which were not asked from the notes. It appears from the document that the claimant did not answer some questions. This is not the case. Where no answer is shown by him, the question immediately above was not asked of him. The notes that were taken by Ms McNally are not verbatim. However, apart from the incorrect inclusion of unasked questions, they reflect the broad gist of the discussion.

5.40 The claimant was given the opportunity to be accompanied but he declined. Mr Stewart began by discussing the claimant's call on 17 January about which Mr Stewart had received a customer complaint. The call was not played to the meeting. Mr Stewart is

recorded as having read out some record of his conversation with the claimant related to the call on 17 January 2020, but Ms McNally has not recorded what was read. The record had not previously been shown to the claimant. Mr Stewart asked the claimant about when the claimant should be prompted to raise a complaint on behalf of a customer.

5.41 The claimant indicated his understanding was that he should do so when the customer asks to raise a complaint or when they express explicit dissatisfaction. Mr Stewart asked when it would be acceptable for the claimant to hang up a customer call. The claimant had not been made aware of any hard and fast rules and he said so. He said he believed he was entitled to disconnect a call where a customer was showing a lack of respect or where he believed their behaviour was not reasonable.

5.42 The claimant was asked about the call Ms McNally had listened to at some stage between the 17th and 31st January 2020. He was not played the call. He was not told the date of the call. He was challenged on the apparent failure to update CAST regarding the customer's situation of having no energy supply with children in the house. He was also challenged on his decision not to offer the customer discretionary credit, given her circumstances. The claimant had been discouraged from offering this facility in circumstances where it was not asked for by the customer and he explained this.

5.43 Later in the meeting Mr Stewart moved on to talk about the call on 28 January 2020. He played the claimant the audio recording of the call. He read the claimant the customer's comments on Heartbeat. Mr Stewart discussed the call with the claimant. The claimant maintained that the customer had been unhelpful. He maintained it would not have been appropriate to raise a complaint because he considered the customer was not behaving reasonably. He said the customer was aggressive and said that he considered Mr Stewart

was over exaggerating the situation. He said the customer was "pushing her autism to use as a weapon". The claimant told the meeting he was not prepared to accept aggressive or abusive behaviour and would disconnect.

5.44 Mr Stewart adjourned the meeting to consider the next steps. During the adjournment he discussed the claimant's case with Ms McNally and Ms Young. He was concerned about the claimant's attitude during the meeting to the handling of the call. He considered it clear from the discussion that the claimant would not do anything differently if faced with the same situation as occurred in the call on 28 January 2020 again. He was worried the claimant did not accept that there was anything wrong with how he had handled the call. After the discussion, Mr Stewart decided to suspend the claimant and move to a formal disciplinary process. The claimant was suspended immediately on 31 January 2022.

5.45 After that meeting, EON permitted the respondent to access the audio recording of the call on limited occasions only. EON did not permit the provision of the audio recording to the Tribunal. The respondent did not prepare a verbatim or complete transcript of the call. Mr Stewart instructed at that stage that a note of the call be prepared. This was done by an unidentified employee of the respondent. The note was neither a full nor in all respects faithful transcript.

5.46 Mr Stewart then gathered the investigation papers to send to Lorna Young. She was responsible for allocating the disciplinary to be heard by another manager. Around this time, Mr Stewart reviewed the claimant's personnel file and noted the grievance the claimant had previously raised about D Lally. Mr Stewart read the grievance.

5.47 Lorna Young allocated the case to be heard by Sinead McMillan. Ms McMillan was employed by the respondent as a Team Leader on a campaign for an insurance company. She did not know the

claimant. She was unaware of the claimant's previous grievance against Mr Lally. On or about 3 February 2020, Ms McMillan listened to the audio recording of the call on 28 January. She was also passed the notes which Mr Stewart had arranged for someone to prepare of the call.

5.48 She made arrangements for a disciplinary hearing to take place. It was rescheduled once and went ahead on 10 February 2020. The claimant was sent, in advance, an invitation to the heating. It explained that the hearing would consider allegations of gross misconduct which the letter identified as "Call conduct – not serving customer to a satisfactory standard." The letter enclosed the respondent's disciplinary policy and procedure as well as a copy of the notes of the call of 28 January, the Heartbeat notes, the ICE notes, and Ms McNally's note of the investigation meeting. The letter informed the claimant of his right to be accompanied by a colleague or trade union official.

5.49 At the disciplinary hearing, Gillian Glass, HRBP, attended to take notes. The claimant was unaccompanied, though he was offered the opportunity to be so. During the hearing, there was initial discussion about the call on 17 January 2020. Ms McMillan suggested to the claimant that an action set from that discussion was to start raising complaints when a customer expresses dissatisfaction.

5.50 The claimant was then provided with the notes of the call on 28 January 2020. The audio was not played during this hearing. Ms McMillan asked the claimant, with reference to the call notes, if he would have raised a complaint in this instance. The claimant maintained the customer did not give him respect, that she was aggressive and unreasonable, and that there was no complaint by her. He said that hanging up on customers was a last resort but that when they were going round the same thing and not getting any further, then they were wasting time.

5.51 Ms McMillan asked the claimant about the customer's response to him that she was not being unreasonable but was autistic. She asked the claimant what he thought he should have done then. He said he did not know; it does not entitle anyone to be aggressive. He told Ms McMillan that he did not think he had done anything wrong but that she, Ms McMillan, was telling him he was wrong. He said that she and Mr Stewart had their minds made up.

5.52 Ms McMillan then put to the claimant his ICE notes and the terms of the heartbeat complaint. He accepted his ICE notes were as he wrote them but indicated his view that the Heartbeat comments from the customer had no credibility. When asked if he accepted any responsibility in regard to the call going the way it did, the claimant answered that he wished the customer had acted reasonably and not shown aggression.

5.53 Before Ms McMillan adjourned the meeting, she gave the claimant the opportunity to add anything he wished. He complained that the references to the call on 17 January 2020 were inappropriate and in breach of the company disciplinary policy as the details had not been shared with him. He insisted that there had never been a complaint by the customer and told Ms McMillan he considered the matter to be over exaggerated.

5.54 Ms McMillan adjourned to consider her decision. She looked over all of the information with Ms Glass. She considered that the claimant still presented a risk to the business as he showed no acceptance of his conduct and no accountability. She had concerns that in similar circumstances, the claimant would do the same things again. She did not think placing the claimant on a performance plan would suffice to protect the respondent's customers and clients. She decided to dismiss the claimant on this basis for gross misconduct. She reconvened the hearing and informed the claimant of her decision to dismiss summarily with effect from 10 February 2020. She sent a letter confirming the dismissal and setting out her

reasons on 11 February 2020. It included confirmation of the right to appeal in writing to Callum McKerrell, Assistant Contact Centre Manager at the material time. Mr McKerrell had no knowledge of or relationship with the claimant.

5.55 The claimant lodged an appeal. In his letter, he said he felt the dismissal was not fair. He repeated his view that the customer in question was disrespectful and aggressive. He said he was entitled to work in an aggression and stress-free environment. He complained about the way the investigation meeting unfolded, and, in particular, the discussions about the call on 17 January 2020 and the call Ms McNally had listened to at some stage between then and the meeting on 31 January. He stated the points made in his letter were not exhaustive. He asked for arrangements to be made to listen to the call before the hearing.

5.56 The letter did not mention any allegation that the claimant's ethnicity had been a factor in the decision to investigate or to dismiss. It did not mention the claimant's previous unresolved grievance about Mr Lally.

5.57 When he received the appeal, Mr McKerrell reviewed the relevant documentation, including the claimant's personnel file. He became aware then of the grievance the claimant raised in March 2019 about D Lally. He arranged an appeal hearing for 25 February 2020. At that hearing the claimant wished to listen again to a recording of the call on 28 January but no recording was available because EON held the recording and had not provided it. Mr McKerrell had not heard the recording at this stage. The call of 28 January was discussed. At the meeting, the claimant first mentioned his view that he had been investigated because of his race. He referred to a lack of floor walking opportunities. Mr McKerrell decided he should listen to the call and should speak to Mr Stewart and Ms McNally. He adjourned the hearing. Later that day, Mr Mckerrell received some information from Lorna Young in an email about the occasions on

which the claimant had been given 'floor-walking' opportunities between 27 December 2019 and 16 January 2020.

5.58 The Covid pandemic then struck in the UK and there was a significant delay in reconvening the appeal meeting. On 28 May 2020, the claimant lodged his ET1 with the Tribunal. On 16 September 2020 a further appeal hearing was convened. Mr McKerrell indicated it would be of more benefit to conduct the appeal hearing afresh. On 11 September 2020, Mr McKerrell listened to the recording of the call on 28 January 2020. The hearing on 16 September 2020 was adjourned and reconvened on 22 September 2020. On the latter date, it was possible for the claimant to listen to the call again during the hearing.

5.59 The claimant maintained that the customer had been difficult and that it was not the customer's right to treat him in the way she did. He told the appeal hearing he believed this to be aggressive, discourteous and rude.

5.60 Following the hearing, Mr McKerrell considered the claimant would be a risk to the business if he continued to be employed. He rejected the appeal and did not uphold any of the claimant's grounds. An appeal outcome letter was sent on 20 October 2020 which explained Mr McKerrell's reasons for rejecting the appeal.

Other disciplinaries

5.61 Ms McMillan, the dismissing officer, undertook many disciplinaries for the respondent. She conducted approximately one or two such hearings a month on average. These included many disciplinary hearings for call conduct which was a common reason for cases to progress to disciplinary hearings. It was not uncommon for these matters to be escalated to disciplinary hearings in relation to concerns arising from a single call (or a "1st offence" to use the terminology in Appendix 2 of the disciplinary policy). The respondent treated conduct in a single call as potential gross misconduct from

time to time where the behaviour on the call was serious enough. Roughly 5 of the disciplinary hearings Ms McMillan conducted over a year, on average, culminated in dismissal.

5.62 In 2019, Ms McMillan dismissed an employee, AM, of white British ethnicity, because of that individual's conduct on a customer call. AM was also employed at the Airdrie call centre. She was a customer service agent. It was alleged that AM had used an unacceptable tone and that she began the call laughing. The allegation in the disciplinary hearing invite was: *The hearing has been arranged to discuss alleged breaches of the Company Disciplinary rules regarding your poor tone used on a call as discussed.* AM felt she had been direct but not cheeky. She maintained she didn't think the way she spoke to the customer was bad. AM suggested she should have further training. AM also maintained that she struggled because of her poor hearing. Ms McMillan dismissed AM summarily because she believed that if she allowed AM to return to the call centre floor, the same thing would happen again.

5.63 On 30 April 2021, a different team manager of the respondent dismissed an employee of white British ethnicity after that employee shouted at and spoke over a customer during an inbound call. The employee accepted the conduct was not professional and would not look good for the respondent's reputation. The employee was dismissed summarily. The allegation in the disciplinary hearing invite was: "*Gross misconduct by unprofessional behaviour on calls that could bring the business into disrepute*".

5.64 On 31 May 2021, a further team manager of the respondent dismissed an employee of white British ethnicity for alleged 'call avoidance'. It was alleged the employee hung up three separate customer calls, which the employee denied. The allegation in the disciplinary hearing invite was: "*Cutting off calls or other forms of call avoidance (including subverting handling calls, for example*

short calls, placing calls on hold unnecessarily, misusing codes to avoid calls through, etc …".

Observations on the evidence

The call on 28 January 2020

6. There was a key dispute between the parties about the content and tone of the call on 28 January 2020. This call was central to the disciplinary process and, on the respondent's case, its decision to dismiss. The evidence available to the Tribunal was less than ideal. We accepted that the omission to provide the audio recording was not the respondent's decision but was one taken by their client, EON. Neither party applied to the Tribunal to exercise its case management powers in Rule 31 to require EON to disclose the material. The note the respondent arranged to have prepared was not a complete or faithful transcript of the call. The Tribunal, therefore, required to make findings in fact based on the disputed note and the witness evidence about the call, without access to the original audio. It was plain from the face of the note that it was not a verbatim transcript. All four of the witnesses before the Tribunal had heard the audio recording. At least three of them (including the claimant) referred to recollections of aspects of the conversation which were not recorded in the note. The individual who prepared the note was unidentified and did not give evidence to the Tribunal.

7. The claimant accepted some but not all aspects of the dialogue attributed to him and the caller during the call. We accepted some parts of the claimant's evidence regarding the content of the call, but in some respects, we preferred the note's content to the claimant's recollection. We accepted the claimant did not raise his voice during the call but that the customer did. Mr Stewart said during cross examination that the customer in the call on 28 January did not raise her voice. We did not accept Mr Stewart's evidence in this respect. The claimant disputed this and the respondent's note of the call records on two occasions records that the customer "raises her voice" and is annoyed.

8. We accepted that the claimant and the customer spoke over each other at times. In his evidence to the Tribunal, the claimant denied that the customer

repeated to him that she had autism when he criticised her approach during the call. The disputed note indicated that she had repeated this on a further two occasions, after informing the claimant of her autism early on in the call. On balance, we accepted that the customer had indeed done so, broadly as recorded in the note, and had raised this specifically when the claimant accused her of being disrespectful and unreasonable. We considered this finding consistent not only with the note of the call but with the comments the claimant admitted he had recorded on the ICE system. He had noted on ICE that the "customer believes her autism entitles herself".

Observations on credibility and reliability

9. For the most part we considered the claimant recounted events as he believed them to be. We did not consider that he sought to mislead the Tribunal, but we did consider that he had a genuinely different perception about the nature and appropriateness of the call on 28 January 2020 to that held by the other witnesses who heard it. We also considered that the claimant had different views about acceptable call conduct to those held by his managers. Some aspects of his evidence which were too vague to sustain meaningful findings. For example, he referred to managers "playing favourites" with staff but no examples were given. He suggested in his statement that he should have had dozens of floor walking opportunities but was only given two (though he later accepted in oral evidence that he had received at least four opportunities). No dates were specified when he claimed his performance warranted a floor walking period which he alleged was withheld and no evidence was led regarding the floorwalking granted to others or their comparative KPI performances on the dates in question, or their ethnicities. There was insufficient evidence on which to base any finding that the claimant was deprived of floor-walking opportunities which ought properly to have been granted to him on any occasion.

10. We had concerns about aspects of Mr Stewart's evidence. Mr Stewart disputed the claimant's account that it was not uncommon for colleagues to shout or mute themselves and use foul language while on calls. Mr Stewart's evidence in this regard did not sit easily with the evidence of Ms McMillan and

Mr McKerrell, both of whom were candid about such behaviour being a common problem in the call centre environment. Mr McKerrell admitted there were disciplinaries happening across the respondent's sites on a daily basis relating to call and email conduct and call avoidance. On balance, we considered it unlikely that Mr Stewart, a Team Leader on the challenging "Pay as you Go Meter" campaign, never witnessed the types of behaviour by call handlers described by the claimant and his fellow managers.

11. We did not accept Mr Stewart's evidence about the training modules the claimant had received. We were concerned that his evidence was vague and unsupported by any documentary evidence such as training records. Mr Stewart did not maintain he had personally delivered the training to the claimant or that he recalled releasing the claimant for the training. He did not suggest he had seen a training record that established the claimant's presence on the modules on specified dates. He said only that "pretty much everyone on the campaign went through the same training." The claimant disputed he had undertaken the modules (as he had done throughout the internal process), and we accepted the claimant's evidence on this.

12. We did not accept Mr Stewart's evidence in its entirety about the conversation he had with the claimant after he listened to the claimant's call on 17 January 2020. We accepted that a conversation took place but not that it was described at the time to the claimant as a coaching session or that it lasted as long as 30 minutes, as Mr Stewart maintained. We accepted the claimant's evidence that the conversation took place on the contact centre floor with Mr Stewart standing behind his head. There was a suggestion in the investigation meeting notes that the conversation had been documented but no written record was produced to the Tribunal and the investigation meeting notes did not record what, if anything, was read out in that regard during the investigation meeting. It was not disputed the claimant had never been given any written note of the conversation regarding the 17 January call at the time or later, during the investigation meeting.

13. We did not consider the evidence before the Tribunal about that conversation was sufficient to allow us to make findings about the specific nature of the

feedback given to the claimant on that date. We don't accept it was made clear to the claimant during that discussion when it would be acceptable to disconnect customer calls as Mr Stewart says in his witness statement. The investigation meeting notes record that the claimant said he hadn't been made aware of any rules on this and Mr Stewart is not recorded as having challenged him on that, or as having referred him to any apparent written note to contradict the claimant's professed uncertainty.

14. We accepted, however, that Mr Stewart had significant concerns on listening to the recording of the call on 28 January 2020 and that he found the claimant's comments after the call on the ICE system to be outrageous. We accepted that Mr Stewart considered that the claimant's behaviour on the call presented a risk to the respondent's business, and that it was this which prompted Mr Stewart to initiate the investigation process without delay. We accepted his evidence that, at this stage, he was not aware of the grievance about Mr Lally on the claimant's personnel file though, after the investigation meeting, he became so aware. In light of the findings we have made about the content of the call itself and the Heartbeat comments made by the customer, it seems to us inherently probable that such a call would cause significant concern to a call centre Team Leader and we had no hesitation in accepting Mr Stewart's evidence that it did so.

15. We further accepted that, at the adjournment of the of the investigation meeting, Mr Stewart continued to be concerned that the claimant would not do anything differently if faced with the same situation again. We accepted that it was this risk which prompted Mr Stewart to suspend the claimant pending a formal disciplinary hearing.

16. We found Ms McMillan to be a credible and reliable witness. She gave her evidence in a straightforward way which was not self-serving. She was honest when she did not recall details. We accepted Ms McMillan's evidence that she had no knowledge of the unresolved grievance about Mr Lally when she heard the case and made her decision to dismiss. We accepted that, after the disciplinary hearing, Ms McMillan continued to have concerns that the claimant was a risk to the respondent's business and that she believed he

would continue to speak to customers the same way. We accepted her evidence that it was this concern that caused her to take the decision to dismiss the claimant.

17. Mr McKerrell, the appeal manager, gave evidence which we considered unreliable in a number of respects. We had a concern about Mr McKerrell's grasp of the details of the claimant's case. His recollection of the claimant's case appeared to be inconsistent in important respects with that of other respondent witnesses. He suggested in his statement and in oral evidence that the claimant had been subject to a performance improvement plan, and that he didn't fall into the category of being a high performing agent. During cross examination he suggested there were "a few PIPs in place". The claimant denied being subject to any PIP. Mr Stewart, the claimant's Team Leader, who had also reviewed his personnel file, made no suggestion that he had administered one or that he was aware the claimant's former manager had done so. Mr Stewart, on the contrary, noted the claimant had good performance statistics. No documentary evidence was produced of any PIP and no details of the dates or manager involved were offered by Mr McKerrell. We readily accepted that there was no such PIP.

18. Mr McKerrell also gave evidence that he believed the claimant's grievance about Mr Lally to have been resolved by the respondent. Again, he provided no detail about who he believed had resolved the grievance, in what manner, or when. No documentary evidence was produced to the Tribunal that the grievance had been resolved. The claimant denied any action was taken. Mr Stewart, who accessed the claimant's personnel file, did not suggest in his evidence that he had seen paperwork indicating there had been any progression or resolution of the matter. We accepted the claimant's account that there was no response by the respondent to that grievance.

Relevant law

19. Section 13 EA is concerned with direct discrimination and provides as follows:

"13 Direct discrimination

(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."

20. Section 9 EA deals with the protected characteristic of race. It provides:

*"**9 Race***

Race includes

(a) colour

(b) nationality;

(c) ethnic or national origins."

21. According to section 23 EA, "on a comparison for the purposes of section 13, … there must be no material difference between the circumstances relating to each case". The relevant "circumstances" are those factors which the respondent has taken into account in deciding to treat the claimant as it did, with the exception of the element of race ((**Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11). A person can be an appropriate comparator even if the situations compared are not precisely the same (**Hewage v Grampian Health Board** [2012] UKSC 37). The claimant does not need to point to an actual comparator at all and may rely only on a hypothetical comparison. Very little direct discrimination today is overt and it is necessary to look for indicators from a time before or after a particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias (**Anya v University of Oxford** [2001] IRLT 377, CA). Sometimes evidence is led of so-called 'evidential comparators'. These are actual comparators but whose material circumstances in some way differ from those of the claimant. Their evidential value is variable and is inevitably weakened by differences in material circumstances from the claimant's (**Shamoon**).

22. For a direct race discrimination complaint to succeed, it must be found that any less favourable treatment was because of the claimant's race, through

the discriminatory reason need not be the sole or even the principal reason for the respondent's treatment.

23. Section 27 EA is concerned with victimisation and provides, so far as material, 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.*
>
> *……*
>
> *(4) This section applies only where the person subjected to a detriment is an individual."*

24. For a disadvantage to qualify as a detriment, it must be found that a reasonable worker would or might take the view that he had thereby been disadvantaged. The test must be applied by considering the issue from the point of view of the victim. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a justified and reasonable sense of grievance may well do so (**Shamoon**).

25. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

> *"**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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…"

26. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination, it will be for the respondent to show a non-discriminatory explanation.

27. There are two stages: Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination or victimisation. This means a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. If there are disputed facts, the burden of proof is on the claimant to provide those facts. The respondent's explanation is to be left out of account in applying Stage 1. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden in accordance with Stage 2. Those bare facts 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 un unlawful act of discrimination. 'Something more' is, therefore, required (**Madarassy**).

28. If the claimant shows facts from which the Tribunal could decide a discriminatory act has occurred, then, under Stage 2, the respondent must

prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic or protected act (**Igen v Wong** [2005] IRLR 258).

29. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination (or victimisation). However, they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage**).

Submissions

30. Mr Ross and Mr Gibson provided written submissions to which they respectively made additions and clarifications orally. Both summarized the legal provisions and approach in direct discrimination and in victimisation claims. There was no material dispute as to the applicable legal tests.

31. Mr Ross clarified certain anomalies in his written submissions with reference to his haste in finalizing these. Although his written submission appeared to refer to a section 26 harassment claim, he confirmed that no such claim is in fact advanced by the claimant. He clarified the claimant does not rely on any actual comparator, as the second page of his submission suggests, but relies on a hypothetical comparator. Section 39 EA was reproduced in the written submission, but Mr Ross confirmed this was included in error and no claim proceeds under that provision. Contrary to the text of the final paragraph of the written submission, Mr Ross reaffirmed that the claimant seeks compensation for injury to feelings only and does not make any claim for loss of earnings.

32. The written submissions are not reproduced here in full, but the respective arguments made by the parties are summarized in the discussion that follows.

Discussion and decision

Direct race discrimination

Did the respondent fail to allow the claimant to undertake the same 'floor-walking' opportunities during his employment as comparable employees of white British ethnicity?

33. Mr Ross submitted that the burden of proof has shifted to the respondent. It is therefore understood to be the claimant's position that he has established a *prima facie* case of discrimination with respect to the floor-walking opportunities. Mr Gibson submitted that there was no failure by the respondent to afford the claimant the same opportunity to undertake floor walking during his employment and no less favourable treatment.

34. Having considered all of the facts and evidence, absent the respondent's explanation, we are not satisfied that the claimant has surmounted the hurdle of Stage 1. We do not consider that the claimant has proved facts from which a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination by the respondent with reference to the provision of floor walking opportunities. Where, as here, there are disputed facts, the burden of proof is on the claimant to prove those facts necessary to establish a *prima facie* case of discrimination.

35. No specific occasions were identified when the claimant said his performance warranted a floor walking 'reward' which was alleged to have been withheld. We accepted, broadly, that the claimant performed well on the KPI of arranging smart meter installations. This was undisputed by the respondent. However, there was no evidence before us about what particular target required to be met for the floorwalking privilege to be granted or how often the claimant met these targets. We heard no evidence regarding the floorwalking granted to others in the claimant's team or how their KPIs compared with the claimant's. We heard no evidence about their ethnicities. We did not consider facts were proved from which we could properly decide on the balance of probabilities that the respondent had committed a discriminatory act, ignoring any explanation put forward by the respondent.

36. The claimant has shown the presence of a protected characteristic but he has not proved on the balance of probabilities that he experienced less favourable treatment. The burden remains on him to show such less favourable treatment and indeed 'something more' from which the Tribunal could conclude discrimination. There was no evidence before us from which the Tribunal could draw inferences that a comparator with materially the same circumstances other than the protected characteristic was or would have been treated more favourably.

37. The claimant was given at least four opportunities to do floor walking. Though he alleged in his witness statement that he ought to have had 'dozens' of opportunities, there was no evidence regarding when or on what basis he believed he had earned that entitlement.

38. We appreciate that discrimination is rarely overt and considered whether there were any indicators that Mr Stewart's decision-making with respect to floor-walking (or generally) was affected by racial bias. We did not identify any other evidence before us from which we could properly infer discriminatory treatment by Mr Stewart in allocating floorwalking opportunities. We find that a *prima facie* case of discrimination with respect to the alleged absence of floor-walking opportunities has not been established. The burden of proof does not shift to the respondent to prove the absence of any discrimination from its decision-making regarding floor-walking.

Did the respondent decide on or about 31 January 2020 to commence a disciplinary investigation process?

39. This is not in dispute.

Did the respondent dismiss the claimant on 10 February 2020?

40. This is not in dispute.

Did the respondent fail during the disciplinary process to follow its own disciplinary procedure?

41. It is understood that the alleged failure upon which the claimant relies is (i) a failure by the respondent to deal with his conduct issue under the informal stage of the respondent's disciplinary policy and procedure; and (ii) a failure to provide adequate details of the allegations against him including details of his alleged breach of the respondent's policy.

42. Mr Gibson submits that there were no failures in the application of the respondent's policy as the claimant contends. It is clear, he says, that the policy does not oblige the respondent to deal with every act of suspected misconduct informally as the claimant seems to suggest.

43. In light of our findings regarding the nature of the call on 28 January, the vulnerability of the customer and the customer's complaints about the claimant on Heartbeat, we accept that the respondent acted within the parameters of its disciplinary policy and procedure in treating the matter as potential gross misconduct and in following a formal procedure. The policy itself expressly reserves this option in cases of potential gross misconduct. The non-exhaustive list of possible gross misconduct includes "*Behaving in a way that is found to be offensive by customers*…". The customer described the man she spoke with on Heartbeat as "dismissive" and "rude". The respondent's Mr Stewart and Ms McMillan had listened to the audio recording, and both had significant concerns how it was conducted.

44. We do not find that the policy constrained the respondent to deal with the matter under the informal stage of the procedure. We have found as a matter of fact that the respondent in general and Ms McMillan in particular, often conducted disciplinary hearings under the respondent's formal procedure for call conduct issues. We have also found that it was not uncommon for these matters to be escalated to disciplinary hearings in relation to concerns arising from a single call, or a "1st offence" to use the terminology in Appendix 2 of the Policy.

45. The claimant also alleges the respondent breached the Policy by giving insufficient detail of the allegation he faced to satisfy the requirements of section 8.2.10, Appendix 3. That appendix requires that details of the allegations be given and that copies of any evidence gathered during the investigation be provided. In the invite dated 6 February 2020 to the hearing, the claimant was told "*we will consider allegations of Gross Misconduct in accordance with the company's disciplinary policy and procedures as follows: Call conduct – not serving customer to a satisfactory standard*." Enclosed with the letter was, among other things, a copy of the respondent's disciplinary policy and procedure and a copy of the note that had been prepared of the call dated 28 January 2020 alongside the ICE and Heartbeat text related to that call.

46. We accept that the allegation to be considered at the disciplinary hearing was not well specified. Ms McMillan's letter failed to adequately identify which call or calls would be considered. It is true that the note of the call of 28 January 2020 was also enclosed, but we accept it is dubious that this enclosure sufficed in the circumstances to clarify that this call, and this call only, would be considered at the hearing. Section 8.2.10 of the Policy envisages the provision of the allegation details and evidence before the hearing takes place. We accept that there was flaw in the application of the Policy in Ms McMillan's failure to specify sufficient detail before the hearing to enable the claimant to understand which call or calls were under consideration for the purposes of the gross misconduct allegation.

Were these acts or omissions less favourable treatment because of the claimant's Pakistani ethnicity?

Decision to start disciplinary investigation.

47. Mr Ross submitted that the burden of proof has shifted to the respondent. It is therefore understood to be the claimant's position that he has established a *prima facie* case of discrimination with respect to the decision to commence a disciplinary investigation process. Mr Ross said the claimant has submitted

consistent evidence to prove his case. He submits that the actions of the respondent were 'clearly motivated by race'.

48. Mr Gibson accepts that such a decision was taken, and that such a decision has the potential to be a discriminatory act. However, in Mr Gibson's submission, the claim fails on this issue because the decision to commence the disciplinary investigation process on or about 31 January 2020 was not in any sense because of the claimant's race. Mr Gibson says the call on 28 January was a serious example of the claimant not performing his duties properly and that, considering the earlier call on 17 January and the one listened to by Ms McNally, there was more than enough to justify investigation. Mr Gibson maintains the Tribunal is in a position to make positive findings in favour of the respondent. Alternatively, he contends that there is insufficient evidence for the claimant to meet Stage 1. If he is wrong and the Tribunal finds a *prima facie* case of discrimination is established, Mr Gibson says the respondent has proved the decision was in no sense whatsoever connected to the claimant's race.

49. We do not consider that, on this allegation, it is necessary to apply the burden of proof provisions in section 136 of EA. That is because we are satisfied that the respondent has shown on the balance of probabilities a discrimination free reason for the decision taken by Mr Stewart to commence a disciplinary investigation against the claimant on 31 January 2020, following on from the call on 28 January 2020. We make a positive finding that the respondent did not treat the claimant less favourably because of his race in deciding to initiate the investigation (applying **Hewage**). We accept Mr Stewart's evidence that race played no part whatsoever in his decision and that his decision was motivated instead by his concerns about the claimant's handling of the call on 28 January 2020, against the backdrop of an earlier conversation about a call on 17 January. We accept that Mr Stewart considered that the claimant's behaviour on the call presented a risk to the respondent's business. We accept it was this concern which prompted him to initiate the investigation process without delay. We find, on the balance of probabilities, that his

decision was in no sense whatsoever connected to the claimant's Pakistani ethnicity.

Dismissal

50. Again, Mr Ross submitted that the burden of proof has shifted to the respondent. He said the claimant has submitted consistent evidence to prove his case. He contended that Ms McMillan had admitted in evidence that her finding that the "customer felt discriminated against" could not be substantiated.

51. Mr Gibson accepts that the decision to dismiss was taken, and that such a decision could potentially be discriminatory act. However, in his submission, the claim fails on this issue because the decision to dismiss on 10 February 2020 was not in any sense because of the claimant's race. Mr Gibson maintains the Tribunal is in a position to make positive findings in favour of the respondent. Alternatively, he contends that there is insufficient evidence for the claimant to meet Stage 1 and shift the burden of proof. If he is wrong on that, Mr Gibson argues the respondent has proved the decision was in no sense whatsoever connected to the claimant's race.

52. We do not consider that, on this allegation, it is necessary to apply the burden of proof provisions in section 136 of EA. That is because we are satisfied that the respondent has shown on the balance of probabilities a discrimination free reason for the decision taken by Ms McMillan to dismiss the claimant on 10 February 2020. We make a positive finding that the respondent did not treat the claimant less favourably because of his race in deciding to dismiss him (applying **Hewage**). We accept Ms McMillan's evidence that race played no part whatsoever in her decision and that her decision was motivated instead by concerns about the claimant's handling of the call on 28 January 2020 and concerns that the claimant would continue to speak to customers the same way if he was not dismissed. We accepted her evidence that it was this concern that caused her to dismiss the claimant. We find, on the balance of probabilities, that her decision was in no sense whatsoever connected to the claimant's Pakistani ethnicity.

Respondent's application of disciplinary procedure: Inadequate specification of allegation details

53. We have found that the poor specification of allegation against the claimant in Ms McMillan's letter of 6 February 2020 amounted to a flaw in the application of the respondent's disciplinary policy (section 8.2.10 Appendix 3, para 2 (a)).

54. Mr Ross submitted that the burden of proof has shifted to the respondent. It is therefore understood to be the claimant's position that he has established a *prima facie* case of discrimination with respect to the alleged breach of disciplinary policies and procedures. Mr Ross submits the claimant's evidence was credible, reliable and consistent, whereas he says the respondent's witnesses were inconsistent.

55. Mr Gibson says that if there were any such failures with respect to the respondent's policy, they were in no way connected with the claimant's race. Minor imperfections, said Mr Gibson, are often seen by the Tribunal in cases involving disciplinary procedures being dealt with by managers.

56. We reminded ourselves that the Tribunal should take into account all facts and evidence available to it at Stage 1, not only those which the claimant has adduced or proved. Any explanation put forward by the respondent is to be left out at the first stage. As it happens, Ms McMillan did not give any explanation for why she framed the allegation in the manner she did. She was not asked for one in cross examination. To establish a *prima facie* case of discrimination, it will usually be necessary to show a protected characteristic, a difference in treatment, and indeed 'something more' to shift the burden (**Maderassy**). We do not find that the claimant has proved a difference in treatment with respect to the poor specification of the allegation in the invite letter. We accept the respondent's disciplinary policy was not applied satisfactorily by Ms McMillan with respect to the specification of the allegation to be considered at the hearing. However, we also find that the invite she sent to AM, an employee of white British ethnicity in 2019, was poorly specified. It said: "*The hearing has been arranged to discuss alleged breaches of the*

Company Disciplinary rules regarding your poor tone used on a call as discussed". The disciplinary invites by two other managers of the respondents to two other white British individuals for hearings on 30 April and 31 May 2021 were not well specified either. None of them gave the dates of the calls in question. We recognise that the situations compared are not precisely the same and that the nature of the allegations differed. Nevertheless, there was no evidence before us from which we could infer the claimant had been treated less favourably than others had been or would be treated with regard to the approach taken to specifying the allegation in his disciplinary invite.

57. Having considered all of the facts and evidence, absent the respondent's explanation, we are not satisfied that the claimant has surmounted the hurdle of Stage 1. We do not consider that the claimant has proved facts from which a 'reasonable tribunal could properly conclude' on the balance of probabilities that there was discrimination by the respondent with reference to the manner in which Ms McMillan drafted the disciplinary invite letter to the claimant. The burden of proof sits with the claimant to prove facts necessary to establish a *prima facie* case of discrimination. We find that he has not discharged that initial burden.

Victimisation

Did the respondent fail to allow the claimant to undertake the same 'floor-walking' opportunities during his employment as comparable employees?

58. We have not found that the claimant has proved on the balance of probabilities that the respondent failed to allow the claimant floor walking opportunities to which the claimant was entitled. We heard no evidence of specific occasions when the claimant says his performance warranted such opportunities which were withheld. We heard no evidence regarding floorwalking opportunities granted to others in the claimant's team who had not done or were not believed to have done a protected act. Facts have not been proved from which we could properly decide on the balance of probabilities that the respondent has subjected the claimant to a detriment

with respect to the floorwalking opportunities granted because he had raised a grievance about Mr Lally in March 2019.

Did the respondent decide on or about 31 January 2020 to commence a disciplinary investigation process?

59. This is not in dispute.

Did the respondent dismiss the claimant on 10 February 2020?

60. This is not in dispute.

Did the respondent fail during the disciplinary process to follow its own disciplinary procedure?

61. We have found the poor specification of the allegation against the claimant in the letter of 6 February 2020 represented a flaw in the application of the disciplinary policy.

If so, in doing these acts or omissions (or any of them) did the respondent subject the claimant to detriment?

62. Mr Gibson accepts that there was a decision to commence the disciplinary process on or about 31 January 2020 and that there was a detriment in play in that regard. He accepts that there was a dismissal on 10 February and that there was a detriment in play also in that respect. He denies that there was a detriment with respect to floor-walking opportunities or that there was a detriment in the application of the disciplinary policies and procedures.

63. We accept there was no detriment with respect to floor-walking opportunities since we have not made a finding that the respondent failed to allow the claimant floorwalking opportunities which ought properly to have been granted.

64. As to Ms McMillan's inadequate specification of the disciplinary allegation in her letter of 6 February 2020, we accept this amounted to a detriment**.** Approaching the matter from the point of view of the alleged victim, we accept the claimant would reasonably take the view that his treatment in receiving

the poorly specified allegation was to his detriment. His concern about the lack of detail was not unreasonable and cannot be dismissed as an 'unjustified sense of grievance' (**Shamoon,** para 35).

If so, were any such detriments because the claimant raised a grievance in relation to the behaviour of David Lally on 19 March 2019?

65. Three detriments are potentially in play. We turn to the question of causation in respect of each of these.

(i) The decision to commence a disciplinary investigation process

66. Mr Ross submitted that the burden of proof has shifted to the respondent. Mr Gibson accepts the decision was, potentially, a detriment. However, in his submission, the claim fails because the decision to commence the disciplinary investigation process was not in any sense because of the grievance dated 19 March 2019. Mr Gibson says the call on 28 January was a serious example of the claimant not performing his duties properly and, considering the earlier calls, there was more than enough to justify investigation. He maintains the Tribunal is in a position to make positive findings in favour of the respondent. He contends there is insufficient evidence for the claimant to meet Stage 1, but says if he is wrong in that, then the respondent has proved the decision was in no sense whatsoever connected to the protected act.

67. We do not consider that, on this allegation, it is necessary to apply the burden of proof provisions in section 136 of EA. We are satisfied that the respondent has shown, on the balance of probabilities, a victimisation free reason for the decision by Mr Stewart to commence a disciplinary investigation against the claimant on 31 January 2020, following on from the call on 28 January 2020. We make a positive finding that the respondent did not subject the claimant to a detriment because of his earlier grievance (applying **Hewage**). We accept Mr Stewart's evidence that he was not aware of the grievance at the time when he initiated the investigation meeting and, therefore, that the grievance played no part whatsoever in his decision. We further accept on balance that his decision was motivated by his concerns about the claimant's handling of

the call on 28 January 2020 (against the backdrop of an earlier conversation about a call on 17 January).

(ii) *The decision to dismiss the claimant*

68. Mr Ross submits the burden of proof has shifted to the respondent and so maintains the claimant has established a *prima facie* case of victimisation with respect to the decision to dismiss.

69. Mr Gibson accepts that the dismissal decision was a potential detriment. However, in Mr Gibson's submission, the claim fails because the decision to dismiss on 10 February 2020 was not in any sense because the claimant had previously raised a grievance about Mr Lally on 19 March 2019. Mr Gibson maintains the Tribunal is in a position to make positive findings in favour of the respondent. He contends that there is insufficient evidence for the claimant to meet Stage 1. If he is wrong in that, he argues the respondent has proved the decision was in no sense whatsoever connected to the claimant having previously raised a grievance about Mr Lally.

70. We do not consider that, on this allegation, it is necessary to apply the burden of proof provisions in section 136 of EA. We are satisfied that the respondent has shown on the balance of probabilities a victimisation-free reason for the decision taken by Ms McMillan to dismiss the claimant on 10 February 2020. We make a positive finding that the respondent did not subject the claimant to the detriment of dismissal because he had done a protected act (applying **Hewage**). We accept Ms McMillan's evidence that she was not aware of the grievance in question which, therefore, played no part whatsoever in her decision. We accept her decision was motivated by concerns about the call on 28 January 2020 and concerns that the claimant would continue to speak to customers the same way if not dismissed.

(iii) *Disciplinary policy failure: inadequate detail of allegations*

71. Again, Mr Ross's submission is understood to be that the burden of proof has shifted to the respondent and has not been discharged by the them.

72. Mr Gibson says this claim fails because any imperfections in the process were because of human error and were not in any way related to the grievance viewed as a protected act. He maintains the Tribunal is in a position to make positive findings in favour of the respondent. There is insufficient evidence for the claimant to meet Stage 1, says Mr Gibson, but if that is wrong, he alternatively argues that the respondent has proved the decision was in no sense whatsoever connected to the grievance.

73. We do not consider that, on this allegation, it is necessary to apply the burden of proof provisions in section 136 of EA. We are satisfied that the respondent has shown on the balance of probabilities a victimisation-free reason for the approach taken by Ms McMillan to the letter setting out the allegation against the claimant. We make a positive finding that the respondent did not subject the claimant to the detriment of inadequately specifying the disciplinary allegation because he had done a protected act (applying **Hewage**). We accept Ms McMillan's evidence that she was not aware the claimant had raised a grievance. We accept, therefore, that this played no part whatsoever in Ms McMillan's approach to the specification of the allegation in the letter of 6 February 2020.

Conclusion

74. As well as looking at each alleged incident of discrimination and victimisation separately, we also looked at the events globally to identify whether they might add up to something more than the sum of their parts. We reminded ourselves that a fragmented approach can have the effect of 'diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds' (**Anya**). On considering the totality of the evidence, we remained satisfied with the conclusions we have reached with respect to the individual allegations advanced in this case.

75. We find that the respondent did not directly discriminate against the claimant because of his Pakistani ethnicity and it did not victimise him because he had done a protected act.

Employment Judge: Lesley Murphy
Date of Judgment: 09 June 2022
Entered in register: 10 June 2022
and copied to parties