



EMPLOYMENT TRIBUNALS

Claimant: Mr Michal Swaciak

Respondent: Rowse Honey Limited

Heard at: London (Central) Tribunal via Cloud Video Platform

On: 29 - 30 November & 1, 2 & 14 (in chambers) December 2022

Before: Tribunal Judge Peer acting as an Employment Judge
Ms Maria Pilford
Mr Stephen Soskin

Representation

Claimant: Mr Martin Kozik, Legal Consultant of KL Law

Respondent: Mr Rad Kohanzad of Counsel instructed by Walker Morris LLP

JUDGMENT

The unanimous decision of the tribunal is that:

1. The claimant's allegations that he was subjected to less favourable treatment because of his sex:
 - 1.1. by the respondent treating a complaint made by a woman against him as a grievance faster and more expeditiously than it treated the claimant's complaint which it disregarded;
 - 1.2. by the respondent suspending him on 12 June 2020;
 - 1.3. by the respondent subjecting him to a final written warning further to the complaint made against him;
 - 1.4. by the respondent 'stepping-up' the woman who made the complaint against him as team leader on the line he had worked on during his suspension;
 - 1.5. by the respondent failing to explain the reasons for the final written warning imposed;
 - 1.6. by the respondent refusing to accept or extend time for his appeal; and
 - 1.7. by the respondent imposing a period of monitoring on the claimantare well-founded.

2. The claimant's allegation that he was subjected to less favourable treatment because of his sex in that the respondent did not interview witnesses identified in his complaint is not well-founded.
3. The claimant's allegation that he was subjected to less favourable treatment because of his sex by being suspended on 8 August 2020 is dismissed upon withdrawal.
4. The respondent is ordered to pay the claimant the sum of £9,000 as compensation for injury to feelings.

REASONS

CLAIMS AND ISSUES

1. The claimant, Michal Swaciak, worked for the respondent from September 2012 until his resignation in February 2022. His claim presented to the tribunal on 12 October 2020 is for direct sex discrimination.
2. Further to a case management hearing before EJ Tinnion on 8 April 2022, a list of issues was agreed and set out with case management orders (CMO) sent to the parties.

Complaints and issues to be decided as set out in the CMO

3. The claimant's complaint is of direct sex discrimination under ss.13 and 39(2) of the Equality Act 2010 in relation to the following allegations of less favourable treatment:
 - a. the respondent suspended the claimant on 12 June 2020 after Agata Kulaga lodged a grievance about him but did not suspend Agata Kulaga after the claimant made a complaint about her. The respondent accepts the claimant was suspended on 12 June 2020.
 - b. the respondent treated Agata Kulaga's grievance about the claimant faster and more expeditiously than it treated the claimant's complaint about Agata Kulaga.
 - c. the respondent interviewed the witnesses identified in Agata Kulaga's grievance but did not interview the witnesses the claimant had identified in his complaint against Agata Kulaga.
 - d. the ultimate outcome of Agata Kulaga's grievance against the claimant was the claimant being given a final written warning whereas the ultimate outcome of the claimant's complaint against Agata Kulaga was no disciplinary sanction.
 - e. the respondent replaced the claimant with Agata Kulaga in the team leader post. The respondent accepts Agata Kulaga 'stepped up'

during the claimant's suspension but says this was not replacing the claimant.

- f. the respondent did not give the claimant written reasons for his final warning or its decision to replace the claimant with Agata Kulaga in the team leader post.
- g. the respondent did not grant the claimant's request to extend time to submit an appeal against the final written warning. The respondent accepts that it did not grant the claimant's request to extend time to submit an appeal against the final written warning.
- h. after returning to work, the respondent monitored the claimant for a 6 week period (which he found humiliating). The respondent accepts the claimant was monitored for a period of 6 weeks after he returned to work.
- i. on 8 August 2020, the respondent suspended the claimant again. The claimant accepts that this is incorrect and this allegation is not pursued.

4. The tribunal must decide:

- a. whether the conduct identified above occurred?
- b. if it did, did the respondent treat the claimant less favourably than (a) it treated the actual comparator; or (b) it would have treated a hypothetical comparator identical to the claimant in all respects other than sex?
- c. If the claimant was treated less favourably, was that because of his sex?
- d. If the claimant was subjected to unlawful direct sex discrimination, what injury to feelings (if any) did he suffer, and what compensation should be awarded for any such injury?

5. The claimant claims compensation in the mid-*Vento* band for injury to feelings only. At the hearing, the claimant clarified that the award should be at the top end of the mid-*Vento* band. The respondent's position is that if the tribunal holds there was direct sex discrimination in relation to the complaints, an award at the top end of the bottom-*Vento* band is appropriate.

THE HEARING

- 6. The hearing was a remote hearing. The form of remote hearing was fully remote by way of Cloud Video Platform (CVP). A face-to-face hearing was not listed due to the ongoing Covid-19 pandemic, all parties were content to proceed by way of remote hearing and all issues could be determined in a remote hearing.
- 7. The tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.

8. From a technical perspective, there were a few minor connection difficulties from time to time. We monitored these carefully and enabled participants time as necessary to ensure an appropriate connection.
9. The tribunal had the services of a court interpreter. The interpreter (Polish language) was present throughout the hearing to assist the claimant and a witness.
10. The claimant and the respondent each had legal representation.
11. There was a witness statement bundle of 50 pages containing six written witness statements. Signed and dated versions of witness statements for the claimant were produced on the first day of the hearing, the versions in the bundle being unsigned.
12. For the claimant, we heard evidence from the claimant, Denis Newcombe (Trade Union representative) and Sebastian Rola (ex-colleague and Team Leader).
13. For the respondent, we heard evidence from Tracey McMillan (HR Business Partner), Ian Adams (ex-Factory General Manager) and Elizabeth Onyait-Revell (Production Shift Manager).
14. There was an agreed trial bundle (including index) of 203 pages. We admitted into evidence an additional document provided by the respondent being a disciplinary procedure although it being observed that the document appeared to post-date the events of the claim both parties confirmed that there was no intention to refer to or rely on the document in any event.
15. We read the evidence in the bundles to which we were referred and refer to the page numbers of key documents relied upon when reaching our decision below.

FINDINGS OF FACT

16. Having considered the evidence, we found the following facts on a balance of probabilities.
17. The parties will note that not all the matters that they told us about are recorded below. That is because we have confined our findings of fact to those relevant to the legal issues. Where there were disputes as to factual matters between the parties, we have explained the reasons for the fact finding we reached applying the balance of probabilities standard of proof.

Background

18. The respondent is a manufacturer of honey based products. A statement of terms and conditions of employment was signed by the claimant on 28

October 2012 and the respondent on 29 October 2012 and provides that the claimant's continuous service for employment purposes began on 17 September 2012. The claimant was employed as a production line operative. The claimant was promoted to team leader responsible for a team of production line operatives. The claimant resigned from his employment in February 2022.

19. By May 2020, the claimant had worked for the respondent for over 7 years and had been a team leader for 5 years. He was also trained to step up as a production shift manager.
20. Agata Kulaga worked in the claimant's team as a production line operative. She was trained to step up as a team leader. The claimant trained her.
21. The respondent's stepping up process was usual business practice when there was an absence on the line. Employees either volunteer for training to step up when needed or are identified as suitable through the appraisal process as suitable for this purpose. There was more than the usual level of absence and consequent stepping up during the summer of 2020 due to the pandemic.
22. Each shift would have approximately 40 people including those working on the lines, team leaders and the shift managers at work in the factory. Each line was about 40 metres long and would be run by 4-6 production line operatives with a team leader. The production line operatives working on the line would be spaced approximately two metres apart and it is possible that an operative could be closer to an operative on a different line from those on the line they worked on. The factory floor was noisy when lines were in operation. Team leaders needed to go up and down the line to communicate to the production line operatives in their team.
23. The respondent had a grievance procedure (55-58) and a disciplinary policy (59-61).
24. The grievance procedure sets out that 'full recognition is given to the significance of personal grievances and it is our policy that all grievances will be dealt without delay and resolved at the earliest possible stage'. The grievance procedure provides that where a grievance cannot be resolved at the informal stage, a formal grievance can be initiated in writing. The formal procedure provides that the HR Department will acknowledge receipt of a written grievance within 5 working days. The right to be accompanied by a work colleague or trade union representative at any investigative or grievance meeting is referred to. There is right of appeal against the outcome of 'your formal grievance' within 7 working days.
25. As to confidentiality, the grievance procedure sets out that 'All employees must treat as confidential any information communicated to them in connection with a grievance.' Witness statements will be treated confidentially and only shared with individuals who need to be involved but may be used in any subsequent disciplinary proceedings and shared with the employee whose conduct is the subject of those proceedings 'to enable them to prepare for the hearing and respond to the allegations against them'.

26. The disciplinary policy sets out that ‘an open, honest dialogue between employees and managers is key to setting clear and mutually understood objectives and to support working together in a harmonious and productive environment.’ There is reference to suspension where appropriate in order that any investigation can take place. The procedure provides that before any formal disciplinary decision managers will endeavour to deal with matters informally. The employee can appeal against any decision and is to inform HR within 7 calendar days if they wish to exercise the right. The policy contains a non-exhaustive list of examples of misconduct and gross misconduct. The policy provides ‘Abusive, violent, dangerous, intimidating or provocative behaviour’ and ‘Acts of harassment and/or bullying’ as examples of gross misconduct.
27. The respondent’s induction process covers whistleblowing and matters in relation to work in a food factory. During 2021, the respondent introduced an online training platform with training modules on equal opportunities and diversity and inclusion for all staff. Prior to that the respondent delivered various equal opportunities and discrimination training courses which were only provided to staff down to production shift manager level.

Chronology

22 May 2020

28. On 22 May 2020, the claimant asked Ewelina Tomaszewicz, his production shift manager, if Agata Kulaga (AK), a production line operative in his team could be moved from his line. The production shift manager had a meeting with the claimant and AK. This meeting did not resolve matters between the claimant and AK. The claimant said that AK twice said to him ‘I will take revenge in your private life’ including in front of the production shift manager. AK accepts she made the statement ‘I will take revenge in your private life’ after this meeting. Tracey McMillan gave oral evidence that she believed the statement was made in the meeting. We find the statement was made by AK to the claimant on 22 May 2020 on at least one occasion.
29. The production shift manager told the claimant and AK to put their complaints in writing to HR.

Claimant and AK provide written complaints to HR

26 May 2020

30. AK set out her formal complaint in writing in a letter dated 26 May 2020 to the HR department (62-64). She alleged that the claimant had been ‘emotionally abusing me and mentally bullying me for the past few months’. She set out various allegations including that the claimant had told her to lie about a Paulina Ryzkowska, to ‘mentally abuse Mateusz Sz wajczuk’ and had told a Monika Busz not to speak with either her or Mateusz Sz wajczuk. She also referred to Chloe Tidmarsh. She wrote ‘All employees mentioned above can confirm my accusations towards Mr Michal Swaciak and they are prepared to come forward and testify as witnesses’. The letter concluded ‘I

really hope this formal letter will be considered with huge attention...not the kind of behaviour worth a team leader. If not I am ready to go further and contact the National Bullying Helpline and other enforcement authorities'. The letter asks for a chance to talk it through and sets out that she would like to be accompanied by Chloe Tidmarsh.

31. We find that the respondent had therefore been told of an allegation of bullying by the claimant towards AK and told that the persons named by AK were said to be able to come forward and confirm this and as such were aware of the situation between the claimant and AK. We find that Chloe Tidmarsh was a trusted colleague of AK as AK said that she would like to be accompanied by her at any meeting. Tracey McMillan described them as work friends.
32. On the same day and in a letter signed by Tracey McMillan dated 26 May 2020 (66), the respondent acknowledged AK's 'grievance', informed her that it would be fully investigated as per the grievance procedure and asked that she keep the fact she had raised the grievance confidential. The letter indicates that AK was sent a copy of the grievance procedure. The claimant accepted in oral evidence that the nature of the allegations made by AK were serious and that it was right to investigate them.
33. On 26 May 2020, the claimant also provided a written statement to HR (65). The claimant set out that he wished to report a situation which happened on the 22 May 2020 with him, AK and the shift manager. The claimant set out that AK had intimidated him by twice stating, including in front of the shift manager, that she would take revenge in his private life. The statement concludes 'I would like to be aware of this situation and please be aware of this situation. I am a bit worries that Agata will make problems for me at work and in private life as she said this twice and in front of shift manager.'
34. The respondent did not acknowledge the claimant's statement as a formal grievance in writing or at all.
35. Tracey McMillan's written evidence sets out that when the claimant handed in his statement, she asked him if he wanted to raise a formal grievance but he just wanted 'to add a record of the meeting to his file'. Tracey McMillan's written evidence sets out that the decision not to investigate the claimant's complaint formally was due to 'his explicit request not to'. In her oral evidence, she said that she had asked the claimant three times if he wished to raise a formal grievance and he wanted a file note.
36. Tracey McMillan's written evidence sets out that the claimant confirmed this request not to investigate 'in his grievance investigation meeting'. Tracey McMillan was asked about the reference to 'his grievance'. She initially said that she was not sure what that referred to and then said that it was around him having a meeting to discuss the grievance about AK. We understand this to refer to the meeting which took place the following day between the claimant and Nicola Wilkinson.
37. The claimant's written evidence does not set out any details of a meeting with Tracey McMillan on 26 May 2020. Paragraph 7 of the claimant's witness statement refers to the interview on 27 May 2020 and sets out that

'I believed that this interview was being conducted in response to my complaint ...at no point did I ask the Respondent not to proceed with investigating my complaint'.

38. The respondent says that the inference to be drawn from the written statement is that the claimant was silent as to what he wanted done with his complaint letter. The respondent points out that the written statement does not say that the claimant said that he wanted the matter to be dealt with formally at any point.
39. During oral evidence, the claimant suggested that it was possible that Tracey McMillan had misunderstood him as he would not have made his letter if he didn't want it to be considered and his grievance was formal. The claimant therefore accepted there was a discussion between him and Tracey McMillan. The respondent submits that this is a shift in evidence from silence to the claimant saying he wanted it treating formally but was possibly misunderstood on this. We sought clarification of the claimant's evidence at the hearing and the claimant told us that he wanted and expected his complaint to be investigated and that what AK had said was a serious matter and that he did not recall being asked by Tracey McMillan whether he wanted to make it a formal grievance. The claimant said his impression at the meeting was that Tracey McMillan took his complaint letter as if she didn't want to treat it formally. The respondent submitted that the claimant's oral evidence that Tracey McMillan gave the impression that she didn't want to treat his complaint letter formally was new.
40. In oral evidence, Tracey McMillan said that the statement 'I will take revenge in your private life' in Polish was akin to saying 'go away' or 'get lost' in English. She said she did not consider there was a threat of anything physical. She said she would not have treated the situation any differently if a man had said to a woman that he would take revenge against her in her personal life. We did not have any evidence as to Tracey McMillan's awareness or expertise in the Polish language or any objective evidence regarding how to interpret this turn of phrase. We find that at face value the statement 'I will take revenge in your private life' is a statement that amounts to a threat that action will be taken outside the workplace against a person. We observe that the claimant had referred to AK having 'intimidated' him and to 'worries' in his letter of 26 May 2020.
41. We note that during an interview the following day and at a later disciplinary hearing the claimant referred to his letter going 'on file'. We do not consider that this means the claimant wanted his complaint simply to be put in a file and ignored. English is not the claimant's first language. We find that the claimant would not have taken the trouble to set out matters in English in writing if he did not want them taken seriously. The claimant's shift manager had told him to put his concerns in writing and provide them to HR and that is what he did. There was no evidence that the claimant was provided with a copy of the grievance procedure at any point. We did however hear during examination-in-chief that the claimant had raised a grievance previously so was familiar with the grievance process and that it was initiated in writing.
42. We find that Tracey McMillan's evidence as to her view of the contents of the claimant's complaint as not amounting to anything of concern is

consistent with the claimant forming the impression that she did not present as wanting to take his complaint seriously or formally.

43. When asked whether she would always decide not to investigate when employees raised worries about receipt of threats but asked that they not be investigated, Tracey McMillan said that they would encourage people to put it in writing and raise a formal complaint. She could not immediately recall any occasion when there had been a decision to investigate when a complainant had said that they did not want an investigation. In re-examination, Tracey McMillan clarified that she imagined allegations of physical harm or sexual assault would be investigated even if a person did not wish for an investigation to take place.
44. We also heard evidence from Sebastian Rola, a work colleague of the claimant. The respondent did not dispute that AK had been moved from Sebastian Rola's line at his request. Sebastian Rola's written evidence was that he requested AK be moved from his line because her 'behaviour was having such a negative impact on the production line' and that he had witnessed her talking about people when they were not there, gossiping and speculating. He sets out that her behaviour worsened when he had tried to address matters with her directly. He formed the impression that no one wanted to tackle her behaviour. During cross-examination, he said he thought she was a troublemaker. Mr Rola said that he did not know the basis on which the claimant's claim had come before the tribunal. When it was put to him that he didn't mention sex discrimination in his written statement and that he was not saying the claimant had suffered sex discrimination in the work place, Mr Rola's answer was in fact simply 'I think so.'
45. Mr Rola worked for the respondent for 7 years until he resigned in April 2022 to return to his old career of welding. His written statement sets out that Agata Kulaga was telling people he was being fired and after he confronted her, she complained to HR. HR told him to leave the 'topic' alone. When Mr Rola was asked about the procedures for dealing with any difficult employees, he said there were procedures in place and that he had reported AK to management but he didn't think any of his referrals were ever taken seriously into account.
46. We found Mr Rola to be a straightforward witness and we accept his evidence. His evidence was that HR did not take complaints about Agata Kulaga's behaviour seriously and that she was a troublemaker.
47. The respondent treated the claimant and AK's written complaints to HR differently. The claimant's complaint was treated less favourably than AK's complaint as it was not acknowledged as a formal grievance. Tracey McMillan's evidence was that it was not regarded as serious and there was no intention to investigate it further.
48. Tracey McMillan's evidence is that she appointed Nicola Wilkinson as Grievance Officer to investigate AK's grievance. There is no documentary evidence of this appointment, the terms of reference for the grievance or the papers provided to the Grievance Officer for the purpose of the grievance investigation.

49. We clarified with Tracey McMillan why Nicola Wilkinson referred to investigating the claimant's complaint if it was intended to be an investigation into AK's grievance and the claimant's letter had simply been placed on file. Tracey McMillan said that they were short-staffed and with hindsight they should have chosen someone else to do the investigation as Nicola Wilkinson got confused. When asked how Nicola Wilkinson knew about the claimant's complaint if the letter was on file, Tracey McMillan suggested that someone must have told her. When asked who would have known about the file notes on other people's files, Tracey McMillan said that 'factory staff talk' and she was sure people knew about the letters from the claimant and AK. She said she was fairly sure that the claimant would have told people about his letter.
50. In re-examination, it was suggested the claimant's letter might have been in the document pack and Tracey McMillan said that a colleague probably put the pack together and her gut feeling was that the claimant's complaint would not have been in there although she eventually accepted that she did not know whether the document was or wasn't in the pack. We find that the claimant's document was clearly available to Nicola Wilkinson.
51. We also consider that an even-handed approach might well have been to consider the complaints and allegations together within the context of a grievance investigation to find facts as to what had happened. We find that this was not the approach intended by Tracey McMillan given her evidence was that the document was not intended to be in the pack. Tracey McMillan's evidence was to the effect that Nicola Wilkinson's investigation was an investigation into AK's grievance.
52. Given interviews started the next day, it would seem that action was taken with some haste and the matter was progressed at pace.

Nicola Wilkinson's investigation

27 May 2020

53. On 27 May 2020, Nicola Wilkinson met with Ewelina Tomaszewicz, Chloe Tidmarsh, AK and the claimant in that order according to the times on the notes of the investigation meetings signed by the persons interviewed.
54. The notes record that Nicola Wilkinson told the persons she interviewed different things about the reason for the interview.
55. Ewelina Tomaszewicz was told that Nicola Wilkinson was investigating complaints from the claimant and AK. Chloe Tidmarsh was told that a couple of complaints were being investigated and that her name had come up. The claimant was told that Nicola Wilkinson was investigating a letter that he had handed in. We note that this is consistent with the claimant's written evidence that he believed his complaint was being investigated. AK was told that Nicola Wilkinson was investigating her complaint.
56. Ewelina Tomaszewicz told Nicola Wilkinson (76-77) that the relationship between the claimant and AK had not been good a few months ago and AK had raised that the claimant was not giving her information about breaks

and changing batches. The claimant had asked for AK to be moved from the line and said her work was fine but she was creating rumours. The claimant asked again on 22 May 2020 for AK to be moved. At a meeting, she had said she was seeking to deal with their concerns informally but the claimant was not happy and Ewelina Tomaszewicz suggested a statement to HR. She said that the claimant and AK were not shouting at each other at the meeting although the claimant had accused her of shouting.

57. Chloe Tidmarsh described an incident where the claimant looked like he was shouting at AK. She also said, 'I could have cried at how she was being shouted at' and as to the claimant 'wouldn't say aggressive but very intimidating'. She said AK would train her when she needed help but the claimant would laugh at her (74-75).
58. AK was asked a number of questions about her allegations and the meeting with Ewelina Tomaszewicz. A new name is mentioned that of Jose Montilla. She also told Nicola Wilkinson about the threat she made to the claimant and is recorded as saying 'I know it is bad but I said to him I will revenge in your private life' (69). AK who speaks Polish clearly viewed the phrase as carrying some weight given she accepted it was 'bad' which undermines the suggestion that it was as trivial as saying 'go away'.
59. The notes record that when she met with the claimant (71-73), Nicola Wilkinson told him 'I have been asked to investigate a letter that you handed in. I would like to remind you that anything said in this room is to remain private and confidential, so should not be discussed with anyone outside of this room. This is just an investigation at this moment in time. No decision has been made as to what is going to happen.' The claimant was not told that he was part of a grievance investigation into allegations raised against him by AK. The claimant told Nicola Wilkinson that when he spoke to Tracey McMillan, he had said that he 'didn't want to cause any problems'.
60. The claimant said that AK had made the revenge comment after the meeting with the production shift manager. The claimant said that AK was a good worker. The claimant was asked if he had ever shouted at AK and he referred to a time when production hadn't finished and 'It was loud, maybe she thought I was shouting but I wasn't. I have been working here more than 8 years, I haven't had a problem with anyone.' The claimant was asked if he was supportive to his team and he said 'You need to ask them. I don't see any problem.' The notes do not record that the detail of the allegations against him were specifically put to the claimant to explore his version of events other than whether he had shouted at AK.
61. The claimant then said that if another meeting was going to happen, he would like a representative. Nicola Wilkinson told the claimant 'If it this goes in another direction then you are more than welcome to have a representative however at this point we are just gathering information.' At this point the claimant said: 'I don't want to have conflict. I gave that letter to Tracey to put on the file I didn't know what to expect. I don't want any problems.' The claimant was asked if he was okay and if he felt he could go to HR and he said, 'Just a little bit' and that he didn't want to say anything at that point.

62. We note that the grievance procedure sets out a right to be accompanied at any grievance or investigative meeting. We also note that we saw no formal invite to the meeting with Nicola Wilkinson and it took place the day immediately after the claimant and AK provided their complaints.

29 May 2020

63. On 29 May 2020, Nicola Wilkinson met with Monika Busz (78-79) and Matusz Szwajczuk (80-81). The notes record that they were told their names had come up in 'some statements' that Nicola Wilkinson had been asked to investigate. Monika Busz said the claimant had never shouted at her or told her not to speak to people and Matusz said he had 'not heard shouting'. They both referred to a lack of information and communication on the line. We note that they did not provide significant evidence corroborating AK's allegations of bullying by the claimant.
64. There was no investigation report before us or any written grievance outcome. Tracey McMillan's written statement sets out that Nicola Wilkinson upheld AK's grievance, concluded that the claimant had not acted appropriately towards the claimant and that the claimant's actions be considered under the disciplinary process. Tracey McMillan says that a grievance outcome meeting was held with AK but there are no notes from that meeting. We find that this means that at some point likely prior to 9 June 2020 that AK was aware of matters and potentially before the claimant.
65. Tracey McMillan gave oral evidence that she made the decision to instigate disciplinary proceedings against the claimant. Her written statement sets out that the recommendation to instigate disciplinary proceedings was a reasonable conclusion based on reviewing the evidence gathered during the grievance investigation. The written statement refers to this evidence as AK's allegations supported by the evidence of Chloe Tidmarsh that she had viewed shouting and she herself found the claimant intimidating together with the information from Ms Busz and Mr Szwajczuk that the claimant was not passing on information and communicating with the team generally.

Disciplinary proceedings

9 June 2020

66. The claimant was sent a letter dated 9 June 2020 inviting him to a disciplinary hearing to consider an allegation of 'intimidatory behaviour' (82-83). The letter was signed by Tracey McMillan. The enclosures stated to be the disciplinary policy, Agata Kulaga Statement and Michal Swaciak Statement. We note that at this point Tracey McMillan included and therefore considered the claimant's statement to be relevant. The letter sets out that if proved the allegation could be deemed gross misconduct and result in dismissal. The letter sets out that 'If you have any requests for additional information, witness statements or evidence to be considered, or would like to call a witness, please submit this request to me'. The right to be accompanied is referred to. The hearing was scheduled for 11 June 2020.

67. On 10 June 2020, Tracey McMillan sent a letter confirming that the hearing had been postponed at the claimant's request to enable him to get in touch with his union (85). That letter enclosed copies of the investigation meeting minutes.
68. We find that the enclosures sent to the claimant by way of the letter dated 9 June 2020 were AK's grievance letter and his document in light of the fact that the documents sent on 10 June 2020 were the minutes of the investigation meetings that had taken place. We further find that the claimant was not aware of the full contents of AK's grievance letter until it was sent to him on 9 June 2020. We find that it is more likely than not that the claimant did not understand that he had been subject to any formal grievance investigation concerning AK's grievance given he had been told his interview was about his complaint.
69. We note that the claimant was told on 9 June 2020 that he faced an allegation of 'intimidatory behaviour' which could result in his dismissal the details of which could only be AK's allegations given the information sent and contents of the disciplinary invite letter. The respondent initially gave the claimant two days to prepare to answer the case against him and did not provide the investigation minutes until 10 June 2020. We find that this means that prior to 10 June 2020 the claimant was not aware of any persons interviewed by the respondent or proposed witnesses other than AK. Again, action would seem to have been taken with some haste although the 11 June 2020 hearing was subsequently postponed. On 12 June Tracey McMillan confirmed that the disciplinary hearing was postponed until 18 June 2020 (86).

Agata Kulaga's second complaint

12 June 2020

70. On 12 June 2020, Tracey McMillan was told by AK that her fiancé had been called on 10 June by friends of the claimant who threatened her and said the investigation should be stopped. Tracey McMillan says she was also approached by a production line operative, Jose Montilla, who provided information that the claimant had been telling other employees about the grievance and disciplinary process and had pressured him into signing statements in his defence. Tracey McMillan says that she spoke with Ian Adams and they concluded that the allegation was that the claimant was trying to interfere with the disciplinary process and making threats to other employees and that it was reasonable to remove him from the workplace.
71. The respondent suspended the claimant on 12 June 2020. The respondent set out in a letter dated 16 June 2020 that the claimant was suspended pending investigation into a further allegation (88-89). The allegation was stated as: 'witness tampering/intimidation prior to a disciplinary hearing'. The letter sets out that 'you must not communicate with any of our customers or contractors nor discuss this matter with any work colleague.'
72. We find that suspension during a disciplinary process is consistent with the respondent's disciplinary policy. We find that in circumstances where a person might interfere with an investigation or disciplinary proceedings

including interfering with a person who might provide evidence at those proceedings it can be appropriate to suspend that individual to mitigate that risk and possible impact on the fairness of the proceedings. We also find that the respondent had not explicitly identified any persons it proposed to call as witnesses for the purpose of the disciplinary proceedings although had provided the claimant with notes of Nicola Wilkinson's investigation meetings.

73. We find that the claimant had been told in the initial disciplinary invite letter which gave him two days' notice of the disciplinary hearing that 'If you have any requests for additional information, witness statements or evidence to be considered, or would like to call a witness, please submit this request to me'. We find that this does not explicitly tell the claimant that he can only approach a possible witness or prepare witness statements by first asking Tracey McMillan for permission and then approaching the potential witness. We remind ourselves that the claimant's first language was not English and he had told Nicola Wilkinson that in terms of whether he felt he could approach HR this was 'just a little bit'.
74. We note that AK remained on the factory floor. Her initial complaint had informed the respondent that other persons were aware of the situation and those persons were interviewed by Nicola Wilkinson. We find that persons other than the claimant were aware of a situation between AK and the claimant. Tracey McMillan had told us that factory staff talk and that she was sure people were aware of AK and the claimant's letters.
75. Whilst the claimant was suspended, the respondent decided that AK would 'step up' to perform a team leader role and that she would 'step up' to de facto replace the claimant in the team leader role on their line. Whilst we accept that AK was already trained to 'step up' and we also accept the evidence that at the relevant time in 2020 there were numerous absences, we did not have any explanation as to why it was considered reasonable to visibly place AK in the claimant's role. We were just told that she did not replace him because she was just stepping up. At this point the respondent knew the claimant was subject to allegations raised by AK but also that AK had threatened the claimant albeit that the respondent did not consider AK's threat to be of serious concern. The respondent was aware that AK had already been moved from one line due to difficulties. AK was now in the position of team leader.
76. The claimant was invited to an investigation hearing on 19 June 2020 and the disciplinary hearing scheduled to consider the allegation of 'intimidatory behaviour' was postponed.

Investigation into Agata Kulaga's second complaint

19 June 2020

77. An incident investigation form (113-115) records that Sarah Quinn was appointed Investigating Manager on 19 June 2020 to investigate two allegations recorded as (1) an individual had called AK's fiancé on behalf of the claimant to get her to drop the grievance and (2) that the claimant was

asking people to sign letters they didn't agree to. The investigation is marked as completed on 24 June 2020.

78. The Investigating Manager proposed to interview the claimant, AK, Jose Montilla, Mateusz Sz wajczuk, Ula Bierowicz and Patryk Pawlowski. After interviewing those persons, the Investigating Manager concluded that she did not believe action could be taken on the allegation about the call. In relation to the other allegation Sarah Quinn decided 'I believe that there is enough evidence to show that Michal breached confidentiality of his ongoing investigation, and by doing so, tampered with witnesses to gather information in his favour for the disciplinary meeting. By Michal providing pre-written letters and using his position as team-leader, I believe that there is enough evidence to reasonably show that Michal tampered with witnesses on this occasion.'
79. The incident investigation form records the evidence that Sarah Quinn took account of and that she had gathered during the investigation that supported her conclusion that the allegation be considered in disciplinary proceedings. The claimant accepted that he had written the letters and that they were prepared because of his disciplinary but said they were character references. Jose Montilla and Mateusz Swajczuk had stated that they did not agree with the letter/s they had signed whilst the claimant stood over them. One of the letters signed by Jose Montilla mentioned AK's name. Ula Bierowicz said she wrote the letter she sent herself further to being told by the claimant about an investigation and issues with AK and knew there was a pending disciplinary.
80. We note that the claimant was consistent throughout the proceedings that his purpose was to get character references and entirely open about what he had done maintaining he gave people a choice (91). Jose Montilla said he was given a choice (95) but the claimant was waiting for him and although he didn't agree he signed three letters. The claimant was of course facing disciplinary proceedings and was entitled to prepare his case to meet the allegations against him. Sarah Quinn told the claimant that as the meeting was only an investigation if it went no further it would not be included in his disciplinary and Ian Adams won't know about it. Ian Adams of course did know about these matters as he made the decision to suspend the claimant with Tracey McMillan. The claimant told Sarah Quinn he didn't know anything about a call to AK's fiancé.
81. On 23 June 2020, the claimant provided a letter dated 12 June 2020 together with the statements to Sarah Quinn by email (100-109). The email refers to 5 statements and my own. The letter sets out that it is a 'Formal statement towards the disciplinary letter against myself written by Miss Agata Kulaga'. We find that this letter is the claimant's answers to the allegations raised against him by AK in her grievance letter. There is no evidence that the claimant was aware of AK's grievance letter or the detail of the allegations until AK's letter was provided to him on 9 June 2020. The letter refers to AK having had issues with others and ends 'strongly hope and insist that this letter will be considered with huge attention and consequences will be taken on Miss A Kulaga for making such a serious false accusation against me. I would like an apology from Miss A Kulaga'.

82. The respondent submits that the suggestion that AK should face sanction for the making of false allegations is rooted in immaturity. Whilst the claimant's statements and approach perhaps present as somewhat clumsy or naive, we find that it is more likely than not that the claimant was simply trying to defend himself in relation to the allegations against him by asking colleagues to confirm his character and behaviour and did not consciously consider that he was seeking to tamper or interfere with the investigation. We further note that the claimant's letter was his first real opportunity to set out his case in relation to AK's allegations which was the evidential basis for the bringing of disciplinary proceedings. We note that AK had closed her letter by asking for HR to consider with 'huge attention' failing which she would go to enforcement authorities. The claimant says the allegations against him are false and asks for an apology.
83. The claimant's statements consist of short paragraphs written by him and then signed by a number of others. We note that whilst standing over a person may sound intimidating the reality is that people were working on the line with the claimant showing them a short statement and asking if they would be willing to sign it. A letter referring to the claimant 'behaving with the right manner acting as a professional Team Leader' was signed by Jose Montilla and Ewelina Tomaszewicz amongst many others. A further letter relates to 'informing whole team on tea breaks'. A third letter refers to 'training Mateusz Szewczuk'. A letter signed by Jose Montilla refers to 'never seen or been witnessed of bad behaviour or bullying to Mrs Agata Kulaga'. The letters, other than Ula's, are more likely than not to have been signed on or before 12 June 2020 when the claimant was suspended.
84. We note that Ewelina Tomaszewicz was the claimant's manager and in signing the letter could not be said to be in a position of subordination to the claimant. Further, Ewelina Tomaszewicz was signing to acknowledge that she considered the claimant was a professional Team Leader. The fact that the claimant's superior and the production shift manager signed the letter is inconsistent with the claimant's approach being obviously and inherently divisive and tampering with witnesses.
85. A final letter refers 'never seen him abusing or in any way behaving in a vulgar manner towards Agata Kulaga' and is signed by Ula Bierowicz. She told Sarah Quinn when interviewed that the claimant didn't say straight away what happened but that Agata was not happy to be working with him and thereafter referred to the claimant saying he was in 'this situation' (110-112). Ula said 'this situation' meant the claimant was working but not working. Sarah Quinn unprompted informed Ula that the claimant had been suspended. Tracey McMillan accepted that Sarah Quinn's provision of the information to Ula that the claimant had been suspended amounted to a breach of confidentiality. Ula said she understood there was an investigation about the claimant and Agata and understood her statement was about his character for an investigation.
86. A letter dated 29 June 2020 invited the claimant to a disciplinary hearing on 3 July 2020 in relation to an allegation stated as witness tampering/breach of confidentiality (121-122). The claimant is provided with the disciplinary policy and the minutes of the investigation meetings conducted other than

that with Jose Montilla. The invite letter again refers to any requests to call witnesses or witness statements to be made to the respondent.

87. On 2 July 2020, there was email correspondence between the claimant and Tracey McMillan in which it was confirmed that the claimant could not have legal representation at the disciplinary hearing, that Denis Newcombe, a trade union representative could accompany him and that the disciplinary hearing to discuss and explore the details surrounding 'the allegation' would take place on 6 July 2020 (123-124).
88. Tracey McMillan refused to allow the claimant to provide a statement from an Aleksandra Polinska reporting she had heard from others that AK had said the claimant was demoted and had been sending her text threats on the basis that the investigation was closed and it was not relevant as it did not relate to the allegations raised against him which were witness tampering/breach of confidentiality (126). This was not explored in evidence. We note however that whilst hearsay, this presented a relevant line of enquiry related to both whether AK was discussing matters on the floor and whether the claimant was threatening her by text.

Disciplinary hearing

89. On 6 July 2020, a disciplinary hearing took place with the claimant accompanied by Denis Newcombe. Ian Adams was the chair and Sharon Bibaka was the note-taker (130-138).
90. At the outset Ian Adams referred to the meeting 'as it was laid out in the letter you would have received'. We note that the letter inviting to the disciplinary hearing on 6 July was in relation to the hearing postponed from the 3 July which referred solely to the allegation of witness tampering/breach of confidence. The invite to a hearing in respect of 'intimidatory behaviour' had been postponed prior to that. The conclusion of the disciplinary hearing on 6 July 2020 however was a first written warning on the basis that the disciplinary hearing had looked at both allegations and 'the behaviour demonstrated by the claimant is unacceptable'.
91. During the disciplinary hearing, the claimant referred to asking Ewelina Tomaszewicz to move AK and that AK had said she wanted revenge and he had brought his 'statement to HR and spoke to Tracey. I told her I wanted it on file.' The claimant also stated that he had been working there for 8 years and no one had said he was aggressive. The claimant accepted that he had breached confidentiality given the statements referred to AK. The claimant said that AK was also talking about the case and was told that was hearsay. In a context where the respondent regarded the breach of confidentiality as potentially sufficient to result in dismissal, there was no evidence that the respondent took any steps to investigate whether persons other than the claimant including potentially AK were talking about the situation on the factory floor.
92. Ian Adams said that going around the factory floor getting people to sign statements was tampering and that the evidence showed that the claimant was standing over people waiting for them to sign the statements and he said that there was always time for meetings or for people to discuss things.

He clarified that if a person wanted to access people to speak in their defence, arrangements should be made through HR to go off the line and have a meeting. Ian Adams also gave evidence that the confidentiality requirement was set out in the grievance policy but accepted when it was put to him that at the time the claimant was said to be taking statements, he was subject to disciplinary proceedings.

93. The notes of a meeting (140-141) between Tracey McMillan, Ian Adams and Sharon Bibaka which took place later that day record the purpose of the meeting as so that Tracey McMillan can get a better understanding about what happened in the disciplinary hearing as 'when we left the video call, it was going to be a dismissal and then it turns out that he was given a final written warning'. The notes are inconsistent with Tracey McMillan's written evidence that Ian Adams came to speak to her.
94. Ian Adams is recorded in the notes as referring to there not being 'much consistency throughout this process'. He refers to the first investigation not being concluded formally and that information provided by the claimant was not dealt with and 'it is like we have chosen to cherry pick bits of his email to use' given only Ula Bierowicz was interviewed yet other information had been provided. It was noted that it was unclear when documents were provided as they were not formally stamped but they pre-dated the end of the investigation and the claimant had mentioned a complaint letter. Ian Adams is recorded as saying 'I wanted to sack him believe but I think sacking him would be a nightmare. If that had all been date stamped and we had gone back to him then I would understand. I take it this is not the outcome that Camilla wanted but it didn't feel safe sacking him with this letter hanging over us.'
95. Neither Tracey McMillan nor Ian Adams gave clear evidence about the video call that was referred to during which 'it was going to be a dismissal'. Ian Adams said in oral evidence that he couldn't recollect a video call and stated that he never had a discussion about what the outcome should be before the hearing and not had a direct discussion with Camilla. We had no real explanation about the video call that was referred to and when it took place.
96. Ian Adams said the reference to Camilla was because it was his surmise as to why they were having the meeting after the disciplinary hearing. We found this explanation implied that Ian Adams understood in advance that dismissal was the expected outcome of the disciplinary proceeding. When asked why Camilla Wesson who was the Head of HR would want the claimant sacked, Ian Adams said this was due to the gravity of the case. We accept that it would be reasonable to have a view expressed that particular allegations were grave and if proven could amount to gross misconduct for which dismissal could be the appropriate sanction. In re-examination, Ian Adams explained that what he meant by gravity was that if the evidence was correct, he would have dismissed him.
97. We accept that Ian Adams raised concerns about evidence that was not available to him and lines of enquiry that had not been pursued describing this as cherry-picking. However, Ian Adam still reached a decision that on the evidence available to him the allegations were proven. If there were

procedural issues or matters that required further investigation, the proceedings could of course have been adjourned for that to take place. In giving the claimant the final written warning Ian Adams referred to the claimant as a 'respected member of staff' which we find odd in circumstances where Ian Adams was communicating that the claimant had been found to have engaged in intimidatory behaviour and witness tampering/breach of confidentiality and was receiving a final written warning.

98. By way of letter dated 6 July 2020 (142), the claimant was given written confirmation that he was subject to the disciplinary sanction of a final written warning which would remain on his file for 12 months and notified that required improvements to his behaviour would be discussed on the return to work. The letter provided that if the claimant wished to exercise his right of appeal, he was to contact Camilla Wesson by 13 July 2020.
99. Tracey McMillan sets out in her written statement that she spoke with Camilla Wesson about Ian Adams' concerns and they decided it was appropriate to rescind the final written warning and re-open the investigation to ensure all the claimant's documents were considered. We note that this decision both set aside Ian Adams' decision which he said he had reached independently and subjected the claimant to further disciplinary proceedings with the possible outcome of dismissal.
100. The claimant was also told after he returned to work on 8 July 2020 that he was to remain on suspension. A letter dated 10 July 2020 (143-144) gave the claimant written confirmation that the suspension was continuing and that the final written warning had been rescinded.

Further investigation

101. An incident investigation form (153-154) records that Jeni Wareing started an investigation on 15 July 2020 given that the claimant's letter responding to points raised by AK in her grievance letter had not been fully investigated in the initial disciplinary investigation. Jeni Wareing interviewed Ewelina Tomaszewicz, Mateusz Dylag and Sebastian Rola.
102. The incident investigation form refers to there being 'ongoing issues between the two parties' and sets out Jeni Wareing's conclusion that there is 'enough evidence to show that Michal has not behaved correctly towards Agata and there have been occasions where communication between them has failed and he has not passed on information to her, which could be interpreted as a form of bullying.' The investigation was concluded on 16 July 2020.
103. The evidence considered by Jeni Wareing includes statements that confirm the relationship was strained and possibly broken and communication had become difficult and statements that suggest the claimant was not communicating correctly with his team about breaks, line changes and other issues. The claimant's statement that AK was a 'good worker' is referenced.
104. A document in the bundle presents as the claimant's letter responding to the points raised in the grievance letter with a date stamp of 16 July 2020

with comments in response to the points raised by the claimant from Jeni Wareing (155-159). Tracey McMillan sets out in her written statement that this demonstrates that all the claimant's complaints had been investigated. The incident investigation form does not record that Jeni Wareing was investigating complaints raised by the claimant. The incident investigation form records that the claimant's letter setting out points in reply to the allegations raised against him in AK's grievance had not been fully investigated in the initial disciplinary investigation. The claimant's position and evidence in relation to the allegations raised against him in AK's grievance had not been fully and directly put to him to address during the grievance investigation but were now considered in the context of disciplinary proceedings against him.

105. Tracey McMillan's written statement also highlights that it was not considered necessary to interview all the persons named by the claimant supporting his general conduct as the complaints related to his relationship with AK and not the wider team. We note that Jeni Wareing records that the evidence she considered did include statements about the claimant's communication with his team. Tracey McMillan also refers to Jeni Wareing's conclusion that AK's threat to the claimant was only a one-off incident when she was upset and a 'knee-jerk reaction' and that at no point had the claimant raised a grievance against AK so 'it naturally follows that no disciplinary sanctions were issued against Ms. Kulaga'.
106. We did not find it convincing that in order for any disciplinary action to be considered against AK, the claimant would have had to have raised a 'grievance' against AK. We note that none of the complaints the claimant put in writing were acknowledged or investigated as a grievance. We note that the respondent considers it acceptable for AK to have made a threat against the claimant. We find that the respondent did not pursue any lines of enquiry regarding the suggestions and suggested evidence provided by the claimant that AK may have been talking about the situation on the floor and engaged in behaviours that were not appropriate or had issues with other people.
107. The basis for disciplinary action being initiated against the claimant in the first place were the written allegations raised by AK. The respondent had now taken account of information from the claimant in answer to those allegations which disclosed allegations against AK. The respondent proceeded with disciplinary action including breach of confidentiality on the basis of the evidence that the claimant had breached confidentiality in collating statements to answer the disciplinary case against him. The investigation had also concluded there was evidence that the claimant had engaged in behaviours around not communicating correctly with his team including AK.

Second disciplinary hearing

108. By way of letter dated 20 July 2020 (162-163), the claimant was invited to a further disciplinary hearing to consider the allegations of intimidatory behaviour and witness tampering/breach of confidentiality. A letter dated 21 July 2020 postponed the hearing until 28 July 2020.

109. On 24 July 2020, Diane Harmsworth who had been appointed to hear the disciplinary hearing raised some queries by email with Jeni Wareing copying Tracey McMillan and Sarah Quinn. Diane Harmsworth asked where the incident investigation form was circa 27 May 2020 to understand the reasons why HR sent the 9 June disciplinary letter and whether Ula's evidence meant that the claimant was in breach of the confidential nature of the investigation.
110. The disciplinary hearing took place on 28 July 2020 (171-185). After the hearing, on 29 July 2020, Diane Harmsworth emailed Jeni Wareing and Tracey McMillan (186). Diane Harmsworth queried whether the evidence of behaviours towards AK are 'bullying or just bad coms?' Tracey McMillan suggests they meet.

Final written warning

111. By way of letter dated 30 July 2020 (190), Tracey McMillan confirmed to the claimant that the outcome of the re-hearing was a final written warning. The letter states what the allegations were but does not specify whether the warning was given in relation to one or both of the allegations given a sanction relates to a proven allegation of misconduct.
112. The letter provides no reasons as to how the conclusion that a final written warning was the appropriate sanction was reached. We note that there was no evidence before us that the claimant had any previous disciplinary sanctions or difficulties during his 8 years working for the respondent. The letter also refers 'the outcome of the first disciplinary hearing is being upheld' although the final written warning notified previously had been rescinded.
113. The letter also refers to required improvements to the claimant's behaviour to be discussed on the claimant's return to work. The claimant is notified that if he wishes to appeal, he must contact Camilla Wesson by 7 August 2020.
114. The respondent submitted that there was no evidence to show that the failure to set out a rationale for the warning was related to sex and 'It is simply a poorly drafted letter.' We find that the letter and the evidence available to us is essentially silent on the actual reason the claimant was given the disciplinary sanction of a final written warning.
115. Elizabeth Onyait-Revell who became the claimant's production shift manager told us that she was not aware that the claimant had been through a disciplinary process that concluded he had engaged in intimidatory behaviour and witness tampering/breach of confidentiality. Her written statement refers to the disciplinary process concluding that 'there was a breakdown in communication in his original team'. To the extent that the actual reason for the final written warning was for the reason of a breakdown in communication this was certainly not communicated in writing or made clear to the claimant.
116. We note that on several occasions the claimant was told the situation was about him and AK and not the wider team. We note that Diane Harmsworth

was equivocal after the disciplinary hearing as to whether there was bullying or bad communications even though the outcome letter confirmed a final written warning where the allegations were of intimidatory behaviour and witness tampering/breach of confidence.

117. We find that the outcome of a final written warning was directly related to disciplinary proceedings but that these ensued as a result of AK's grievance and Tracey McMillan's decision to instigate disciplinary proceedings and thus the ultimate outcome of AK's grievance was the disciplinary sanction of a final written warning against the claimant. There is no evidence to suggest that AK was subject to any investigations, disciplinary proceedings or disciplinary sanctions due to the claimant's complaint or other information provided during the process.

Claimant's return to work

118. The claimant returned to work on 3 August 2020. The claimant returned to work on a different shift pattern and as team leader of a different line and with a different production shift manager, Elizabeth Onyait-Revell. She explained her role as a production shift manager as organising shift rotas, including where employees step up, together with helping to resolve employee disputes and manage day to day operations. Elizabeth Onyait-Revell told us that the interpersonal skills needed to step up were good communication skills in order to communicate with a wide range of people across the business and people skills. She said that people needed to be trustworthy and be able to keep things confidential. We note the claimant was trained to step up to the production shift manager role. She said that when she was managing the claimant, she did not observe any issues with communication between him and the rest of the team.
119. Elizabeth Onyait-Revell's written evidence explained how the shifts worked. Her evidence was that the claimant remained on the same shift pattern. The morning and afternoon shifts were 6-2 and 2-10 and they rotated bi-weekly. The night shift was 10-6 and that was permanent. The claimant refers to only being given overnight notice of the changes and that there was an impact on his transport and family life together with being in contact with AK at change overs. Given the shifts rotated bi-weekly, we were not convinced that the move to a different shift pattern would have had real impacts for the claimant's travel to work and any impacts could not have been of real duration given he already worked with bi-weekly rotation.
120. A letter from Tracey McMillan dated 4 August 2020 sets out the required improvements that the claimant is to make to his behaviour and conduct (191). The respondent accepts that after the claimant returned to work on 3 August 2020, he was monitored for a 6 week period. The claimant was to meet weekly with Jeni Wareing to discuss how the week has gone 'in terms of communications with the line that you are working on'. In addition, Jeni Wareing is to choose a person at random from the line who will be asked to give feedback on communications between the claimant and the line/that person. The improvements required relate to general communication with the wider team. If the real issue was poor communication style with his team

on the part of the claimant, the final written warning which remained on his file for a period of 12 months was disproportionate and inappropriate.

121. The letter states that this is so the claimant 'improve on your communication skills and to ensure that these types of allegations do not occur again'. We find this statement odd. We observe that it is not unheard of for a person in a managerial or supervisory role to have good communication skills but be subject to allegations of bullying even if those allegations are baseless. The reference to 'allegations' is odd given at this point the respondent has subjected the claimant to a serious disciplinary sanction of a final written warning which logically is on the basis that the respondent has found the allegations proven such that they are not simply allegations.
122. The claimant says that he found the monitoring humiliating. We accept this evidence. Although we heard from Elizabeth Onyait-Revell that she didn't notice he was upset and that he never told her he was humiliated and the team was friendly, we find that the claimant may well have not been open about feeling humiliated or displayed visible signs. The claimant was a team leader responsible for a line of about 6 people. He was placed on a new line and over a 6 week period those he supervised were to be invited to feedback on him. The team would in due course become aware their team leader was being monitored. We observe that it is not clear how a team leader can operate easily and with authority when under such a spotlight. We consider it reasonable that a person would experience this as humiliating.
123. The claimant sets out in his written statement that his partner tried to get him psychological help but they were confronted with difficulties in part due Covid. The evidence is therefore that the claimant did not have any medical or other support further to the events even if he or his partner felt it would have helped him. There was no medical or other documentary evidence before us to support these stated attempts to seek psychological help. Whilst we accept and find above that the claimant felt humiliated in relation to the monitoring, we also accept that the claimant did not visibly manifest any impacts in the workplace. We further find that the claimant did return to work as soon as permitted and continue to work at the respondent for a significant period thereafter until his resignation in February 2022.
124. On 7 August 2020, the claimant emailed Tracey McMillan (192) stating: 'I understand that I am to lodge an appeal by today.' The email then stated that an extension of 5 working days was requested to seek advice and 'draft a proper document'. The respondent accepts that an extension of time to appeal was refused. The respondent did not treat the email sent on time as the claimant's wish to appeal the outcome of the disciplinary proceedings or provide any information as to the procedure simply refused to extend time.
125. The respondent says that refusing to extend time is in accordance with their disciplinary policy. The policy states that 'The employee has the right to appeal against any decision made and should inform HR in writing within 7 days if they choose to exercise this right.' The policy does not set out that any grounds of appeal or detail as to the basis of the appeal must be provided within the 7 day period. The claimant had informed HR within the 7 day period that he wished to exercise this right to appeal. The claimant

was asking for more time to 'draft a proper document' rather than to decide whether or not to appeal per se.

126. On 24 August 2020, the claimant's lawyers wrote to the respondent referring to conciliation and setting out the claimant's contention that "taking a female's [sic] complaint for granted and totally disregarding our Client's" amounted to sex discrimination. The claimant presented his claim to the tribunal on 12 October 2020.
127. The respondent applied for an extension of time to submit its response on 22 December 2021. A draft response was sent in February 2022. On 8 April 2022, EJ Tinnion granted the respondent permission to extend time for the filing of a response. On 21 April 2022, the tribunal notified the parties that the response had been accepted.

LAW

Direct sex discrimination

128. Under section 13(1) of the Equality Act 2010 read with section 9, direct sex discrimination takes place where a person treats the claimant less favourably because of sex than that persons treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.
129. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of sex. In many cases and particularly where there is only a hypothetical comparator the crucial question is: **What is the reason why** the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] IRLR 285.
130. Case law provides that the motivation or 'mental processes' of the decision-maker must be considered. Discrimination is often at the sub-conscious level and need not be the only or even the main reason for the less favourable treatment provided it significantly i.e. in a more than trivial way influenced the decision-maker.
131. Section 136 of the Equality Act 2010 sets out the burden of proof. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.
132. In **Igen v Wong** [2005] IRLR 258 and **Madarassy v Nomura** [2007] IRLR 246, both decided under the previous anti-discrimination legislation but applicable under the current legislation, the Court of Appeal identified a two stage approach to the burden of proof. At the first stage the Tribunal considers whether the facts were such that, in the absence of an

explanation from the Respondent, it could properly find that discrimination had taken place. In **Madarassy** the Court of Appeal emphasised that this should be a finding that the Tribunal could properly make. There would have to be something (which might not in itself be very significant) beyond a difference in protected characteristic and a difference in treatment that would enable such a finding to be made. In the event that the Tribunal found the facts to be of this nature, the burden would be on the Respondent to prove that it did not discriminate against the Claimant.

133. Where there is unexplained unreasonable conduct, it may be open to a tribunal to draw an inference of discrimination but discrimination should not be too readily inferred. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof, **The Solicitors Regulation Authority v Mitchell** UKEAT/0497/12.
134. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out, **Nagarajan v London Regional Transport** [1999] IRLR 572, HL.

ANALYSIS AND CONCLUSIONS

135. In light of the facts we have found, the conduct alleged occurred as follows:
 - a. the respondent suspended the claimant on 12 June 2020 after Agata Kulaga lodged a grievance about him but did not suspend Agata Kulaga after the claimant made a complaint about her. The respondent accepts the claimant was suspended on 12 June 2020. The suspension occurred after Agata Kulaga's complaint and immediately after her second complaint. Agata Kulaga was not subject to disciplinary proceedings or suspended at any point.
 - b. the respondent treated Agata Kulaga's grievance about the claimant faster and more expeditiously than it treated the claimant's complaint about Agata Kulaga. The respondent did treat Agata Kulaga's grievance faster and more expeditiously than it treated the claimant's complaint about her.
 - c. the respondent interviewed the witnesses identified in Agata Kulaga's grievance but did not interview the witnesses the claimant had identified in his complaint against Agata Kulaga. The respondent (Nicola Wilkinson) did interview the persons named in Agata Kulaga's complaint and the persons named in the claimant's complaint were also interviewed. The respondent did not interview all the other persons identified by the claimant thereafter.
 - d. the ultimate outcome of her grievance against the claimant was the claimant being given a final written warning whereas the ultimate outcome of the claimant's complaint against Agata Kulaga was no disciplinary sanction. The claimant received a final written warning at

the conclusion of disciplinary proceedings which ensued further to the grievance brought by Agata Kulaga. The respondent has not taken any disciplinary action against Agata Kulaga in response to the claimant's complaint.

- e. the respondent replaced the claimant with Agata Kulaga in the team leader post. The respondent accepts Agata Kulaga 'stepped up' during the claimant's suspension but says this was not replacing the claimant. The respondent decided that Agata Kulaga was to step up to the team leader role on the line on which the claimant and Agata Kulaga worked thus she de facto replaced him whilst he was suspended.
 - f. the respondent did not give the claimant written reasons for his final warning or its decision to replace the claimant with Agata Kulaga in the team leader post. The respondent confirmed the final written warning in writing but did not set out any reasons other than referring to the disciplinary allegations. The respondent did not give the claimant any reasons as to its decision that Agata Kulaga was to step up and act as team leader. The reasons given relate to the stepping up practice but do not explain why it was specifically to the claimant's line de facto replacing him whilst he was suspended.
 - g. the respondent did not grant the claimant's request to extend time to submit an appeal against the final written warning. The respondent accepts that it did not accept an appeal from the claimant against the final written warning and refused to extend time.
 - h. after returning to work, the respondent monitored the claimant for a 6 week period (which he found humiliating). The respondent accepts the claimant was monitored for a period of 6 weeks after he returned to work. The monitoring was reasonably found humiliating by the claimant.
 - i. on 8 August 2020, the respondent suspended the claimant again. The claimant accepts that this is incorrect and this allegation is not pursued.
136. We considered whether the treatment the claimant received was less favourable than the treatment that Agata Kulaga received. We have concluded that the claimant was treated less favourably than Agata Kulaga and refer to our findings of fact above.
137. The claimant's complaint was not taken seriously and Agata Kulaga's complaint was taken seriously from the outset and at face value with the respondent immediately acknowledging it as a grievance. The decision to instigate disciplinary proceedings was essentially based on the allegations raised by Agata Kulaga given the limited extent of the information gathered from persons other than Agata Kulaga as outlined in Tracey McMillan's statement. Agata Kulaga's threat to the claimant was considered simply a permissible one-off 'knee-jerk' reaction. The evidence gathered in relation

to the claimant was eventually regarded as supporting that he had engaged in intimidatory behaviour towards Agata Kulaga and witness tampering/breach of confidentiality. There were a range of procedural failings in the way the grievance and disciplinary proceedings were managed.

138. We have concluded that based on the facts we have found there were aspects of the way matters were handled which are unexplained and unreasonable.
139. The respondent has not satisfied us that its approach was not motivated or influenced in a significant and more than trivial way by the claimant's sex. We have concluded that the respondent's starting point displayed by Tracey McMillan in disregarding the claimant's complaint compared with the immediacy with which the allegations of bullying raised by AK were handled and accepted at face value cannot be disentangled from an animus demonstrating mental processes and motivations related to the sex of the claimant and Agata Kulaga. We have concluded that this starting point contaminated what happened next to the claimant such that it cannot be said that the claimant's sex did not significantly influence decision-making.
140. Whilst it is a matter of fact that the persons named in the claimant's initial complaint were interviewed, we were concerned that there was no follow up with a range of persons named by the claimant as relevant at the earliest realistic point namely once he knew what the specific allegations made against him by Agata Kulaga were and was able to respond to them. Tracey McMillan made the decision to instigate disciplinary proceedings against the claimant based on little more than Agata Kulaga's allegations given the scope of the investigation carried out. The only corroboration was a work friend's conviction that she had seen the claimant shouting at Agata Kulaga and that she found him intimidating. Other evidence related to general communication issues.
141. The claimant's suspension was instigated by Tracey McMillan triggered by a second allegation of Agata Kulaga which was eventually found unsubstantiated. The other reason for suspension related to information that the claimant was pressuring people into signing supportive statements. The claimant accepted he had breached confidentiality a bit in the preparation of these statements in a context where the respondent's evidence was that there was talk on the factory floor and there were other possible sources of information and breaches of confidentiality. Whilst the claimant was suspended, Agata Kulaga was stepped up.
142. The disciplinary sanction imposed on the claimant is without clear rationale and there appears to be a disconnect between the final penalty and what is recorded as considered. We have no answer as to how the conclusion was reached to award a final written warning. We have concluded that overall matters were managed to a disciplinary sanction on the claimant and that this was significantly influenced by the claimant's sex even if there were other reasons for actions taken. Given Tracey McMillan's involvement throughout, we are not satisfied that there was no motivation due to the claimant's sex in relation to either the refusal to accept the appeal or the imposition of monitoring.

143. We have therefore concluded that the respondent has not discharged the burden of proving that there was no discrimination.
144. Accordingly, the claimant's complaint of direct sex discrimination is well-founded in respect of his allegations other than the allegation in relation to not interviewing persons named in his original complaint.

Remedy

145. We have considered what the appropriate remedy is in relation to the direct sex discrimination experienced by the claimant. The claimant requests an award of injury to feelings to compensate him for the upset, distress and humiliation caused by the unlawful treatment he has received. The tribunal has discretion with regard the amount of any compensatory award. The claimant submits that the appropriate award is one at the top of the middle *Vento* band. The respondent submits that any award should be no higher than the top of the lower *Vento* band.
146. In the case of **Vento v Chief Constable of West Yorkshire Police (No2)** [2003] IRLR 102, the Court of Appeal identified three broad bands of compensation for injury to feelings and gave some guidance about their application. An award of sums in the top band should be in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. An award of sums in the middle band should be used for serious cases which do not merit an award in the top band. The lowest band is for less serious cases where the act of discrimination is an isolated or one-off occurrence. The figures have since been revised in various ways. We have taken account of the bands for cases brought on or after 6 April 2020 in light of the claimant's claim being presented on 12 October 2020 namely £900-£9,000 for the lowest band and £9,000- £27,000 for the middle band.
147. The claimant was caught up in disciplinary proceedings further to Agata Kulaga's complaint on 26 May 2020 for a period of approximately two months until he returned to work early August. Thereafter he had the six week monitoring period and the effects of the final written warning which were over him for a period of 12 months namely until end July 2021. We have reflected on whether what happened to the claimant should be categorised as a one-off incident noting its ostensible containment to the episode of the disciplinary proceedings. We have concluded that this was more than a single isolated incident such as an isolated remark or act.
148. We have taken account of the fact that the discrimination experienced was in the context of HR processes run by persons senior to him. We were also mindful that the claimant is not a vulnerable individual although the processes he was subject to were not conducted or experienced by him in his first language. We noted our findings of fact above as to the impact on the claimant arising from the discrimination including that he returned to work without any real difficulties.
149. We bear in mind some general principles in exercising our discretion. Awards should not be so low as to diminish respect for the policy and that

society condemns discrimination whilst restraining excessive awards as the route to untaxed riches. We take into account the value in everyday life of the sum by reference to purchasing power or earnings.

150. In the circumstances, we have decided to exercise our discretion and make an award of £9,000 as compensation for injury to feelings.

Tribunal Judge Peer acting as an Employment Judge

Date 1 February 2023

JUDGMENT SENT TO THE PARTIES ON

01/02/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.